





# A FORMER TRIBAL LEADER'S THOUGHTS ON SERVING TRIBAL CLIENTS

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**B**efore I became a lawyer, I was on the tribal council of my tribe, the Hopland Band of Pomo Indians. For three years I held a position that, in my tribe, we generally refer to as a “tribal council member” or a “tribal leader,” although I know in some tribes the term “tribal leader” is reserved solely for the tribe’s highest-ranking official, such as a president or tribal chair.

Nowadays, I receive a number of questions about what it was like to be a tribal leader. What exactly does a tribal council member do? Is it a paid position? What did I learn from the experience? But when talking to other *lawyers*, a different question arises: What do I know—now that I am a lawyer—that I wish I knew when I was a tribal leader?

I don’t have an answer. Yes, I rely on my legal training every day *now*, when I write legal briefs, research legal issues, and work with other lawyers to resolve legal disputes. But those tasks weren’t what I needed to do when I was a tribal leader. Here and there, the job would come close to that type of work, like when I represented my tribe in discussions with the local, non-Indian utility district about using district infrastructure to transport my tribe’s reserved water

in the local river. Yet the few times that legal issues predominated during such activities, it was enough that I could turn to my lawyer for quick training and guidance. After all, I didn’t need to be an accountant to review, understand, and approve the tribal budget. Why would a legal issue be different?

Thus, my fellow lawyers, we ask the wrong question. It’s not what do I know now that I wish I knew then. It’s what do all of the tribal leaders wish we lawyers knew then, now, or ever. I provide here some of the things I remember wishing my lawyers had known, but take the advice with a grain of salt—Indian country is a diverse place. Tribal governmental structures, political cultures, and needs and resources can all differ significantly. For instance, in my tribe we democratically elect our tribal council members, which significantly shaped what I needed from my lawyers. To keep things simple, for the most part I write the below as if you are literally my tribe’s lawyer, and thus in most instances I presume some fundamental facts: that you report directly to an elected body composed of seven council members, that no separate executive branch exists in the tribe’s government, etc. Your tribal client could be different, so be thoughtful when you consider how these thoughts might apply to your practice.

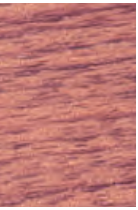
Finally, let me underscore that my tribe employed a number of lawyers during the three years that I helped select and supervise our tribal attorneys. Some of those tribal attorneys are among the greatest lawyers I’ve ever worked with. To state the obvious, they did not need this advice.

### Remember That I Am a Politician

Because my tribe democratically elects its leaders, all tribal council members are—by definition—politicians. That was true even of me. I knew before I was elected that I would go to law school at the end of my term, and thus I was free to “ignore” the politics because I wouldn’t seek re-election. But I was still a politician. After all, I needed the votes of the other council members to get things done, and those other council members wanted to be re-elected. Politics, then, was the true core of our work as the tribe’s governing body.

This fact fundamentally shapes how you should go about doing your job as my tribe’s lawyer. You’re accountable to seven individuals who are not of one mind about what *we* should do, what we need *you* to do, and whether *you* are even the person to do whatever we decide we need done. Politics can mean you receive directions that are opaque, inconsistent, and ambiguous.

We won’t thank you for putting up with the frustration you feel at such moments. But the thing is, it’s frustrating for us, too. We live the tribal politics day after day. You have seven bosses, but we have 700. Our bosses are our neighbors, our friends, and our family. They call us up in the evenings. They corner us at the tribal Christmas gathering. And they don’t thank us, either.



**Some of you, I presume, also measure success by the impact your work has on the tribe(s) you serve. In my experience, it’s the lawyers who don’t favor one political coalition over another who have the most influence.**

So I suggest that you think about the political pressures *we* face and factor that into the advice that you give us. Don’t, of course, let the political considerations cloud your legal judgment. But also, don’t let the political considerations go ignored.

Take the following hypothetical involving “council member A” and “council member B.” Council member A worries that he isn’t qualified to second-guess your recommendations. *You* have a graduate degree. This is *your* area of expertise. Who is he, he says to himself, to question your judgment on this matter? Council member B has no such reservations. However, she has worked alongside council member A for so long that she can tell that he is struggling. Preferring the course of action that you’ve recommended, council member B encourages council member A’s hesitation. She fosters the idea that: “You’re the lawyer and we paid you to figure this out for us, so we have to accept it.”

Ultimately, it is council member A’s responsibility to make up his own mind. But have you presented your suggestions in a way that leaves room for discussion and debate? Or have you inadvertently put a thumb on the tribe’s political scales?

### Remember That You Are Not a Politician

While some attorneys don’t recognize that tribal council decisions are driven by politics, other lawyers are *too* cognizant of this fact. It’s one thing to take account of the politics. It’s another to take advantage.

Most notably, some lawyers who serve tribes seem tempted to act somewhat like council member B from my prior hypothetical. For now, I’ll call this attorney the “savvy” lawyer. The savvy lawyer understands that his continued employment with the tribe depends

on the approval of a majority of the tribal council. He identifies a coalition that seems most likely to have or soon have the votes to control the council. And he tailors his legal advice to help that coalition push through its political priorities. If he helps the coalition achieve political victories, the thinking goes, then the coalition will keep him around. In other words, he *intentionally* puts his thumb on the political scales.

Immediately, the savvy lawyer might argue that objecting to his practices is unproductive. He understands the relevant political dynamics, so the concerns I’m about to raise are ones he’s presumably already considered and found unconvincing. Yet perhaps there are lawyers who haven’t previously accounted for tribal politics when giving their advice. Now beginning to think about how they will do so, they are contemplating becoming “savvy” lawyers themselves. I recommend that you not.

I’ll start by appealing to your self-interest. You actually might not be ensuring your own job security. There’s a good chance that the other political coalitions understand what you’re doing. And even with your assistance, the political coalition you serve today could be relegated to the political minority tomorrow. When that happens, will the new dominant coalition accept your services? Perhaps they will,

if you subtly indicate that you’re willing to help them the way you helped their opponents. But at some point, I expect a newly empowered political coalition will view you as a servant of the old regime, making termination of your employment one of the very things the new coalition was elected to do. You’re thus out of work in any event, and word may spread to the leaders of nearby tribes about how you operate. Those other leaders might not have heard good things.

I suggest that refusing to play politics could produce longer—albeit not necessarily sequential—employment than what comes from aligning with a particular political faction. Yes, if you try to avoid the politics, there might come a time when the leadership opts to instead use a lawyer who will help advance a specific political agenda. But that coalition is not likely to be in power forever. And I’ve seen that, sometimes, the next coalition will be interested in rehiring the lawyer that the previous coalition terminated. This happens when the new coalition wants a lawyer who already knows the ins and outs of the tribe but, at the same time, feels it cannot trust the lawyer the previous government used. You then become that new coalition’s best option.

Some of you, I presume, also measure success by the impact your work has on the tribe(s) you serve. In my experience, it’s the lawyers who don’t favor one political coalition over another who have the most influence. Part of this is because of longevity: If you do end up being around longer, you have more of an opportunity to leave a mark. But part of this is also because the council and the membership will be more willing to listen to your ideas if they perceive you as being politically unconnected. Once you play politics, people are inclined to presume that everything you do is politically motivated.

If you stay out of the politics, others might disagree with your ideas, but at least they'll believe your suggestions come from a sincere, unbiased place.

Finally, and inevitably, I question the ethics of being the savvy lawyer. Regardless of whether such practices are defensible as a matter of *professional* ethics, I've found that council members and tribal members end up gravitating toward a single word to use instead of "savvy" when they describe you: *slippery*.

### Remember That You Are *Not* a Tribal Leader

Somewhat different from the question of whether you should get involved in political fights is the question of what exactly your role should be in charting the tribe's future. Inevitably, there will be times you are asked to do things that are akin to leading the tribe. In the courtroom, of course, you always represent the tribe. And you might also be asked to represent the tribe in negotiations with potential investors or in meetings with government officials. Further, your opinions, as I've discussed above, will sometimes be given great weight, to such an extent that you feel almost as if the tribal council is following *you* on an important matter of tribal governance or business development.

But ultimately, you still serve me and the rest of the council. There will be times we do *not* accord your opinion much weight—even if it's an opinion about a purely legal matter and even if you indicate that you don't see much wiggle room. That's our prerogative. We're the ones who the membership entrusted with these decisions, so we have an obligation to exercise our own best judgment.

When you're irritated at these moments, I suggest you take a step back. Remember that it's not your tribe, so you're not going to live with the consequences of our actions the way we do. And remember that some of the most important developments in federal Indian law came about because tribal leaders took action that, at the time, even the best lawyers might have characterized as foolhardy.

On the opposite side of the spectrum, consider whether you're inadvertently becoming too much of a crutch for your tribal leaders. Because you have the education and you do your job well, tribal leaders might at times not want to get in your way. But would the tribe's interests be better advanced if the tribal *leaders* took the lead? Say, for instance, that you're knocking on doors at the state legislature along with the tribal chair. You could run the meetings, but instead, I recommend you use this as an opportunity to give the tribal chair the training she needs. Then let the dialogue occur between the leadership of the two sovereigns.

A last word on this topic for those lawyers who *are* members of the tribes that they serve. It's true, the calculus for you is not quite the same as it is for other lawyers with tribal clients—including other *Native* lawyers with tribal clients. Nevertheless, you've signed up to serve the tribal leaders, and this remains true even when you think they're making the wrong decisions. You're always free to seek employment with a different tribe if you feel the wrong leadership is in control. If that's not enough for you, perhaps that means you're supposed to be a tribal leader, not a tribal lawyer.

### Respect Different Types of Knowledge

There are a lot of different types of knowledge in Indian country. I suspect that you have found that to be the case both within the tribe's membership at large and with respect to the tribal council members you report to. But even if you've *recognized* that different

types of knowledge exist in Indian country, you might not be *respecting* the value of different types of knowledge.

I know where you're coming from. As someone who has spent a lot of time pursuing Western education, I understand that it can be hard to avoid the trap of academic snobbery. It's not always easy to derive healthy self-worth from one's Western educational achievements without looking down on those who haven't pursued—or more likely, when it comes to Indian country, haven't had the chance to pursue—such markers.

I also know that it can be difficult to work with people who have different types of knowledge. When *you're* involved, the tribal matter at issue usually has significant legal elements. Since the law is your specialty, it makes sense that others in the room might need more time than you do to work through that type of problem. At those moments, though, are you impatient? Are you arrogant? Are you dismissive?

If so, you need to get past those feelings. Otherwise, you're going to miss a wealth of skills, wisdom, experience, and information that your bosses and other key stakeholders are bringing to the table. This is especially true when it comes to tribal elders. I presume that by this point in your career you recognize that they hold positions of special honor and respect in our community. We try to defer to them for a reason. You must do so as well.

But hey, let's even put aside (1) the ethics (not professional ethics, mind you, but moral ethics) of looking down on other forms of knowledge and (2) whether you're hindering your ability to do the best job possible by ignoring other perspectives. Think just about your self-interest for a second. If your bosses figure out that you don't value what they contribute—and they will figure it out—do you really think they're going to keep you around?

### Limit Your Interactions With Tribal Members

Look, I get it. A lot of you serve tribal clients because you care deeply about advancing the cause of Native peoples. And for you, that means more than just helping the tribal *government*. You want to help *people*, too. Thus you want to give a tribal member a thought or two about what to do in the Indian Child Welfare Act (ICWA) case where he's seeking temporary custody of his niece. You want to give another member some simple strategic advice about how to fight that (state) speeding ticket she recently received. You don't see any harm in it if it's just a couple of off-the-cuff remarks about basic legal principles (and let's presume there are no professional responsibility obstacles to your providing this advice).

I also understand if you want to satisfy a member's curiosity when he has simple, innocuous questions about what you're working on, which don't touch on areas necessarily covered by attorney-client privilege. For instance, a member might ask: "In that new public safety ordinance the tribal council asked you to draft, what speed limit is the tribal council thinking about setting next to the school bus stop?" Even though I know you really want to "help out," I need you to hold back in these situations, for two reasons.

First, you are one of the tribe's resources, and it is my and the rest of the council's responsibility to determine how to allocate tribal resources. There is a tremendous amount of unmet legal need within my tribal community. Those members talking to you also bug *us* to see if the tribe can help with their current legal troubles. Thus, we have a better perspective than you do on where the legal needs are the most pressing. If we think it's in the tribe's best interest to assist

an individual member with her legal issues, we won't hesitate to say, "Hey, we have a tribal member who could really use just a few minutes of your time. Is that something you can help out with?" But by letting the tribal members come to you directly, you risk opening a Pandora's box. More tribal members are going to ask for advice after they hear that you're giving it out, and then they'll say it's not fair when you decline because (1) the requests have become too numerous or (2) the requests have become too big. That's going to undermine the tribal membership's faith that you're competent and unbiased—something that the council values, as I discuss below. And it's going to create a political headache for me and the rest of the tribal council when the members complain to us about *you*.

Second, you need to be careful when you interact with tribal members because you—at least if you're not a tribal member yourself—don't understand the complicated "who's who" of my tribal community. Consider the two examples above. In the first, it turns out the person you're talking to is looking for a way to drag you into the tribal politics of the moment. Especially in a small tribe like mine, you talking to the wrong tribal member is akin to a White House lawyer granting an impromptu and unauthorized interview to CNN. What you say is going to be public knowledge within the community, and if you aren't *very* careful with your words, you will create a political controversy that we could have avoided if we had released the information as planned. For the second example, think back to the tribal member with the ICWA question. It turns out that his niece is a tribal council member's granddaughter, and that council member wants to see her granddaughter in the temporary custody of an Indian relative on the *other* (the council member's) side of the family. That's a minefield that I guarantee the tribal council is spending a lot of its time trying to delicately navigate; you've just blundered into the middle of it.

Now, perhaps the hardest part of limiting your interactions with the tribal community is that you can't reveal that the tribal council is the reason the tribal members aren't getting a little bit of spare legal advice or an answer to a simple question about what's going on at the tribal government. Otherwise, the tribal member making the request is going to be mad at me and the other council members, even though we're trying to act in the best interests of the tribe when we impose this limitation. Obviously, the council doesn't want members angry at us. But at the same time, we don't want the tribal members mad at *you*. We need them to trust you, because when they trust you, they're more likely to trust the council that relies on your advice. So remember when I told you not to play politics? This is the exception. When a tribal member asks you a question, pivot like a candidate at a presidential debate.

### Consider the Monetary Costs

You majored in Native American studies in college, and you wrote your thesis on tribal restorative justice systems. Your thesis adviser was so impressed that he encouraged you to pursue a master's to flesh out your thesis even further and then to go to law school so that you could put your ideas into practice. This is just one example, but it speaks to something shared by many lawyers who serve tribal clients: a fierce passion for a reform that you hope will make Indian country a better place.

I'm open to your ideas. In fact, during my time as a tribal leader, my tribe explored, with some success, opportunities to implement ideas drawn from tribal restorative justice systems as we attempted

to build our tribal court. And I have advanced my own thoughts about how to structure and run tribal governments.<sup>1</sup> But especially if it's an idea that you learned about in school or first heard about in the media, consider two things: (1) we're probably already familiar with the idea and (2) there might be a good reason why we haven't adopted it. More times than not, that reason is cost.

So generally, please think about cost when you give me advice. Of course, I'm concerned about *your* fees. But over the long term, I'm more concerned about the financial feasibility of *implementing* your recommendations. This concern is especially elevated when your advice is about developing and altering governance structures or creating and restructuring tribal businesses.

Your legal advice, then, should be shaped by some managerial levelheadedness. Some questions you might consider: If we're going to rely on grant funding, how stable is that source of funding? How much do we need to invest into writing the grant application to have a fair chance of receiving the funding? Does a tribal ordinance you propose create new enforcement or administrative burdens that will require us to hire additional staff? Will your proposal inadvertently increase the burdens imposed on existing staff? Have you talked to the relevant staff to find out what is working and what isn't? Is the tribal administrator on board with this project? Is the tribal CFO? Does your plan depend heavily on institutional memory, such that the loss of a single staff person could unravel months of effort? Have there been any community meetings to ensure membership buy-in? Is the problem we're trying to address one shared by any nearby non-Indian government that might be interested in pursuing a joint effort? Is the problem we're trying to address one shared by any other nearby tribes that might be interested in pursuing a joint effort? (Hint: This last question not only helps me, but also presents a business-development opportunity for you.)

### Keep Your Advice Simple and Direct

I'm busy as a tribal leader. Like, *really* busy. You probably already appreciate this to an extent because you've seen *some* of the things I'm dealing with. But you know what, the number of problems I'm dealing with that I *haven't* told you about is actually greater than the number of problems I'm dealing with that you *do* know about. Remember the political minefield of a council member who has a preference about who should get temporary custody of her granddaughter? We weren't going to tell you about that because it's a political issue, not a legal one. And that's just scratching the surface of what isn't on your radar that wants to consume all my time. Because of how busy the council is, and because of the differences in types of knowledge that I discussed earlier, you need to keep your advice simple and direct. Like, *really* simple and direct.

You probably think that you are already following this advice. After all, your legal writing instructor impressed upon you how much *she* valued simple and direct legal writing, and you got an A in that class. You're right. If your audience was the in-house counsel at a corporation or if you were clerking and writing a memorandum for your judge, what you've produced *would* be a model of crisp, clear, and direct legal writing. But your clients aren't lawyers. I need the bottom line.

And I know, fellow lawyers. The law is complicated. The law is nuanced. The law is ambiguous. The law is malleable. But how about this compromise? Before you write it down, think about whether you can tell us it in person. And if you have to write it down, once you have your final draft, do one more round of revision to make it simpler.

## Train Us

I'm probably not going to offer to pay you to do this, but I'd be really impressed if you offered to come out to the reservation to do some trainings. And I don't just mean for me. Yes, I need to understand the basics of federal Indian law to do my job. But I'm not the only one. My government employees could do their jobs better if they knew these basics. And my tribal members would be better off if they had more access to this knowledge. You practice federal Indian law, so you know it's an incredibly difficult subject. Think about how complicated and confusing it must be to live and work in Indian country for those who aren't lawyers.

Nor does it just have to be about federal Indian law. Some of it *should* be about federal Indian law: the boundaries of federal, state, and tribal jurisdiction; ICWA; the authority of federal, state, and tribal police in and out of Indian country; the difference between trust land and fee land. But some of it should be about tribal law. You'd be surprised, for instance, how many council members—and tribal members and staff—don't know of the existence of that tribal-housing ordinance that was enacted 35 years ago. You might also be surprised when you give a training and a tribal elder—the tribal secretary during the 1980s—informs *you* that *you* have forgotten about a tribal-housing ordinance that was enacted 35 years ago. Turns out, the only record was stored up in his attic. That's just how things were done back then, before the casino opened.

Finally, some of the training should be about basic legal subjects. What is separation of powers? What is a federal agency? What is the difference between a state court and a federal court? What is the difference between a trial court and an appellate court? Are we supposed to follow “Robert's Rules of Order” or “parliamentary procedure” when we run a meeting? (*Please*, by the way, dissuade us of the notion that we need a 600-plus page book to run a 60-minute, seven-person meeting. It would be helpful, though, if you provided a short list of simple and sensible rules of order.)

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## Gould Profile *continued from page 33*

Cardozo, Babe Ruth, and Seahawks quarterback Russell Wilson. He quipped that if he could pick one it would probably be Babe Ruth. Indeed, he has a small nook in his chambers devoted to Babe Ruth memorabilia.

Finally, I asked him what he likes best about being a judge. Judge Gould responded that he really likes “the whole package.” He enjoys thinking about “how the case should be decided for all the parties” and “trying to reach a result that is fair to everybody,” rather than simply advocating for a client. He also enjoys having the opportunity to confirm what the law is in cases where the law's ambiguous. He further noted that he likes “having great law clerks,” who come to him with “fresh ideas, . . . fresh ideals, and with recent legal training.” Because they are new to the law, “they're coming to the job in an idealistic way based on what they learned in school.” He added that “they really help me a lot.” ☺

## Endnotes

<sup>1</sup>Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008).

<sup>2</sup>Nichols v. Azteca Rest. Enter., 256 F.3d 864 (9th Cir. 2001).

<sup>3</sup>Emeldi v. University of Ore., 673 F.3d 1218, as amended 698 F.3d 715 (9th Cir. 2012).

## Pick Up the Phone

Come on, this one is obvious. And it's easy, too. When you're on the client side, you are astounded by how hard it can be to get your lawyer on the phone. For the moment, don't even think about how you're impacting the tribe. Just think about your own financial interest. You can't—and won't—get more work if I can't get you on the phone.

## Good Luck

Regardless of whether you are in private practice or are in-house counsel, representing a tribe is a form of public service. You might wish that the tribe's leadership didn't ask some of these things of you, but admit it: Few legal jobs provide so much opportunity to engage in fascinating, challenging, and—most importantly—meaningful work. ☺



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## Endnote

<sup>1</sup>See Developments in the Law: Indian Law, *Tribal Executive Branches: A Path to Tribal Constitutional Reform*, 129 HARV. L. REV. 1662 (2016).

<sup>4</sup>Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843 (9th Cir. 2014).

<sup>5</sup>You can hear more from Judge Gould on this topic in an excellent short video called “Pathways to the Bench: U.S. Court of Appeals Judge Ronald M. Gould,” available at <https://www.youtube.com/watch?v=IDHupwtp5KQ>.