

Lawyer Ethical Quandaries in Indian Country

Gabriel S. Galanda
Bree Black Horse
Gaming Law Summit
December 13, 2018

Hypothetical #1

- Tribal Council hires Casino GM. Tribal Attorney negotiates GM's contract; then works with GM on operational issues. Later, Tribal Gaming Commission seeks to suspend GM's gaming license. Commission looks to Tribal Attorney for legal advice. What's the Tribal Attorney to do?

Hypothetical #1

- MRPC 1.13: Organization as Client
 - WA RPC & ORPC 1.13
 - Comment 2
 - Comment 10
- MRPC 2.1: Advisor
 - WA RPC & ORPC 2.1

Hypothetical #2

- Tribal Attorney serves Tribal Council over the years, most frequently taking the Council's direction via Tribal Chair. Council fractures. Council faction initiates "suspension" proceeding of Chair; looks to Tribal Attorney for legal advice. What's the Tribal Attorney to do?

Hypothetical #2

- MRPC 1.13: Organization as Client
 - WA RPC & ORPC 1.13
 - Comment 1
 - Comment 3
 - Comment 4
 - Comment 10
- MRPC 2.1: Advisor
 - WA RPC & ORPC 2.1

Hypothetical #2(a)

- The pretext for the suspension is that Chair dolled out financial benefits to family members preferentially. Tribal Attorney counseled the Chair regarding the creation and distribution of those benefits. What's the Tribal Attorney to do?

Hypothetical #2(a)

- MRPC 1.13: Organization as Client
 - WA RPC & ORPC 1.13
 - Comment 2
 - Comment 10

Hypothetical #2(b)

- Council faction causes Tribal Prosecutor to initiate criminal proceedings against Chair for dolling out financial benefits to family members preferentially. Tribal Prosecutor looks to Tribal Attorney for strategic advice. What's the Tribal Attorney to do?

Hypothetical #2(b)

- MRPC 1.13: Organization as Client
 - WA RPC & ORPC 1.13
 - Comment 2
- MRPC 1.6: Confidentiality of Information
 - ORPC 1.6 (slight variance)
 - WA RPC 1.6 (significant comments)
- MRPC 3.7: Lawyer as Witness
 - WA RPC 3.7 (slight variance, significant comments)
 - ORPC 3.7 (added subpart, and variance)

Hypothetical #2(c)

- Tribal Attorney advises Council to conduct an internal investigation into allegations of Chair dolling out financial benefits to family members preferentially. Council wants to use Tribal Attorney's firm. What's the Tribal Attorney to do?

Hypothetical #2(c)

- MRPC 1.13: Organization as Client
 - WA RPC & ORPC 1.13
 - Comment 2
- MRPC 1.6: Confidentiality of Information
 - ORPC & WA RPC 1.6
- MRPC 1.7: Conflicts of Interest – Current Clients
 - WA RPC & ORPC 1.7
 - Comment 1

Hypothetical #3

- Tribal Attorney defends Tribal Council officers from Tribal Court *Ex parte Young* lawsuit to prevent administrative disenrollment proceedings. Increasingly frustrated by Tribe's inability to get Tribal Court case dismissed, Tribal Council proposes to the Tribal Attorney that they legislatively disbar his opposing counsel. Council asks the Tribal Attorney: "Can we do this?" What's the Tribal Attorney to do?

Hypothetical #3

- MRPC 1.13: Organization as Client
 - WA RPC & ORPC 1.13
- MRPC 1.2: Advisor
 - WA RPC & ORPC 1.2
- MRPC 8.4: Misconduct
 - WA RPC & ORPC 8.4
- MRPC 3.1: Meritorious Claims
 - WA RPC & ORPC 3.1

Hypothetical #3(b)

- Tribal Attorney delegates matter of legislative disbarment of his opposing counsel to outside counsel. “Disbarred” lawyer sues for property rights deprivation under ICRA. Tribal Attorney considers using same outside counsel to defend the ICRA suit. What’s the Tribal Attorney to do? What’s outside counsel to do?

Hypothetical #3(b)

- MRPC 1.13: Organization as Client
 - WA RPC & ORPC 1.13
- MRPC 1.6: Confidentiality of Information
 - ORPC & WA RPC 1.6
- MRPC 1.2: Advisor
 - WA RPC & ORPC 1.2
- MRPC 8.4: Misconduct
 - WA RPC & ORPC 8.4

Hypothetical #3(c)

- Tribal Judge enjoins Tribal Council from disbaring Tribal Attorney's opposing counsel. Tribal Council fires Judge, leaving the Court Clerks without direction. Tribal Attorney considers using same outside counsel who handled legislative disbarment matter, to counsel the Clerks about handling of "disbarred" lawyer's ICRA suit. What's the Tribal Attorney to do? What's outside counsel to do?

Hypothetical #3(c)

- MRPC 1.2(d): Advisor
 - WA RPC 1.2(d) & ORPC 1.2(c)
- MRPC 3.4(c): Fairness to Opposing Party
 - WA RPC & ORPC 3.4(c)
- MRPC 3.5(d): Impartiality and Decorum
 - WA RPC & ORPC 3.5(d)
- MRPC 8.4 (c) & (d): Misconduct
 - ORPC 8.4 (a)(3)-(6)
 - RPC 8.4(c), (d), (f), (i), (k), (n)

Hypothetical #3(c)

➤ WSBA ODC File No. 17-01776:

Some commentators have opined that lawyers should be held morally responsible for the projects they voluntarily assist and for the means used to pursue them:

Lawyers have the right to decline to represent or withdraw from representing clients with whose projects they morally disagree. If they make a decision to represent a client nonetheless, why should we not hold them responsible for the project which they voluntarily assist? And why not also hold them responsible for the means used to pursue that project? . . . Lawyers also have the right (shall we say duty?) to advise their clients not only legally but also morally. If the lawyers have done so and failed to convince their clients, or have failed even to try to convince them, and still continue to represent those clients, why not hold the lawyers morally responsible?

Andrews, Aronson, Fucile & Lachman, The Law of Lawyering in Washington 4-20 (Wash. State

Hypothetical #3(d)

- After Tribal Council fires Tribal Court Judge, the Council asks Tribal Attorney to become new Judge. Recall the pending *Ex parte Young* lawsuit to prevent administrative disenrollment proceedings, and “disbarred” lawyer’s ICRA suit. What’s the Tribal Attorney to do?

Hypothetical #3(d)

- MRPC 1.13: Organization as Client
 - WA RPC & ORPC 1.13
- MRPC 1.2: Advisor
 - WA RPC & ORPC 1.2
- MRJC Canon 1, Rule 1.2: Confidence in the Judiciary
 - WA CJC Canon 1, Rule 1.2
 - ORJC 2.1

Hypothetical #4

- Tribal Council faction proposes to disenroll a 300 person family that constitutes a powerful, adverse voting block. Council asks Tribal Attorney to figure out the quickest way to disenroll them, claiming that *Santa Clara Pueblo v. Martinez* gives the Council an “absolute right” to do so, with impunity. What’s the Tribal Attorney to do?

Hypothetical #4

- MRPC 1.13: Organization as Client
 - WA RPC & ORPC 1.13
- MRPC 1.2: Advisor
 - WA RPC & ORPC 1.2
- MRPC 3.1: Meritorious Claims
 - WA RPC & ORPC 3.1
- NNABA Ethics Opinion No. 1:
 - “The tribal advocate has a duty to inform his or her client of the moral and human rights norms potentially violated by disenrollment proceedings.”

Thank You

Gabriel S. Galanda

206.300.7801

gabe@galandabroadman.com

Bree Black Horse

206.735.0448

bree@galandabroadman.com