
Exploiting, or Filling, the Ethical Void for Tribal Lawyers

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- There remains a void of law and order, including lawyer ethics, in Indian Country.

The Ethical Void

- “[T]he complicated jurisdictional scheme that exists in Indian country—
 - has a significant negative impact on the ability to provide public safety to Indian communities;
 - has been increasingly exploited by criminals; and
 - requires a high degree of commitment and cooperation among tribal, Federal, and State law enforcement officials.”
 - Section 202(a)(4), Tribal Law and Order Act of 2010

“The Complicated Jurisdictional Scheme”

- The Obama Administration takes a hands off approach to law enforcement in Indian Country, especially in tribal “internal” disputes.
 - The BIA “does not get involved in individual tribal matters unless the agency's participation is included in the tribal constitution.”
 - If the Bureau does get involved, it takes months—if not years.
 - Even then, any agency decision will be appealed to the IBIA for as long as three more years, and stayed in the meanwhile. 25 C.F.R. 2.6(b).
 - The NIGC “only rarely invokes its authority to enforce the law against Indian tribes.”
 - The NIGC and DOJ look chiefly to the BIA for direction; if the BIA does not get involved, nor does either federal law enforcement agency.

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“The Complicated Jurisdictional Scheme”

- States turn a blind eye to law enforcement in Indian Country, especially in tribal “internal” disputes.
 - To the extent state or local government possess criminal or civil authority per P.L. 280, they refuse to exert it, or don’t have the resources to do so.
 - They too look to the BIA for direction.
 - But again, the BIA either does not get involved; or gets involved too late; or gets involved too late before going up on appeal to the IBIA.

“The Complicated Jurisdictional Scheme”

- So too do the courts.
 - The United States District Courts generally lack federal question jurisdiction over Tribal leadership disputes.
 - The federal courts feign that they are “without [ancillary] jurisdiction to adjudicate the underlying Tribal governance dispute.” *State v. Picayune Rancheria of Chukchanski Indians* (E.D. Cal. Oct. 29, 2014).
 - State courts with P.L. 280 or other authority just don’t want to get involved. So they don’t. *See e.g. Healy Lake v. Mt. McKinley Bank*, Supreme Court No. S-14987, No. 6890 (Alaska 2014).
 - If there even is a tribal court, the tribal court is greatly challenged to mete out enforceable justice.

“The Complicated Jurisdictional Scheme”

- And so too do state bars, even in the face of Indian lawyer unethical behavior that aids and abets, if not causes, the tribal “internal” dispute.
 - A state bar either:
 - (a) maintains that it lacks jurisdiction, deferring instead to the tribal bar to take any disciplinary action. State Bar of Arizona, Ethics Op. 90-19 (1990); Massachusetts Bar Association, Ethics Op. 12-02 (2012); or
 - (b) has jurisdiction but refuses to assert it, appreciating that lawyer ethical issues amidst a tribal leadership dispute are not for the meek.

“The Complicated Jurisdictional Scheme”

- Meanwhile, there is:
 - No tribal court to speak of; or
 - If there is a tribal court, there is likely not any lawyer disciplinary enforcement mechanism--administrative, civil or criminal.

The Result

- “[T]he complicated jurisdictional scheme that exists in Indian country has been increasingly exploited by criminals”—including Indian lawyers.
 - Section 202(a)(4), Tribal Law and Order Act of 2010

- The void of tribal law and order, and of Indian lawyer ethics, must be filled **now**.

Filling The Void

- As of the day a dispute erupts, and for every day until it resolves, authorities will—or should—“recognize the last undisputed officials” of the Tribe.
 - *Alturas Indian Rancheria v. Acting Pacific Regional Director*, 54 IBIA 1 (2011).
- Meaning, everything defaults—or should default—to the day immediately before the dispute.
- The same holds true for the Tribal Court (if one exists) and all other institutions of tribal government (if they exist), including codified tribal law.

Filling The Void

- In anticipation of a Tribal moment of truth, help cultivate strong, culture-based institutions of tribal government.
- When doing or counseling any of the following activities, imagine your Tribe in a leadership dispute, and decide accordingly:
 - Listening to **Elders** and learning **Teachings**
 - Engaging in **General Council** governance
 - Electing a **Chairman** or **Tribal Council**
 - Developing a **Tribal Court**
 - Appointing a **Tribal Judge** or **Police Chief**
 - Revamping a **Tribal Constitution** or drafting **Tribal Laws**, especially concerning Indian constitutional rights
 - Developing relationships with **Local, State and Federal Government Officials**

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Filling The Ethical Void

- Cultivate strong tribal governmental institutions to prevent tribal lawyer unethical behavior, like:
 - Tribal bar admission protocols,
 - Tribal law firm business licensing,
 - Tribal federal Indian Traders licensure requirement,
 - Tribal ethical code and RPCs,
 - Tribal court oath of admission,
 - Tribal procedural rule equivalent to Fed.R.Civ.Proc. 11,
 - Tribal criminal statute like 18 U.S.C. 1001,
 - Tribal disciplinary process, or
 - Tribal administrative, civil or criminal enforcement mechanisms.

- Until the ethical void is filled, defend against the following “plays” from being called against your Tribe.

Manufactured Leadership Dispute

- “We do a recall, election and take over. Let’s discuss.” – Jack Abramoff, February 14, 2002
- WA RPC 1.2(d) – Forbids counsel from assisting a client “in conduct that the lawyer knows is criminal or fraudulent.”
- WA RPC 3.3(1) – Forbids “a false statement of fact or law to a tribunal.” *See also* Fed.R.Civ.Proc. 11.
- WA RPC 4.1(a) – Forbids “a false statement of material fact or law to a third person.”
- WA RPC 8.4(c) – Forbids “conduct involving dishonesty, fraud, deceit or misrepresentation.”

Seize the Palace

- Forcibly take over Tribal headquarters and the casino.
- WA RPC 1.2(d) – Forbids counsel from assisting a client “in conduct that the lawyer knows is criminal.”

Fill the War Chest, Protract the Dispute

- Siphon off Tribal revenues. Sever the opposition's per capita monies. Extract a large retainer deposit.
- WA RPC 1.5(a) – Forbids “an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.
- WA RPC 3.2 – “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”
- WA RPC 3.2, Comment[1] – Forbids counsel from delaying “for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. . . Realizing financial or other benefit from otherwise improper delay in litigation” is especially improper.

Make It About Disenrollment

- Allege a “membership” dispute. Before it’s over, disenroll the opposition and other dissident members.
- WA RPC 3.1 – “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous”
- WA RPC 3.1, Comment[1] – “The advocate has a duty . . . not to abuse legal procedure.”
- Any disenrollment that lacks a good faith basis is not only unethical, but **immoral**. *See* WA RPC Preface (“Lawyers, as guardians of the law, play a vital role in the preservation of our society.”).

Rush to the Media

- Create headlines to cause federal and local officials stay out of it. Issue paid-for press releases as “news.”
- WA RPC 3.6(a) – Prohibits a lawyer involved with an “investigation or litigation of a matter” from making “an extrajudicial statement **that the lawyer knows or reasonably should know will be disseminated by means of public communication,**” and which could prejudice a proceeding.
- Ethical scholars make clear that RPC 3.6 is, or should be, generally applicable to non-adjudicative (trial) proceedings too.

Make Political Rounds

- Using all prior plays, get federal and local officials to stay neutral; or at least take their time in doing anything.
- WA RPC 3.1, Comment[1] – “The advocate has a duty . . . not to abuse legal procedure.”
- 18 U.S.C. 1001: Criminalizes “false, fictitious, or fraudulent statement or representation” “in any matter within the jurisdiction of the [U.S.] executive, legislative, or judicial branch of the Government.”

Conduct “Independent” Investigation

- Commission a Pennsylvania Avenue investigation.
Issue a “Mitchell Report” that impugns the opposition.
- WA RPC 3.1 – “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous”

Switch Tribal Clients

- Vacillate between representing the “Tribal Council,” the General Council, other Tribal bodies, and third-parties.
- WA RPC 1.9 – Forbids a lawyer from representing a new client “in the same of a substantially similar related matter in which that [client’s] interests are materially adverse to the interests of the former client.”

- New plays are already being scripted for the next Tribal takeover—and there will be another one.
- The time is now for Indian Country, including the federal Indian family, to take a stand, and fill the void.
- The solution “requires a high degree of commitment and cooperation among tribal, Federal, and State law enforcement officials.”

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Thank You

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