

ETHICAL "OBLIGATIONS" AND AFFIRMATIVE TRIBAL SOVEREIGNTY: SOME CONSIDERATIONS FOR TRIBAL ATTORNEYS

Kaighn Smith, Jr.
Drummond Woodsum & MacMahon
Email: ksmith@dwmlaw.com

"In an age when guilt and romantic fantasy often masquerade as politics, tribal sovereignty has seemed like a cure-all for the genuine wounds of the past. There is no doubt that it has brought self-empowerment and relative prosperity to many tribes that were long paralyzed by federal paternalism. However, without more public debate than it has so far received, tribal sovereignty and the casinos that are its offspring will continue to transform the U.S. in ways that are impossible to predict, and maybe not always for the better." Fergus M. Bordewich, "The Least Transparent Industry in America," The Wall Street Journal, Jan. 5, 2006

This case "raises important questions that the state and people of California must address to ensure that non-Native American citizens who accept employment in gaming casinos located on tribal lands receive the equal protection and due process of law guaranteed to all persons living in the United States." Complaint filed in sexual harassment case, Corinn Medina, et al. v. Thunder Valley Casino, United Auburn Indian Community, Station Casinos and Curtis Broome, in which defendants assert sovereign immunity.

"As a public citizen, a lawyer should seek improvement of the law, access to the legal system, [and] the administration of justice." Preamble to the ABA Model Rules of Professional Conduct

INTRODUCTION

Tribal sovereignty is under intense scrutiny and subject to attack. The more it is perceived to cause unjust results, the more it is vulnerable to criticism. Today, perhaps more than any other time, the preservation of tribal sovereignty requires that it be exercised with an eye towards how it is perceived by non-Indian political forces (including the media) and the federal courts. Bad facts make bad law in this field.¹ And

¹ See, e.g., *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) (tribe signed roofing contract and related arbitration agreement then reneged on

the perception that tribes are lawless enclaves, lacking laws to protect the health, safety, and welfare of individuals within their jurisdiction, inevitably leads to pressures to impose federal or state authority upon tribes and their reservation affairs.²

What are the “obligations” of the tribal attorney in this setting? Federal law doctrines protective of tribal self-government are fraught with unpredictable balancing tests and competing trends across the federal courts. As an ethical matter, does the tribal attorney have a duty to consider how a particular case could affect the overall integrity of the “field” before pressing forward with litigation? If the enactment of tribal law protective of individual rights within a given tribal jurisdiction can help prevent pressures to impose federal or state authority within the reservation, do tribal attorneys have an “obligation” to push for the enactment of such tribal law?

This paper outlines some of these broad concerns. The purpose is to trigger discussion, not to reach a particular conclusion. A short initial discussion of how tribal sovereignty is perceived when exercised affirmatively or defensively helps to set the

the contract, signed with other contractor, refused to arbitrate with first contractor and claimed sovereign immunity; unanimous Supreme Court held that the tribe waived sovereign immunity; it said that tribe’s argument that it only agreed to arbitrate, not to be sued, was disingenuous because, in fact, the tribe refused to arbitrate, and any arbitration would be meaningless if unenforceable); *Nevada v. Hicks*, 533 U.S. 353 (2001) (state and tribal law enforcement officers cooperate to investigate alleged violation of Nevada hunting law – killing bighorn sheep – by tribal member (Hicks); tribal court issues order approving of on-reservation execution of search warrant by Nevada law enforcement officers; search fails to turn up evidence of bighorn sheep, but officers find heads of other sheep; Hicks sues the state and tribal law enforcement officials and the tribal court judge in tribal court for harm to his sheep heads and wrongful search; tribal court dismisses most counts, leaving Hicks’s tort and civil rights claims against individual state officers; Nevada, on behalf of its state officers, sues in federal court to enjoin the tribal court action for want of jurisdiction; Supreme Court holds that tribal court lacks jurisdiction).

² See “Drug Traffickers Find Haven in Shadows of Indian Country,” *The New York Times*, Feb. 19, 2006.

stage. The paper goes on to address issues of concern in the areas of civil rights and labor and employment.

AFFIRMATIVE AND DEFENSIVE TRIBAL SOVEREIGNTY

Tribal sovereignty can be exercised affirmatively or defensively. Affirmative sovereignty is the positive assertion of tribal authority, including the enactment of tribal law, to govern matters within the jurisdiction of a given tribe. Defensive tribal sovereignty involves the use of sovereign immunity to shield tribes, tribal enterprises, and tribal officials from lawsuits or the invocation of legal doctrines to shield tribes, their reservation affairs, and their reservation enterprises from the imposition of state or federal authority. Defensive tribal sovereignty draws, by far, the most media attention, and when tribes, tribal enterprises, or tribal officials appear to avoid liability or accountability, that attention is often negative.³

The exercise of affirmative tribal sovereignty can offset the negative perception of defensive tribal sovereignty. Consider, for example, an Indian tribe with a tribal law providing employees with enforceable tribal court remedies for workplace sexual harassment. Such an "affirmative tribe" will be far less vulnerable to media attack when it, or one of its enterprises, prevails in dismissing a federal court action by an employee under Title VII of the Civil Rights Act; for it can point to fair and enforceable tribal law

³ See, e.g., "House Advantage: Indian Casinos Win By Partly Avoiding Costly Labor Rules, Sovereignty Helps Shield Them from Unions and Lawsuits, Can Limit Worker Benefits," Wall Street Journal, May 7, 2002 at 1; Donna Leinwand, "Seminole Fight Sexual Harassment Suit," Miami Herald, Feb. 12, 1996 at A1. See also Danahy, License To Discriminate: The Application Of Sovereign Immunity To Employment Discrimination Claims Brought By Non-Native American Employees Of Tribally Owned Businesses, 25 Fla. St. U.L. Rev. 679 (1998).

protections for the employee. Similarly, the EEOC or the Department of Labor will be less inclined to push for the imposition of federal employment remedies upon tribes and their enterprises if employees can pursue remedies in tribal court, under tribal law, that are on a par with federal law remedies.

Thus, it can be argued that to stave off negative perceptions of defensive tribal sovereignty, tribes should enact laws, consistent with the values of the tribal community, that protect the health, safety, and welfare of Indians and non-Indians within their jurisdiction; and to do so as well as any state or federal authority would do it if the latter had jurisdiction. If a tribal attorney, in accordance with the preamble to the ABA Model Rules of Professional Responsibility, has a duty “to seek improvement of the law, access to the legal system, [and] the administration of justice,” then he or she should be advocating for active tribal lawmaking in these areas.

Affirmative sovereignty may also mean taking a long range view of whether to litigate a defensive tribal sovereignty position in the federal courts. Again, considering the adage that bad facts make bad law, this could mean careful consideration of the risks of creating bad precedent for the field of federal Indian law, not just the consequences for the particular case. Is there any “ethical” obligation for a tribal attorney to take into account how a particular case for a particular tribal client might affect federal court precedent in the field of federal Indian law? Surely there is no equivalent obligation in most other fields of law. But federal Indian law is unique. All tribes may benefit or suffer from particular developments in the law. In this setting, the ABA Preamble’s suggestion that lawyers “should seek improvement of the law” could be interpreted, in

the Indian law context, as an obligation to take account of the impact of a particular case upon the long term viability of tribal sovereignty.

What follows is an outline of some particular challenges in the areas of civil rights and fair employment practices laws.

CIVIL RIGHTS

A number of tribes have adopted provisions of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et. seq.* ("ICRA"), either as part of a tribal code, as part of a tribal constitution, or both. Section 1302 of ICRA provides:

No Indian tribe in exercising powers of self-government shall -

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;
- (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
- (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. §1302.

Subsection 1, of course, tracks the First Amendment of the U.S. Constitution, subsection 2 tracks the Fourth Amendment, and subsection 8 contains protections tracking the due process and equal protections clauses of the Fourteenth Amendment. Thus, insofar as these provisions are enforceable against tribes, tribal agencies, and tribal officials, they may provide rights and remedies similar those available in the non-Indian context under the counterpart federal constitutional provisions. Rather than allow the law to develop by accident with respect to section 1302 of ICRA or similar provisions in tribal constitutions or codes, however, tribes can proceed affirmatively to address the particulars of how the law should work.

Dealing Directly with Tribal Sovereign Immunity and Civil Rights Claims

A first-level policy consideration for tribal governments under ICRA is whether to expressly waive sovereign immunity for the enforcement of that law or similar provisions in tribal court or other forums.

In *Santa Clara Pueblo v. Martinez*,⁴ the Supreme Court held that with the exception of petitions for *habeas corpus* relief, Congress did not waive the sovereign immunity of tribes with respect to claims under section 1302 of ICRA, and while individual tribal officers may be subject to suit under ICRA, such claims can only be brought in tribal court or other tribal forums. Notwithstanding the Court's admonition that enactment of ICRA had "the substantial and intended effect of changing the law

⁴ 436 U.S. 49 (1976).

which [tribal] forums are obliged to apply," *id.* at 45, some tribal courts have refused to enforce ICRA without a clear waiver of sovereign immunity by the tribal government.⁵ Others have had no trouble finding that ICRA waives tribal sovereign immunity for enforcement in tribal court.⁶ Affirmative tribal lawmaking on the whether to waive sovereign immunity from suit under ICRA, or similar provisions in tribal constitutions, can help avoid uncertainty.

Spelling Out Civil Rights and Remedies

A second-level policy consideration, assuming a tribe decides to waive sovereign immunity from claims under section 1302 of ICRA or similar provisions of tribal law, is the extent to which the rights and remedies should be spelled out. In the absence of focused legislation on these subjects, tribal courts will be left to develop the law. To date, when this has occurred, the tribal courts have relied heavily upon federal caselaw interpreting rights and remedies under the analogous federal constitutional provisions. The results are varied and unpredictable.⁷

⁵ See, e.g., *Kotch v. Absentee Shawnee Tribe*, 3 Okla. Trib. 184, 195 (Absentee Shawnee Tribe Sup. Ct. 1993); *Pawnee Tribe v. Franseen*, 19 Indian L. Rep. 6006, 6008 (Ct. Indian App. - Pawnee 1991); *Board of Trustees v. Wynde*, 18 Indian L. Rep. 6033, 6035 (N. Plns. Intertr. Ct. App. 1990); *Johnson v. Navajo Nation*, 14 Indian L. Rep. 6037, 6040 (Nav. Sup. Ct. 1987); *McCormick v. Election Comm.*, 1 Okla. Trib. 8, 19 (Ct. Ind. Off. Sac. & Fox Tribe 1980).

⁶ See, e.g., *Oglala-Sioux Tribal Personnel Bd. v. Red Shirt*, 16 Indian L. Rep. 6052, 6053 (1983); *Works v. Fallon Paiute-Shoshone Tribe*, 24 Indian L. Rep. 6033, 6033 (Intertr. Ct. App. Nev. 1997); *Dupree v. Cheyenne River Hous. Auth.*, 16 Indian L. Rep. 6106, 6108-09 (Chy. R. Sx. Ct. App. 1988). See generally Frank Pommersheim, 21 Vt. L. Rev. 7, 22-23 & n. 44 (1997) (collecting cases).

⁷ Whether a tribal government employee has a "property interest" in governmental employment, triggering due process rights, is one example of an area of uncertainty. See, e.g., *Johnson v. Mashantucket Pequot Gaming Enterprise*, 25 Ind. L. Rep. 6011 (Mashantucket Pequot Court of Appeals 1996) (employee of Mashantucket Pequot Gaming Enterprise has "property interest" in employment); *Shippentower v. Confederated Tribes*, 20 Ind. L. Rep. 6026, 6026-27 (Uma. Tr. Ct. 1993) (job applicant not entitled to due process protection); *Hoopa Valley Indian Hous. Auth. v. Gerstner*, 3 NICS App. 250, 259 (Hoopa Valley Tr. Ct. App. 1993) (continued employment with the Tribe and its entities "is an important property interest to which due process rights attach"); *Regan v. Finkbonner*, 1 NICS App. 82, 84 (Nooksack Tr. Ct. App. 1990) (when a tribal

Tribal lawmaking bodies can make conscious choices about these rights and remedies, consistent with the values of the reservation community. In so doing, tribes may be in a better position to defend against assertions from outsiders that they fail to protect “individual rights.”

FAIR EMPLOYMENT PRACTICES

Sex, Religious, Race, Color, National Origin, Ancestry, and Disability Discrimination

The most well-known federal employment law is Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination on the basis of race, color, sex (including pregnancy), religion, national origin, and ancestry. Sexual harassment falls under the category of sex discrimination. The more recently enacted Americans with Disabilities Act (ADA) prohibits employment discrimination on the basis of disability and requires employers to provide reasonable accommodations for employees with disabilities. Remedies for violations of Title VII or the ADA may include lost wages, emotional distress, punitive damages, and attorney fees. Lawsuits may be brought against employers for alleged violations by individual employees or by the EEOC on their behalf.

Upon enacting Title VII, however, Congress expressly excluded “Indian tribes” from the definition of employers covered by the Act. *See* 42 U.S.C. § 2000e(b). Congress similarly excluded Indian tribes from the employment discrimination provisions of the ADA. *See* 42 U.S.C. § 1211(5)(B)(i).

As tribes have achieved economic success and become significant employers of both Indians and non-Indians, this “gap” in federal employment discrimination law has come under close scrutiny. *See supra* note 3. Tribes can exercise affirmative sovereignty by enacting their own laws, equivalent to those under Title VII and the ADA, to provide

employee appeals termination decision, employer must afford due process in accordance with ICRA).

remedies for employees suffering from workplace discrimination. *See, e.g.*, Little River Band of Ottawa Indians, Fair Employment Practice Code, available at <http://www.lrboi.com/council/Ordinances%20-%20New/Chapter%20600.pdf>. The alternative, failing to provide enforceable remedies for such employees will continue to generate criticism and scrutiny of the existing Congressional exclusion of tribes from Title VII and the ADA.

Age Discrimination and other Federal Labor and Employment Laws, which are Silent with Respect to their Application to Tribes

Uncertainties abound with respect to the application of general federal labor and employment laws to Indian tribes and tribal enterprises. Tribes cannot assert sovereign immunity against the enforcement of such laws by the federal agencies administering them, the Equal Employment Opportunity Commission, the Department of Labor, and others. *See U.S. v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987), *cert. denied* 485 U.S. 935 (1988). Without the shield of sovereign immunity, tribes or their enterprises must fight against the imposition of these laws on the basis of ill-defined balancing tests, which are inconsistent across the federal circuit courts of appeals.

The Ninth and Second Circuits hold:

A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations. In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179 (2nd Cir. 1996). In these circuits, the

burden rests with the tribe to establish one of the three criteria to avoid the application of a federal employment or labor law of general application.

The Tenth and Eighth Circuits employ a standard that is less sympathetic to federal agencies, but still uncertain in its application to a particular case. In these courts, when federal agencies seek to impose a general federal law upon tribes, the first consideration is whether application of the law would interfere with tribal self-government, recognized by treaty, statute or as a matter of common law. There is no starting presumption that the federal law applies as there is in the Ninth and Second Circuits. If application of the law could harm or interfere with tribal self-government, then it will not apply absent a clear expression of intent from Congress. *See Donovan v. Navajo Forest Products Industries*, 692 F.2d 709, 710-12 (10th Cir. 1982); *EEOC v. Cherokee Nation*, 986 F.2d 246, 249 (8th Cir. 1993).

The Seventh Circuit has suggested a third standard. In *Reich v. Great Lakes Indian Fish & Wildlife Com'n.*, 4 F.3d 490 (7th Cir. 1993), the court held that the minimum wage requirements of the federal Fair Labor Standards Act would not apply to tribal law enforcement employees. The court found it significant that the employees were “law enforcement officers, who if they had been employed by state or local government would have been exempt from the law.” *Id.* at 495. It said, “[w]e do not hold that employees of Indian agencies are exempt from the Fair Labor Standards Act. We hold only that those agencies’ employees exercising governmental functions that when exercised by employees of other governments are given special consideration under the Act, are exempt.” *Id.* In the Seventh Circuit, therefore, tribes may not be subject to

federal labor or employment laws of general application where states would be immune under similar circumstances.

Given the inconsistent legal standards across the federal courts and elusive concepts such as “exclusive rights of self-governance in purely intramural matters,” more control and certainty may be established if tribes enact their own laws to address the same problems addressed by these general federal labor and employment laws.

As a practical matter, if tribal law is in place and used to address a labor or employment concern otherwise subject to scrutiny by federal authorities, there may be no incentive for a federal agency to intervene. Further, with tribal law in place, a tribe could at least claim that it has concurrent jurisdiction over a labor or employment concern (e.g. workplace discrimination, wages and conditions of employment, or union organizing) with federal authorities. And if tribal remedies paralleling those available under federal law are available in tribal court or other tribal forums, the “exhaustion” doctrine could be invoked to deter federal courts from proceeding with claims brought under federal law. See *Garcia v. Akwesasne Housing Authority*, 268 F.3d at 88-89 (Katzmann, J., concurring); *Duncan Energy Company v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994). See also *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (discussing exhaustion doctrine). Although the exhaustion doctrine merely defers federal court adjudication until tribal remedies are exhausted, as a practical matter, reservation employment disputes could well be resolved by tribal adjudication or by settlement before returning to federal court.

Finally, if there is a tug of war about the right of federal authorities to impose federal labor and employment laws of general application to tribes and tribal enterprises, the affirmative exercise of tribal jurisdiction in the same areas could help establish that “intramural matters” involving “tribal self government” are at issue. In *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d at 1082, the Eighth Circuit was influenced, in part, by the existence of tribal law remedies, in concluding that an age discrimination dispute was a matter of tribal self-government. Likewise, in *NLRB v. Pueblo of San Juan*, 276 F.3d 1166 (10th Cir. 2002) (en banc), the Pueblo, having enacted a right to work law, could challenge the imposition of the National Labor Relations Act upon reservation labor relations as an interference with its rights of self-governance.

CONCLUSION

While the ABA Model Rules may not apply to a tribal attorney’s conduct in representing or advising a tribal client, insofar as such an attorney accepts that he or she has a general obligation to “seek improvement of the law, access to the legal system, [and] the administration of justice,” the matters raised here may be well be worthy of consideration. Preserving the integrity of tribal self-government in the face of increasing scrutiny and criticism may go hand in hand with the affirmative exercise of tribal sovereignty through the assertion of tribal authority over matters that generate particular concerns by outsiders or where tribes are vulnerable given uncertainties in the law. The areas of civil rights and labor and employment relations are two examples deserving of particular attention.