

# Basics of Engaging with Tribal Clients

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# Overview

- *Model Rules of Professional Conduct*
- Who is the Tribal Client?
  - **Rule 1.13(a)**
- Overcoming Challenges in Representation
  - Conflict of Interest
    - **Rule 1.7(a)**
  - Zealous Advocacy
    - **Rule Preamble**
  - Communication
    - **Rule 1.4**
  - Dealing with Represented Non-Lawyers
    - **Rule 4.2**
  - Competence
    - **Rule 1.1**



# Who is the Tribal Client?

- A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. **Rule 1.13(a)**
  - Who speaks for the Tribe?
    - Challenges
      - A Tribe with a multi-branch system of governance
      - Inter-agency and intra-agency conflict
      - Representation of enterprise versus government



# Overcoming Challenges in Representation



# Conflict of Interest

- 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. **Rule 1.7(a)**

- Challenges

- Inter-department conflict

- Consider appropriateness of common representation. **Rule 1.7 Comment 30**



# Conflict of Interest (continued)

- ... (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.* **Rule 1.7(a)**
  - Challenges
    - Working for Tribe as citizen of the Tribe
      - *The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.* **Rule 1.7 Comment 10**
      - timing of when conflict arises: before or after representation, or due to unforeseeable developments. **Rule 1.7 Comments 3, 4, 5**



# Zealous advocacy

- *As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer **zealously asserts** the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others. **Preamble***



# Zealous advocacy (continued)

- *...As advocate, a lawyer **zealously asserts** the client's position under the rules of the adversary system.*
  - Challenges
    - Conflict between in-house and outside counsel



# Communications

- *A lawyer shall:*
  - Promptly inform
  - Reasonably consult about the means
  - Reasonably inform about the status
  - Promptly comply with reasonable requests for information; and
  - Consult with client about any relevant limitation. **Rule 1.4(a)**



# Communications (continued)

- Challenges
  - Explaining matters: acknowledging adversarial system
    - *First, the very understanding of the role of the lawyer as zealous advocate in an adversarial system may be culturally and politically antithetical to tribal societies in which the operative norms favor the collective well-being of the group and values such as harmony and balance. Furthermore, the assumption that the client seeks to pursue its autonomy and advance its goals in an adversarial fashion to the exclusion of others does not always reflect tribal objectives. (Kristin Carpenter & Eli Wald, Lawyering for Groups: The Case of American Indian Tribal Attorneys, 81 Fordham L. Rev. 3092 (2013))*
      - **Rule 1.4 Comment 5:** sufficient information to participate intelligently in decisions concerning objectives, means, and extent client is able to
  - Establishing trust & relationship-building



# Communication with Person Represented by Counsel

- *In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. **Rule 4.2***
  - Challenges
    - Navigating the fuzzy line between the role of advisor and negotiator
      - Who is negotiating the deal? The principles or the attorneys? What about the agreement to memorialize the deal?
    - Dynamic area of ethics law
      - Do you need a lawyer's consent to hit "reply all" on an email that includes their client?



# Communication with Person Represented by Counsel (continued)

- *In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. **Rule 4.2***
  - Challenges
    - Dynamic area of ethics law
      - Do you need a lawyer's consent to hit "reply all" on an email that includes their client?
        - *If a lawyer copies a client on an email, it does not mean a lawyer implicitly consents to the other lawyer communicating with the client. (Arizona Supreme Court Order, In re EO-20-0011 (07/19/2022))*
        - *In the absence of special circumstances, lawyers who copy their clients on an electronic communication sent to counsel representing another person in the matter impliedly consent to receiving counsel's "reply all" to the communication. (ABA Formal Opinion 503 (11/02/2022))*



# Competence

- *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. **Rule 1.1***
  - Challenge
    - Does competency include cultural competency?
      - *Treat each client as an individual without applying cultural stereotypes. (Cultural Competency and the Practice of Law in the 21st Century, Aastha Madaan, Probate and Property Magazine, March/April 2016 Volume 30 No 2)*
      - *In particular, non-Indian attorneys or Indian attorneys who are representing a tribe other than their own may learn the relevant cultural knowhow to competently represent their clients. (Kristen Carpenter & Eli Wald, 3124)*
        - *...An understanding of the Navajo life-style and culture is indispensable to the practice of law within the Navajo Nation...[a]lthough an outsider, a non-Navajo attorney is trained to study and decipher Navajo law in a manner few layman could emulate. (Tafoya v. Navajo Nation Bar Ass'n, 6 Nav. R 141, 143 (Nav. Sup. Ct. 1989))*



Thank you!

