



Kansas Lawyers Working for Tribal Clients

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Kansas lawyers working for Tribal Nations, in Tribal Courts and for tribal members

- ▶ Tribal Nations- as Tribal Attorney or General Counsel employed by the Tribal Nation to represent them
- ▶ Tribal Court representation- as attorney appointed to represent individuals who generally are members of a Tribe
- ▶ As attorney retained by tribal member to represent them perhaps in state court or tribal court



Rule Application: Issues Unique to Tribal Representation

- ▶ Application of Kansas Rules of Professional Model Conduct (KS RPMC) to the representation of a Tribal Nation
- ▶ KS RPMC similar to American Bar Association (ABA) Model Rules and focus largely on relationship between attorney and individual client, less on “group” client
- ▶ Rules don’t specifically address attorney-client relationship within context of tribal culture, historical background, changing tribal federal relationships



Lawyers Admitted to the Kansas Bar

- ▶ KS PRMC Rule 8.5 Jurisdiction

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

- ▶ If you are an attorney licensed to practice in Kansas, the Kansas Model Rules of Conduct apply to you wherever you practice law.



KS RPMC 8.5 Jurisdiction - Comments

[1] In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the US. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous it may constitute practice of law in that jurisdiction. See Rule 5.5.

[2] If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

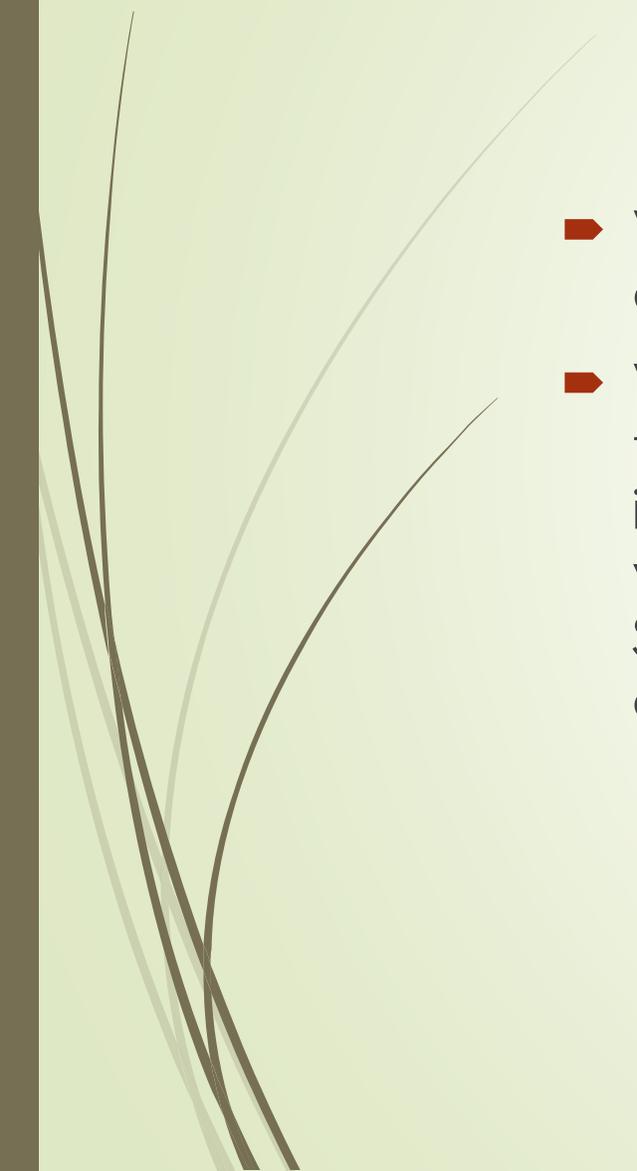


Tribal Court and Tribal Bars

- If you practice in a tribal court you are in another jurisdiction and need to be admitted to that bar and complying with any corresponding rules of professional conduct.
- Lawyers who practice in Prairie Band Potawatomi Nation (PBPN) District Court may have a contract with the Nation (approved by the Tribal Council) to provide legal services to qualifying individuals in that court. They typically are on an appointment list with the District Court.
- Hypo: A lawyer is licensed to practice in KS courts and is admitted to practice in a Tribal court. The Tribal court does not have model rules of conduct for lawyers admitted to its bar, but it has promulgated court rules governing duties for attorneys appointed as a Guardian Ad Litem. Supposing those Tribal rules differ from the Kansas Supreme Court Guardian Ad Litem rules, whose rules does the attorney follow?



Tribal Court Bar Admission and Model Rules

- ▶ Violation of the KS RMPC in tribal court? Attorney is subject to being disciplined or sanctioned by Kansas Disciplinary Office.
 - ▶ Violation of Tribal Court rules? Where tribal courts admit lawyers to the Tribal Court bar or otherwise allow the attorney to practice law in Tribal court, the attorney is subject to disciplinary measures for violation of applicable rules within the Tribal court's jurisdiction. Some Tribal courts have model rules of professional conduct while others may not.
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Rule 1.1 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.

- ▶ Comment. Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate and consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.



What is competence when working for Tribal client?

- ▶ What education, experience and knowledge should an attorney for a tribal client possess? What about practitioners in tribal court?
- ▶ Resources include Tribe's governing documents, statutes, federal Indian law, federal statutes, Tribe's jurisdiction, sovereign immunity, culture and historical perspective of Tribal nation



Rule 1.2 Scope of Representation

Representing a Tribe - Who is the Client?

- ▶ A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to (c), (d) and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue.
- ▶ What about where Tribe is client? Who makes client's decisions?



Rule 1.13 Client-Lawyer Relationship: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Comment [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

- Thus attorneys who are hired to represent “the Tribe”, serve their client through its duly authorized constituents. Who those “duly authorized” individuals are will differ. Frequently they are the elected officials of the Tribe’s governing body, legislature or executive entity. The attorney represents the client (the organization i.e. “the Tribe”) through the directives of the individuals who are duly authorized to be representatives of the Tribe.



Where Client is the “Tribe”

- ▶ An attorney whose client is “the Tribe”, serves her client through its duly authorized constituents.
 - ▶ Who are “duly authorized” individuals? Elected officials of the Tribe’s governing body, legislature or executive entity or all of the above?
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Who are “duly authorized constituents” and what if they don’t act in the best interest of the Tribal client?

- ▶ Can “duly authorized constituents” be the elected officials in one fact pattern but the general membership in another?
- ▶ What if the elected officials or duly authorized constituents don’t act in the best interests of the Tribe? Yet if they the are “duly authorized constituents” it is those individuals that the attorney takes directive from in her representation of the Tribe.



Rule 1.13 Comment [7] Governments as Clients

- Rule 1.13 applies to governmental organizations- Tribes are governmental organizations
- Attorney balancing confidentiality and prevention of wrongful act may be appropriate when client is a governmental organization due to public interest involved (tribal membership public interest)
- Comment suggests that although a government may include subsets of governmental entities, generally it is the whole government that is the client.
- Practice tip: Look to tribal governing documents, tribal constitution, and tribal laws to determine tribal governmental relationships and authorities governing each.



Who is the Client?

- ▶ Attorney may represent many tribal entities within the tribal government
 - ▶ Tribe may have one lawyer in-house, large legal department and or one or more outside legal counsel to represent separate entities, departments, enterprises
 - ▶ Hypo: Tribe has one tribal attorney, who is asked to represent the tribal school, the tribal economic development enterprise, the tribal casino and the tribal government departments. How does this increase the likelihood of possible conflicts or that one of the entities has an interest adverse to the other?
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Rule 1.13 Comment [4] Constituent Actions

- ▶ [4] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province.
- ▶ Measures to take when constituent acts in violation of law or that injures organization: different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law.
- ▶ It may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization.



Rule 1.13 (b)

Proceeding as Necessary in the Best Interest of the Organization

- ▶ Rule 1.13 (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization
- ▶ In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.



Rule 1.13 (b) continued

- ▶ Such measures may include among others:
 - (1) asking for reconsideration of the matter;
 - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
 - (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

- ▶ (c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer shall follow Rule 1.16. (Declining or Terminating Representation)



Rule 1.13 (d)

Client Interests Adverse to Constituents

- (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- Hypo: How should tribal lawyers balance their obligation to limit the tribe's liability (for example by defending the tribe's inherent sovereign immunity) with the commercial demands of financial investors and civil rights claims of tribal citizens? (See Kristen A. Carpenter and Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 Fordham L. Rev. 3094. (2013).

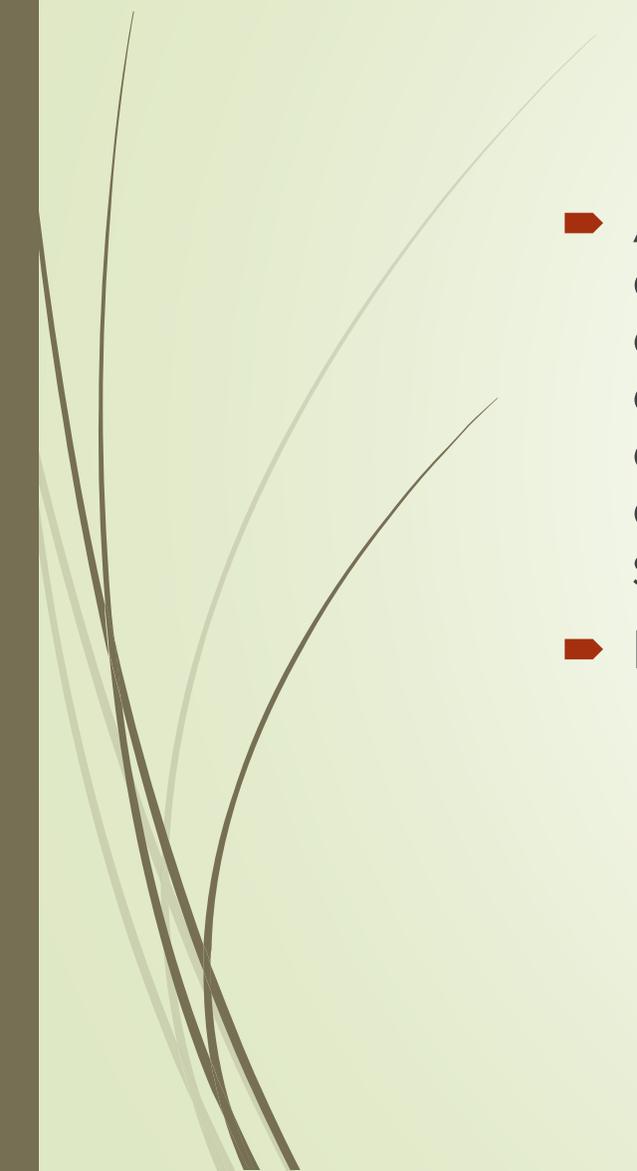


Who is the Client? Potential Conflicts?

- ▶ Hypo: What if the tribal school needs tribal funding to avoid being closed due to shortage of funds caused by government shutdown. The only tribal government budget with available funding is the Tribal Council administrative budget. The Tribal Council does not want to use those funds and would prefer to decrease tribal member per capita payments. But the General Council membership don't want the per cap payments decreased and instead want the Tribal Council budget decreased and applied to the school. The General Council asks the tribal attorney for advice.



Rule 1.13 (e)

- ▶ A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.
 - ▶ How could this be applied to Tribal context?
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Rule 1.13 Comment [2] Entity as the Client

- ▶ Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.
- ▶ Tip: The elected officers' authority may be identified in a governing document and the lawyer should be aware of the limits of officer' authority.
- ▶ How might this apply in tribal government context?



Rule 1.13 Comment (3)

- ▶ Constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6.
- ▶ This does not mean, however, the constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.



Client Communication

- ▶ What methods, if any, for attorney-client communication have been identified by the client?
- ▶ How does the attorney determine what constitutes a directive of the duly authorized constituents?
- ▶ If the duly authorized constituents are elected officials, how does the attorney determine what their directives are? Unless the action is sanctioned by a majority of the elected officers, the directive to the attorney may not be an action that is duly authorized.
- ▶ Note: If Tribe wants its lawyer (lawyer representing the Tribe) to investigate some matter involving tribal government employee, communications between the employee and tribal attorney are privileged and not subject to disclosure. However, the tribal attorney is not the employee's legal counsel in that situation.



Rule 1.13 Comment [8],[9]

Constituent Interests Adverse to the Client

- ▶ The organization's interest may be or become adverse to those of one or more of its constituents
- ▶ In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity or interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that those discussions may not be privileged
- ▶ [9] Whether a warning should be given by the lawyer for the organization to any constituent individual turns on the facts



Other Ethical Issues

- ▶ Hypo: Tribal member is charged in tribal court with stalking and domestic violence crime against another tribal member. Tribal members of each family seek the assistance of Tribal Council to support them monetarily. Tribal Council does not want to take sides. Tribal Council asks tribal attorney for advice.
- ▶ Hypo: Tribal member accused of committing crime but alleges racial profiling. Tribal Council has been concerned about tribal members being racially profiled. Council decides to inquire further on the occurrence of racial profiling and hires outside legal counsel to work on the Tribe's behalf to determine if racial profiling is a widespread problem on the reservation.
- ▶ If an issue could affect tribal sovereignty or tribal members broadly the Tribe's authorized constituents may determine that the cause of an individual is worth their support. Still the outside legal counsel may need to identify to the individual that the Tribe's interest is in the outcome as it affects all of the Tribe, rather than solely in support of the individual



Switch to Rules Relating to District Courts

Proposed Amendments to Rule 116 Admission *Pro Hac Vice* Attorney's representing a party in an ICWA Case

- ▶ The KS Judicial Council Tribal State Judicial Forum recommends Rule 116 be amended to eliminate requirements for:
 - Payment of Court Fee, and
 - Sponsorship and filing of motion by Kansas attorney
- ▶ Currently an out of state lawyer representing a party in an Indian Child Welfare Act (ICWA) case in Kansas courts must comply with Kansas Rule 116 Admission *Pro Hac Vice* for Out of State Attorney.
- ▶ This rule requires the out of state attorney be sponsored by a Kansas lawyer who files a motion in the court where case is pending sponsoring said attorney, the attorney's affidavit including evidence of bar admission in another jurisdiction and good standing, and pay a filing fee of \$100 to the court, all prior to the filing of any pleadings in Kansas courts.
- ▶ Kansas Supreme Court published proposed amendments and requests comments through March 22, 2019.
- ▶ A number of states recently amended their court *Pro Hac Vice* rules as they apply to ICWA cases. (see Turtle Talk for the most up to date list at <https://turtletalk.blog/tag/pro-hac-vice/>).



Additional Resources:

Kristen A. Carpenter and Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 Fordham L. Rev. 3085. (2013).

Hon. Elizabeth A. Kronk Warner, *Ethics and Indian Country*, 63 Federal Lawyer 4 (April 2016).

Rob Roy Smith, *The Council's Counsel: The Ethics of Representing Tribal Councils*, msaj.com/papers.htm.