

**Ethical Considerations for Tribal Lawyers and Judges**

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# ETHICAL CONSIDERATIONS FOR TRIBAL LAWYERS AND JUDGES

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# Presentation Overview

- Issues Affecting Lawyers Representing Tribal Clients
- Issues Affecting Tribal Judges

# Tribal Lawyers

# Competent Representation: Kansas Rules of Professional Conduct, Rule 1.1

- 1.1 Client-Lawyer Relationship: 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.

# Hypothetical #1: The New Client

- A father, who is a citizen of the Tribe you work for, comes to you asking for assistance with the involuntary termination of his parental rights by the state court. He would like to keep his parent rights and parent the child. The biological mother terminated her rights. The father previously indicated his willingness to terminate his rights, although he later rescinded. The child is currently placed with non-Native parents that would like to now adopt her. Your expertise is in taxation and you have no familiarity with child welfare matters.

# Confidentiality: Missouri Rule of Professional Conduct, Rule 1.6

- (a) 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 by Rule 4-1.6(b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
  - (2) to secure legal advice about the lawyer's compliance with these Rules;
  - (3) 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; or
  - (4) to comply with other law or a court order.

# Hypothetical #2: The FOIA Request

- The federal government is proposing to place a new highway through your client's reservation. The current proposed location of the highway would go through a sacred, secret space for the Tribe you represent. You know that if you disclose the sacred place's location that the highway will be relocated. However, you fear that disclosing the location to the federal government could make such information available to the public through the FOIA process.



# Conflicts of Interest: Kansas Rules of Professional Conduct 1.7

(a) 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;
- (2) there is a substantial 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.

(b) 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.

# Tribal Judges

# Definition of “Judge”

- Anyone, whether or not a lawyer, who is an officer of a tribal judicial system and is performing judicial functions is a judge for the purpose of this code. All judges should comply with this code except as provided below.
  - A. Part-time Judges: A part-time Judge is a Judge who serves on a continuing or periodic basis, but is permitted by tribal law or custom to devote time to some other profession or occupation. A part-time Judge:
    - 1) is required to comply with this code unless otherwise exempted;
    - 2) should not practice law either as a lawyer or an advocate:
      - A) in the tribal court on which he or she serves;
      - B) in any court subject to the appellate jurisdiction of the tribal court or council on which he or she serves;
    - 3) Should not act as a lawyer or advocate in a proceeding in which he or she has served or in any related proceeding. *Model Code of Judicial Conduct for Indian Court Judges, National American Indian Court Judges Association, 1 (June 1981).*

# Integrity and Independence of Judiciary

- An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. *Sample Tribal Code of Judicial Conduct* (Christine Folsom-Smith ed.), The National Tribal Judicial Center, 1 (2007).

## Hypothetical #3: Appearance of Impropriety

- A tribal court judge is seen drinking at the tribal casino the previous night. The same tribal court judge fails to appear for oral argument the following day, citing work-related obligations as the reason for her inability to attend oral arguments.

# Appearance of Impropriety

- **An Indian court judge should avoid impropriety and the appearance of impropriety in all his/her activities.**
  - A. An Indian court judge should respect and comply with the law and tradition of the Tribe and should at all times act in a manner that promotes public confidence in honesty and impartiality of the Indian Judiciary.
  - B. A judge should not allow family, social or other personal relationships to influence his/her judicial conduct. He/she should not attempt to use the prestige of his/her office to advance the private interests of others; nor should he/she convey the impression that anyone has special influence on the judge. *Model Code of Judicial Conduct for Indian Court Judges, National American Indian Court Judges Association, 4 (June 1981).*
  
- **Canon 1:** A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. *ABA Model Code of Judicial Conduct, 10 (February 2007).*

# Appearance of Impropriety: Statement of Expectations

- **Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals**
  - It is expected that all Appellate Judges are adequately prepared for oral arguments. Being “adequately prepared” for oral argument means that an Appellate Judge, assuming he or she is assigned to the case to be heard, has read all of the materials forwarded to that Appellate Judge in anticipation of the oral argument.
  - It is expected that all Appellate Judges are physically present for oral arguments when assigned to the oral argument to be heard.
  - It is expected that all Appellate Judges be physically present for deliberations following oral arguments. Appellate Judges should plan on deliberations lasting at least two hours, and the time period for deliberations may be extended based on the individual circumstances of a case.

# Hypothetical #4: Ex Parte Communications

- One of the part-time tribal judges is also a practicing attorney in the community. A different attorney who is appearing in front of the tribal court approaches the part-time tribal judge when he is off the bench. The attorney would like to know when a decision in the case he recently argued in front of the tribal court will be released.



# Ex Parte Communications

- A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
  - (a) Where circumstances require (each tribe can insert its own laws on when it is required), ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
    - (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
    - (ii) the judge makes provision promptly to notify all other parties (*insert "or legal counsel"*) of the substance of the ex parte communication and allows an opportunity to respond.
  - (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.
  - (c) A judge may consult with court personnel<sup>27</sup> whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
  - (d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
  - (e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so. . . .
  - (9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity. ***Tribal Code of Judicial Conduct (Christine Folsom-Smith ed.), The National Tribal Judicial Center, 4-5 (2007).***

# Hypothetical #5: Disqualification

- Tribal Council appoints a woman, who directs a division within tribal child protective services, to a part-time, lay tribal judge position. Soon after her appointment, a termination of parental rights case is set for trial in tribal court. Tribal child protective services played an integral role in making the termination of parental rights recommendation at issue in the case.

# Disqualification

- a. **Disqualification.**
  - (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
    - (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer (*advocate*), or (*has*) personal (*first-hand*) knowledge of disputed evidentiary facts concerning the proceeding ...
    - (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person ...
      - (i) is a party to the proceeding, or an officer, director or trustee of a party ...
      - (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding ...
- ***Tribal Code of Judicial Conduct* (Christine Folsom-Smith ed.), The National Tribal Judicial Center, 8-9 (2007).**

# Extra Judicial Activities

- A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:
  - (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
  - (B) participate in activities that will lead to frequent disqualification of the judge;
  - (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;
  - (D) engage in conduct that would appear to a reasonable person to be coercive; or
  - (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law. *ABA Model Code of Judicial Conduct, 37 (February 2007).*

# Chi Miigwetch! (Thank you!)

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