

TOP ★10★



Insights From In-House and Interior: **TOP 10 LESSONS FROM MY 10 YEARS OF EXPERIENCE**

VENUS PRINCE

For the past 10 years, I have had the distinct honor to serve as both attorney general for my tribe, the Poarch Band of Creek Indians, and the deputy solicitor for Indian Affairs in the Office of the Solicitor at the U.S. Department of the Interior (DOI). I sometimes learned these lessons the hard way and wish that I had learned them before I embarked on each of these professional journeys.

Lessons From My In-House Experience

1. You can't avoid the politics—be mindful and smart regarding them. During law school and my early legal career, I dreamed of returning home and serving as in-house counsel for my tribe. While I correctly anticipated that the legal issues would be fascinating and the work extremely fulfilling, I had no idea how challenging and frustrating tribal politics would be. I quickly learned a few strategies to navigate the political minefield.

First, accept that, as in-house counsel, tribal members may hold you responsible for certain decisions made by the Tribal Council (like denying a tribal member's personal request or amending the Tribal Code). This perceived shift of responsibility to you for certain Tribal Council decisions can be OK as long as you are aware of (and might have agreed to) the decision and as long as the Tribal Council knows the truth and fundamentally trusts your judgment.

Second, always couch your advice in terms of what is best for the tribe, not its individual components. The majority vote of the Tribal Council generally reflects the voice of the tribe, but decisions are rarely unanimous. Stay as neutral as possible during these discussions. If you emphasize that your legal advice is meant to protect the tribe as a whole, you might mitigate the perception that you might be biased. Also, as another in-house counsel recently emphasized and I experienced as well, never say anything to one Tribal Council member that you would not say to all.

Third, this suggestion might sound overly simplistic, but dress the part. Perhaps because I was also a member of my tribe, I made a beginner's mistake of dressing down to fit in with my fellow tribal members. I did not realize that this attempt to gain personal credibility increased the risk that the Tribal Council and senior employees might not take my professional position or advice as seriously. My situation might have been more pronounced because I am also a woman. Regardless, being overdressed is not going to hurt—and likely will help—your ability to advise your client.

2. Keep the management of legal services centralized, and obtain primary control over the hiring of outside counsel. When I arrived as the lone tribal attorney, I had no guidance regarding my role or my authority other than a general job description. After a search of our tribal laws, I found an ordinance that required Tribal Council approval for the hiring of any outside counsel whose legal expenses would exceed \$5,000.

Within a month of my arrival at the tribe, a tribal member-owned

construction company filed a lawsuit against one of our gaming enterprises, and I had no staff and no time to handle significant and controversial litigation—a classic “hand it to outside counsel” scenario. Because the Tribal Council met only twice a month, however, I barely managed to obtain their approval in time for a responsive pleading to be filed.

At about the same time, our gaming and economic development arms were starting to expand and request their own in-house legal counsel because I was beyond capacity. Based on the tribal politics I had observed up to that point, I was concerned that hiring attorneys without any overarching infrastructure for legal services could produce internal battles between the Tribal Council and the other arms of government.

I immediately explored ways that the Tribal Council could centralize the management of legal services and give in-house counsel more discretion in determining when to hire outside counsel. After much discussion, the Tribal Council passed both an amendment to

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our Executive Code and a separate policy that made the attorney general position the chief legal officer, responsible for management of all legal services within the tribe and able to engage outside counsel without Tribal Council approval in most cases. Thus, my position could coordinate all legal services being provided to the tribe and engage outside counsel on routine legal matters without burdening the Tribal Council.

No matter how in-house legal services are structured, make sure outside counsel understands the in-house counsel's role and reports back to in-house counsel, even if Tribal Council or senior management is calling them directly. Outside counsel can have a tendency to encounter Tribal Council at events and offer Tribal Council legal advice in casual conversation. However, they sometimes forget that in-house counsel are navigating daily internal politics and likely have issues and projects that are overlapping. Without this insight and knowledge, outside counsel can inadvertently provide incomplete or bad advice to Tribal Council or management, undermine progress that in-house counsel might have made on certain issues, and create more challenges for in-house counsel to overcome. If outside counsel cannot respect this dynamic and openly communicate with in-house counsel, don't hire them.

3. Make ethics a part of the tribe's culture. This lesson is much easier said than done. My first assignment was to draft an ethics

code. As the Tribal Council was navigating the shifts in power and planning for massive expansion, it wanted to avoid conflicts of interest and excessive gifts from potential gaming management companies and vendors to individual Tribal Council members, gaming board members, and staff. After reviewing the surprisingly few extant tribal ethics codes, I presented a comprehensive Ethics Code applicable to all officials and employees throughout our tribal organization, including gaming and other economic enterprises. The devil was in the details and the swirling politics at the time.

The key to establishing a culture of ethics was not the passage of the ethics code but the implementation and training. First, the Tribal Council needed to appoint five Ethics Board members who were “independent”—they could not sit on any tribal board or work for tribal government or any tribal enterprise. The Tribal Council then agreed that they wanted to appoint the board members anonymously based on an ethics assessment, which tested an applicant's understanding and application of the newly enacted ethics code. This process took at least six to nine months but resulted in a board of five tribal members who were extremely bright, respected in the community, and committed to a culture of ethics.

Second, our legal department needed to conduct mandatory ethics trainings for all officials and employees. In-house counsel can outsource this responsibility if necessary, but I recommend that in-house counsel conduct them if possible. Even if these trainings take a few months to complete, the time and effort will be rewarding. Not only does in-house training offer the opportunity for serious conversations about ethical concerns with officials and employees, but it can increase the overall trust level, benefiting the relationship beyond ethics issues.

For the handling of ethics complaints, however, I unhesitatingly advise in-house counsel to outsource, outsource, outsource! For primarily budgetary reasons, our tribe's original ethics claims process initially required our legal department to conduct internal investigations and advise the Ethics Board when an ethics complaint was filed.

This process can place in-house counsel in an extremely awkward situation if an ethics complaint is filed against any officials or employees with whom the in-house attorneys work on a daily basis. In working with these individuals, in-house counsel tries to develop and maintain the trust necessary to a successful relationship between legal and operations. If the ethics process requires in-house counsel to investigate them and advise the Ethics Board, this extremely sensitive situation can undermine that trust and complicate the relationship going forward. In short, however you design your tribe's ethics process, ensure that you can engage outside counsel to handle investigations and complaints.

4. Establish risk management awareness somewhere within the tribal organization. Although risk management is not an area that is taught in law school or well-known to most attorneys, it is critical to tribal government and business operations. Fortunately, I had previously represented Fortune 500 companies in disputes with insurance companies in my private practice, so I was aware of the importance of risk management and insurance coverage to business operations. As at many companies, however, no one within the tribe understood what policies we had beyond our employee benefits policies. As I pieced together the tribe's coverage, I realized that we had been adding policies and paying additional deductibles with no real strategy. Even worse, brokers were typically paid on a commis-

sion basis for each policy, so brokers had an interest in selling more policies than the tribe might need.

We needed an independent person to think proactively about the best interests of the tribe as a whole, including the gaming and economic development arms. In short, my tribe needed an in-house risk manager who could coordinate both preventive loss control strategies (financial, reputational, etc.) and the tribe's insurance coverage. So does yours.

Increasing the overall risk management awareness within the tribe can assist the legal department and a tribe in myriad cost-saving ways that are sometimes hard to quantify. The implementation of appropriate safety measures can prevent workers compensation claims by employees and "slip and fall" tort claims by gaming patrons and other third parties. The negotiation of better terms for insurance policies when placing or renewing coverage can prevent the subsequent denial of claims. In coordination with in-house legal counsel, an in-house risk manager can also work closely with brokers and outside counsel to save a tribe millions of dollars in defense costs and ultimate liability if the tribe is sued. For example, our in-house risk manager (who was located in gaming but worked with all arms of the tribe) and outside insurance coverage counsel helped us save almost a million dollars in defense costs and liability for one lawsuit alone! Given the real effect that these issues can have on a tribe's bottom line, this area of government and business operations may appear to be low priority, but investing in it can be well worth the effort.

5. Get the tribe's laws in order. This lesson seems fairly obvious but might be the most important. As reflected in several recent lawsuits such as *Dollar General v. Mississippi Band of Choctaw Indians* and frequently mentioned in the press, many Americans question tribes' sovereign rights to govern their tribal lands and members—and especially their ability to handle matters involving non-Indians. The codification of tribal laws (including legislative history) and a robust records management system with a tribal archives can both increase a tribe's effectiveness and improve public perception.

Like many tribes, ours had been exercising its sovereignty and passing laws for many years, but our tribal laws were not well-organized or easily understood upon my arrival. The tribe's ordinances, resolutions, and policies did not cross-reference each other, so we had no true legislative history. I faced a critical, long-term project, and I needed help.

With the support of our tribal council secretary, whose constitutional role was to oversee and preserve all records in our ordinance, I proposed a records management ordinance that both established a tribal archives and required the tribal archivist to implement and oversee a records management system for the tribe. The entire process—from the passage of the records management ordinance and the hiring of the tribal archivist to the development of the legislative history by two paralegals such that the ordinances were fully codified in the Tribal Code and publicly available—took well over seven years.

If your tribe can afford to outsource through its own budget or grant funding, I would do so if possible so that the Tribal Council and its in-house legal counsel can focus on other efforts. Then again, conducting the process slowly as an in-house project has the benefit of increasing the tribe's overall institutional knowledge. Either way, you and your Tribal Council will benefit from (and feel extremely proud of) the result.

Lessons From My Interior Experience

1. Do not hesitate to approach the Solicitor's Office. Based on all that I had heard throughout law school and my legal career, I believed that the Department of the Interior, and particularly the Solicitor's Office, was anti-Indian. Even if that sentiment was true 20 years ago, I can now say that many career employees within Solicitor's Office are pro-tribal and take the trust responsibility seriously. Given that Solicitor Hilary Tompkins is the first Native American who has ever served in that position, I probably served in the most pro-tribal Solicitor's Office that we will see in our generation. But she alone could not have countered my preexisting perception. I also had the opportunity to serve in both the political deputy solicitor role and the career associate solicitor role during my tenure, so that I directly supervised all of the career attorneys within the Division of Indian Affairs.

After working closely with the career employees, I realized that the anti-Indian perception was primarily the result of the directives of the governing administration at the time and did not reflect the career employees' personal and professional opinions. Of course, during Tompkins' six-year tenure, opportunities arose to hire new attorneys in the Solicitor's Office as well. Although the federal government is ultimately the client of any federal attorney, many of these new attorneys are tribal members or attorneys who have worked with tribes and clearly have their best interests of tribes at heart.

The Indian Trust Litigation Office (ITLO) within the Solicitor's Office, which works with the Department of Justice (DOJ) to defend against trust claims made by tribes, also recognizes and seeks to fulfill the trust responsibility. If the trust claims are determined to have merit, ITLO will push internally within DOI and with DOJ for settlement of those claims. The ITLO attorneys also frequently consult and advise attorneys within other divisions of the Solicitor's Office, such as the Division of Parks and Wildlife and the Division of Land and Water Resources, regarding the scope of the trust responsibility and how the Department of the Interior can seek to fulfill it. So, even if a change of administration occurs after the next election, know that you are not necessarily walking into enemy territory when you meet with career attorneys at the Solicitor's Office—they are dedicated, capable professionals who take their responsibilities seriously.

2. Understand that DOI must work with DOJ on litigation requests. DOI cannot initiate affirmative litigation or defend against litigation for actions taken for or against tribes without DOJ. DOJ functions as DOI's litigation counsel but, unlike ordinary outside counsel, does not need to defer to DOI's wishes as a client. Moreover, DOJ has three different sections within the Environment and Natural Resources Division (ENRD) that primarily handle any cases that involve tribes: the Indian Resources Section (IRS), which generally covers all affirmative litigation on behalf of tribes; the Natural Resources Section (NRS), which generally covers all defensive litigation that has been filed against DOI for actions related to tribes; and the Appellate Section, which generally covers all matters that reach the appellate level. This structure creates some interesting dynamics because DOI cannot fully control the cases in which it becomes involved or how it defends itself.

So, especially when dealing with litigation, the personalities and political leanings of the DOJ career attorneys can make a significant difference in DOI's ability to advance tribal issues. During my two-year tenure at DOI, I worked with several fabulous ENRD career attorneys in IRS, NRS, and the Appellate Section who generally

support tribal causes and are willing to push the envelope. Although DOI and DOJ sometimes had different opinions on issues, the truth is that when we truly heard each other and worked together as a team, we created a better, more well-balanced solution in most cases.

Moreover, at times, the DOI Solicitor's Office and DOJ ENRD might agree on a legal issue, but both need to be mindful of and convincing to the Solicitor General's Office. The Solicitor General's Office handles all litigation before the U.S. Supreme Court and must approve the participation of the United States in any appellate litigation (and sometimes trial litigation, depending on the issue). Based on my experience, the Solicitor General's Office can be pro-tribal, but its role is to ensure the consistency of the United States' position in litigation over time. If the United States took a specific position in any brief before the Supreme Court or other appellate courts, the Solicitor General's Office will feel bound by it. Accordingly, while administrations and their rule-making might change over the years, the litigation positions of the United States are much less flexible. Be strategic and wise in which litigation positions you ask the United States to take.

3. Make it easy for DOI to support your position. The single most exasperating aspect of my experience in the Solicitor's Office was that I could not outsource legal work to move matters along more expeditiously. When a tribe came to us frustrated that a matter without any statutory or regulatory deadlines had already been with DOI for five to seven years, I absolutely understood the frustration, and my first instinct was to hire more in-house attorneys or engage outside counsel. Unfortunately, the federal government's bureaucratic processes and budget challenges did not allow me to do so.

While jokes abound about how easy life is for employees of the federal government, they are definitely not true as to the Solicitor's Office. I know firsthand that the attorneys within the Division of Indian Affairs work extremely hard and beyond normal business hours. Also, only a few attorneys might be designated to cover expansive and demanding subject areas, such as fee-to-trust applications. Those few attorneys can make progress on only a few matters at any given time, despite the pending requests of dozens of tribes. In short, the Solicitor's Office is truly capacity-challenged. You can advance your tribe's cause and potentially expedite the process by providing the attorneys with a synthesized package of all information and arguments that support your position (and could be disclosed to third parties if requested).

In addition to presenting your position effectively for any administrative matter before DOI, be sure to engage DOI and DOJ early and often regarding any litigation requests. To initiate any affirmative litigation, including participation as an amicus, DOI's Solicitor's Office must submit a litigation request to DOJ ENRD (which takes time to prepare and get approved by the solicitor), and then the appropriate DOJ ENRD section must prepare an internal memorandum (which also takes time to prepare and get approved either by ENRD's assistant attorney general if litigation is at the trial level or the Solicitor General's Office if litigation is at the appellate level). Navigating this federal approval process is already lengthy and time-consuming, but any litigation request that requires the Solicitor General's Office approval will add at least another 30 to 60 days of processing. As a result, try to inform DOI and DOJ of your request as soon as you possibly can, preferably at the early stages before a trial court.

4. Try not to create a regional/D.C. headquarters turf war if your issue is pending with the region. Before I started with DOI, I had never considered the fact that all regional decision-makers, such as the regional directors of Bureau of Indian Affairs and the regional solicitors, are career employees. I also had no clue that communication between the regional offices and the Washington, D.C., headquarters was sometimes lacking, such that inquiries or directives from the D.C. headquarters could be viewed as being politically driven and not objective. I was fortunate to be part of a team that tried to break down some of this political/career and regional/national divide and to improve the overall communication, but some of this dynamic is simply the inevitable result of the structure.

When a tribe has an issue pending with the regional BIA office or the regional Solicitor's Office and is experiencing delay or frustration with the progress of a matter, please keep in mind that a political or career employee in the D.C. headquarters should not (and sometimes cannot) necessarily step in to resolve the situation. A D.C.-based employee can certainly inquire with the regional offices, seek to help with staffing issues if capacity is the problem, and assist in opening the lines of communication. However, a D.C.-based employee, especially a political appointee, must be careful not to circumvent normal procedure and protocol. Thus, while I recommend that a tribe keep D.C. officials and employees informed, especially when the pending issue could eventually need D.C. approval (such as Solicitor's Office determinations as to whether a tribe has met the *Carciari* requirement that it was under federal jurisdiction in 1934 for purposes of a fee-to-trust application), I strongly urge tribes to work through the regional director and regional solicitor whenever possible.

5. Build relationships with the attorneys in your local Solicitor's Office and the D.C. Solicitor's Office. This last lesson is perhaps the most essential. The Solicitor's Office receives a daunting list of requests and guidance from the assistant secretary of Indian Affairs' Office, the BIA, and other federal agencies, as well as the 567 tribes. The attorneys within the Solicitor's Office seek to respond in a timely and fair manner, but like all of us, they are human. The relationships that they develop with tribal leaders, in-house attorneys, and outside counsel over the years can impact how they approach a tribe's issue.

Treat the Solicitor's Office attorneys assigned to your tribe's matter as potential allies, and help them help you. Many of these attorneys are career employees who will be around for a long time to come. A tribe's in-house attorneys are uniquely situated to provide critical "on the ground" perspective that can motivate the Solicitor's Office attorneys to focus on your issues. Both in-house counsel and outside counsel also can provide guidance and research assistance on complicated issues. The Solicitor's Office might not always be able to say yes to the tribe's request, but the Solicitor's Office will often be able to provide realistic feedback, enabling the tribe to pursue other strategies without being bogged down in the bureaucratic process. While engaging in this process, you can develop enduring respect and regard for each other, which will benefit the tribe and its attorneys on future issues for years to come.

In closing, my past 10 years have been an extraordinary professional experience, affording me the unique opportunity to serve as both in-house counsel for a tribe and as a presidentially appointed lawyer responsible for overseeing all legal issues relating to Indian

Affairs for the solicitor within the DOI. I believe that we are at yet another crossroads in history regarding federal-tribal relations. Before President Barack Obama's administration, many tribes were experiencing unprecedented growth and development of internal infrastructure, including the hiring of in-house counsel and legal departments. Under the Obama administration, tribes have continued to enjoy success in various arenas and have seen the settlement of longstanding trust claims, such as the *Cobell* settlement, the promotion of tribal self-government, and improvement of the tribal relationship with the federal government. I could not have worked with a better team of advocates for Indian Country within the federal establishment.

This renaissance period, however, may be coming to an end, even if another Democratic president is elected. As seen in some of the recent hearings before Congress in which the fundamental issues of recognition and trust lands are being challenged, opponents to tribes have launched full-scale attacks on many fundamental legal principles and statutes. Frankly, because the media coverage of a few, financially successful gaming tribes has skewed the picture, opponents of tribes and the general public also do not understand and appreciate that most of the 567 tribes are not gaming tribes and are still heavily reliant on federal programs and benefits. Despite the reality for most tribes, I anticipate a severe turnaround in the political and financial support for tribes in the coming years. Tribal attorneys, particularly in-house counsel, might be the key to protecting tribes from this backlash.

A Tribal Council clearly functions as the heart of the tribe and must lead the tribe in the best direction for its people. Because its in-house counsel are generally aware of not only internal and external politics, but also the details of government and economic operations, they serve a critical role in keeping a Tribal Council informed as to the well-being of the entire body. In-house counsel and outside counsel also can help to develop and strengthen the skeleton of tribal laws that will enable a tribe to perform at its best and refute unfounded prejudices and expectations about what happens in Indian Country. Outside counsel, in coordination with in-house counsel, can further function as the sword and shield against the many litigation attacks that are likely to come.

The Tribal Council, as the heart of each tribe, should and will guide the attorneys in these efforts. As attorneys, our mission is to be the support system for this heart and ensure that this heart keeps beating for generations to come. ☺



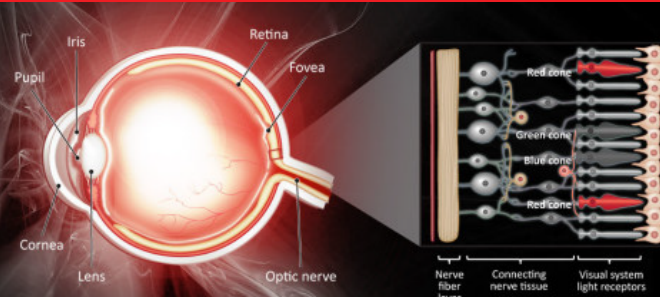
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