Ethics Issues in Doing Business with Native American and Alaska Native Tribes and Tribal Enterprises

By

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ETHICAL CONSIDERATIONS IN DOING BUSINESS WITH NATIVE AMERICAN AND ALASKA NATIVE TRIBES AND TRIBAL ENTERPRISES

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The rising economic and political power of Native American and Alaska Native tribes, and of tribally owned and operated commercial entities throughout the United States, presents ethical issues of first impression. In an era of professed corporate responsibility, ethical standards and their enforcement have not always kept pace with the growth of tribal economies. Nor are tribal-related transactions structured in a manner that is ethically and culturally attuned. How Corporate America treats Native America speaks volumes about the United States’ seriousness in strengthening business ethics in an increasingly globalized economy. This is particularly so as multi-national corporations increasingly deal with developing foreign nations and governments, which – especially given the United States’ pledge to adhere to the United Nations’ Declaration of the Rights of Indigenous Peoples – might be reasonably expected to more closely scrutinize how U.S. companies treat First Americans in our own country.

This Article addresses some of the major ethical considerations that may arise when non-Indians seek to do business with Native American and Alaska Native tribes and tribally owned and operated enterprises. Section I provides a brief overview of tribal economies in the United States, which are increasingly important not just in many local areas, but regionally and nationally. Section II explains why attorneys representing or dealing with tribes have an ethical duty to learn

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2 The Declaration on the Rights of Indigenous People (“Declaration”) took the United Nations more than two decades to negotiate and is an aspirational agreement not legally binding. See Resolution 61/295 of the United Nations General Assembly, 107th plenary meeting, Sept. 13, 2007. A helpful source for materials about the Declaration is maintained by the University of British Columbia at www.indigenousfoundations.arts.ubc.ca/home/global-indigenous-issues/un-declaration-on-the-rights-of-indigenous-peoples.html. The Declaration specifically addresses economic development and employment issues, along with numerous other matters. Among other things, the Declaration provides that indigenous people are individually and collectively entitled to “freely pursue their economic, social and cultural development” (Art. III) and “maintain and strengthen their distinct political, legal, economic, social and cultural institutions” (Art. V). The Declaration was adopted by the U.N. General Assembly on Dec. 13, 2007 by a vote of 143 in favor, 11 abstentions, 34 not participating, and four opposed. The Unites States was one of the four nations that opposed the Declaration, but President Obama announced the United States’ support on Dec. 16, 2010.
about tribal culture and history and gives practical examples of why such preparations should matter to clients. Section III examines some of the core characteristics of many Native nations, reflected in tribal laws, which may be unfamiliar to some non-Indians. Bridging such divergent legal and ethical perspectives is a prerequisite for cultivating and growing productive business relationships.

Section IV of the Article turns to nuts-and-bolts ethics regulation at the tribal level. In practice, Native nations’ standards of professional conduct are nearly as diverse as Native nations themselves. At least 100 tribes have adopted written ethics codes – most of them within the past decade or so – monitored and enforced either directly by governing tribal councils or by tribal agencies, auditors or investigators exercising varying degrees of independence. A driving force behind these ethics systems, which increasingly extend to procurement policies and procedures governing tribes’ outside contractors and business partners, is to prevent self-dealing and insulate – or at least buffer – tribes’ governmental decision-making from tribal enterprises’ arms-length business operations.

Finally, Section V concludes by suggesting practical ways that non-Indian businesspeople and their attorneys can avoid potential ethical pitfalls in dealing with Native nations and their enterprises. Respecting Native culture and tradition is an imperative, but it must never become an excuse for outsiders to pursue business practices with tribes that contravene tribes’ interests or offend companies’ own corporate values. Businesspeople should raise the bar by implementing more effective internal controls to strengthen their own ethical awareness and behavior while reinforcing tribal leaders’ efforts to strengthen professional conduct and depoliticize tribal commerce.

I. INTRODUCTION: THE WEALTH OF TRIBAL NATIONS

Today’s 566 federally recognized Indian tribes and nations control 56 million acres of land in the continental United States plus another 44 million acres in Alaska, adding billions of dollars annually to the U.S. Gross National Product – everything from energy, water and natural resources to banking and financial services, real estate development, and entertainment, hospitality and tourism. The financial wealth of Native nations ranges from barely developed tribal economies, often located in counties with some the lowest reported per-capita income rates in the country, to sophisticated local, regional and even national and international competitors.

Gaming remains the most recognizable tribal commercial endeavor. U.S. tribes generated $27.4 billion in total gaming revenue in 2011, up from $26.5 billion the year before. Those

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3 This Article does not specifically address the Alaska Native Claims Settlement Act of 1971, which, as part of an experimental approach in the settlement of Alaska Native land claims, created both for-profit and non-profit corporations that play a variety of roles unique to Alaska. See Act of December 18, 1971, Pub. L. No. 92-203, 85 Stat. 688, 43 U.S.C. Section 1601 et seq. For an overview, see David S. Case and David A. Voluck, ALASKA NATIVES AND AMERICAN LAWS 176-79 (3d Ed. 2012). Nonetheless, Alaska Native nations are federally recognized and present the same or similar ethical challenges and opportunities.

revenues led to payments of $6 billion to the federal government, $3.8 billion to state governments, and $2.5 billion to local governments.\(^5\) Gaming has transformed the economies of some Native nations geographically positioned to benefit from their proximity to local and regional population centers. One of the best-known examples is the Seminole Tribe of Florida ("Seminole Tribe"), with approximately 3,800 enrolled members. In March 2007, the Seminole Tribe purchased Hard Rock International from United Kingdom-based Rank Group PLC for an estimated $965 million. That initial deal has since grown to include 177 venues in 58 countries: 141 Hard Rock Cafés, 18 Hard Rock Hotels and eight casinos. The Seminole Tribe and its commercial entities today employ more than 20,000 people. Another 15,000 are employed by Hard Rock licensees around the world, or by vendors who operate various businesses under contracts at Seminole gaming sites.\(^6\)

While the Seminole Tribe has successfully leveraged its commercial ventures nationally and internationally, most gaming tribes depend on a local or regional clientele. The Ho-Chunk Nation of Wisconsin ("Ho-Chunk") is a case in point. Formerly known as the Wisconsin Winnebago Nation, Ho-Chunk is headquartered in Black River Falls and entered gaming in 1973, at a time when tribal members were among the state’s poorest citizens. In 1992, the State of Wisconsin entered into gaming compacts with all 11 of the tribes and bands located within its boundaries. This included the Ho-Chunk Nation, with roughly 7,000 enrolled members, about half of them living in Wisconsin. Ho-Chunk today nets $200 million annually through its network of six casinos in or near Black River Falls, Madison, Nekoosah, Tomah, Baraboo, and Wittenberg.\(^7\) The profits from the Ho-Chunk Nation’s gaming operations have enabled it to provide what one court described as “a relatively generous set of benefits for its members, including annual per-capita stipends of $12,000 for adults and one-time payouts of up to $200,000 from a children’s trust fund when a youth turns 18 and graduates from high school.”\(^8\)

Yet important and visible though it is, casino gaming holds little or no economic development potential for most tribes, whose geography can support few if any casinos, bingo halls, or similar facilities despite many non-Indians’ misperceptions. What is perhaps most remarkable is how many Native tribes have built vibrant economies with little or no gaming at all.

The 1,400-member Southern Ute Indian Tribe, for instance, had only a modest casino when it emerged as one of the largest employers in Southwestern Colorado – with a AAA bond rating and enterprises reportedly worth in excess of $4 billion – by focusing on oil and natural gas development. The Southern Ute Tribe’s Growth Fund, formed in 2000, operates and manages the tribe’s diversified businesses and business investments with operations and assets spread over at least 14 states and the Gulf of Mexico.\(^9\) Southern Ute tribal entities operate more than 500 gas and oil wells and, through the Growth Fund, have expanded into numerous ventures, including real

\(^6\) Id.
\(^7\) United States v. Whiteagle, No. 12-3554 (7th Cir. July 21, 2014), p. 3.
\(^8\) Id. (footnote omitted).
\(^9\) Id.
estate development. For example, in 2006, the Tribe was instrumental in replacing the City of Durango, Colorado’s century-old hospital with Mercy Regional Medical Center, an 82-bed, 215,000’ square-foot acute care hospital owned and operated by Centura Health that serves a fast-growing metropolitan population of approximately 60,000. Among other things, a Tribal company donated fee land near Durango for the new hospital complex, which anchors a 700-acre mixed residential and commercial development project the Tribe owns southeast of town.10

Other Native nations are likewise leveraging energy development to grow and diversify their economies. The Mandan, Hidatsa and Arikara Nations, also known as the Three Affiliated Tribes of the Fort Berthold Reservation, broke ground in November 2013 on a refinery to serve the crude oil-rich Bakken Field in North Dakota.11 The refinery, the first to be built anywhere in the United States since 1976, is only the latest phase in the Tribes’ extensive development of its mineral interests in the oil-rich Bakken Field in western North Dakota, which includes both leasing to non-Indian companies and investment in tribally owned and operated energy enterprises. Nor do the Three Affiliated Tribes limit their commercial activities to energy and related infrastructure development. The Mandan, Hidatsa and Arikara Nations – along with two dozen or so other tribes – have also recently launched several “e-commerce” ventures, including consumer lending and other financial services, which can be provided to consumers over the Internet.

The 7,000-member Fort Belknap Indian Community in Montana has similarly turned to online lending to combat an unemployment rate of 73 percent.12 The president of the governing council for the two Native nations sharing the Fort Belknap Indian Reservation, the Gros Ventre and Assiniboine Tribes, reports that income from their on-line lending businesses makes up 20 percent of the Tribes’ total annual revenue and provides $1.2 million in payroll to Tribal employees.13 As instrumentalities of tribal governments, on-line lending and similar enterprises are ordinarily shielded by tribal sovereign immunity, which broadly prevents states from enforcing usury and other generally applicable laws against them.14 While some critics of tribal e-commerce urge Congress to pass legislation forcing Native enterprises to adhere to state consumer laws, supporters counter that “[t]his sort of economic engineering is commonplace for corporate-friendly forums such as the state of Delaware and South Dakota, which routinely export their corporate-favorable state laws upon customers who live in states or territories with more restrict laws. This practice is common and does not subject Delaware or South Dakota to collateral attacks by sister

14 See e.g. Cash Advance v. State, 242 P.3d 1099, 1107 (Colo. 2010) (invalidating state attorney general’s civil investigative subpoenas against on-line tribal lending enterprise on sovereign immunity grounds).
The larger point is that tribes are not only moving into lines of business that would have seemed novel a decade or so ago, but leveraging their competitive strengths to create and sustain entire new markets.

In this and numerous other ways, Native nations are engaged in non-gaming business ventures as never before – often entering what is for them uncharted economic territory. The wave of innovation and entrepreneurship across Indian country presents new opportunities not only for non-Indian companies, but for tribes themselves, which often choose to invest in each other’s gaming and non-gaming ventures. As the variety and velocity of transactions increase, the need for creating, monitoring and enforcing responsible ethics policies has never been greater. Non-Indians seeking to do business with tribes may encounter ethical challenges that more closely resemble doing business with foreign governments than chasing more familiar deals at home. Tribal officials likewise face a wider range of sensitive ethical issues as tribally owned and operated enterprises venture into the realm of what previously was mostly private commercial activity. It benefits all concerned to exercise prudent judgment and vigilance before business dealings get too far ahead of their ethical underpinnings.

II. ESTABLISHING ETHICAL BASELINES: SEEING THE WORLD THROUGH EACH OTHERS’ EYES

A. The Freshness of History and How It Shapes Tribal Business

Raising the ethical bar for how companies, institutions and individuals conduct business with Indian tribes and tribal enterprises – and how tribal officials manage their own employees, contractors, and commercial relationships – can reduce transaction costs and provide enhanced predictability and stability to mutually beneficial transactions. Yet ethics is about much more than risk management. It speaks volumes about Corporate America’s commitment to the ethical values it espouses and encourages others to emulate. Felix Cohen, “the Blackstone of American Indian Law” and author of the Handbook of Federal Indian Law that still bears his name, made a similar connection, albeit between the federal government and tribes, in his last published essay before his death in 1953:

15 Jennifer H. Weddle, “Nothing Nefarious: The Federal Legal and Historical Predicate for Tribal Sovereign Lending,” The Federal Lawyer 59, 62 (April 2014). Weddle also disputes critics’ claims that sovereign loans include usurious interest rates, noting that tribal loans are typically priced at or below market rates: “The annualized interest rate charged by tribes [to consumers] is often between 200 to 900 percent, which is equivalent to, and in many cases lower than, what many banks charge for short-term loan products they often euphemistically label as ‘overdraft protection’ of ‘checking account advances.’” Id. at 64 n. 37.

Like the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.17

Comparing Indians to canaries in coal mines may strike modern readers as quaint or even crude. But Cohen, who at another point in the same article analogizes Native Americans to Jews in Germany,18 chose his words carefully. An early and passionate advocate of the federal government’s obligations to protect Native people and tribal self-governance, Cohen was trying to get Congress’ attention – before it was too late. That same year, the United States launched what became the Termination Era. New laws terminated tribal governments’ traditional police powers, sold off millions of acres of reservation lands, and ended federal recognition for many tribes regardless of the commitments previously made to them through treaties, statutes and Presidential executive orders.19 Termination meant “total assimilation, for some tribes now, for the others soon.”20 It continued as official policy until 197021 when the United States finally began easing and removing some but not all of the federally imposed restrictions on tribal self-governance.22

Any meaningful discussion of ethics ought to start with learning about the Termination Era and its legacy – fresh in the minds of tribal leaders and their constituents – and acquiring insight into the many prior decades of failed federal laws and policies affecting indigenous people and their governments. Gaining this kind of historical understanding can become a life-long educational...

18 Id.
19 On August 1, 1953, Congress approved House Concurrent Resolution 108, declaring a new national policy of tribal termination and directing that the end of the Indian reservation system and related federal services to people living and working on tribal homelands be completed “as rapidly as possible.” Two weeks later, Congress enacted Public Law 93-280, which extended state criminal and civil jurisdiction over many Indian reservations without their consent. Charles Wilkinson, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 57-86 (2005) (“Wilkinson”).
20 Wilkinson, id. at p. 57.
21 President Richard Nixon repudiated Termination, and with it assimilation as a guiding premise in national public policy, in 1970. “Nixon rejected assimilation as the primary focus of Indian policy, and was willing to recognize and support the building of stronger tribal governments that would express tribal culture.” Duane Champagne, NOTES FROM THE CENTER OF TURTLE ISLAND 135 (2010) (“Champagne”).
22 While tribal sovereignty and self-determination have been the cornerstones of national policy toward Indian nations since the Nixon Administration, Congress and the federal courts nonetheless have seriously curtailed tribal governments’ exercise of their traditional police powers. This includes law enforcement and public safety, where tribes’ ability to assert criminal jurisdiction over non-Indians was entirely eliminated by federal law except, beginning earlier this year with a handful of tribes, for a narrow category of domestic violence-related offenses pursuant to the Violence Against Women Act Amendments of 2013. See generally Indian Law and Order Commission, A ROADMAP FOR MAKING NATIVE AMERICA SAFER, Report to the President and Congress of the United States (Nov. 2013), http://www.aisc.ucla.edu/iloc/.
pursuit. But what perhaps matters most is trying to see or at least appreciate how this history – the history many non-Indians never learned in school or anywhere else – still influences the worldviews of tribal leaders and their constituents. One legacy of Termination in Native America is persistent distrust – not just of the federal and state governments, but of non-Indian institutions generally, including corporations, businesspeople, and their (paid) representatives. While non-Indians should not take this distrust personally, in my experience the problem gets worse and not better unless outsiders open their hearts and minds to Natives’ perspectives.

B. The Lawyer’s Duty To Do Justice in the Indian Law Context

Far from being an academic exercise, the quest for greater historical and cultural awareness by attorneys representing or dealing with tribes and tribal enterprises goes to the heart of every lawyer’s basic obligation to provide competent representation to his or her client under Rule 1.1 of the Model Rules of Professional Conduct. Of course the reasons for learning about Native culture and history, and understanding how it still shapes the present legal and commercial landscape whenever Native entities are involved, transcend mere competence. The Preamble of the Model Rules demand that an attorney’s ethical responsibilities go well beyond their clients or the business at hand:

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

“The quality of justice” in this context means recognizing that tribal officials seated at the bargaining table have likely confronted numerous injustices at the hands of federal and state governments and from non-Indian companies and businesspeople. Even if these harms happened long ago, they often endure in the continuing verbal traditions – the story-telling that predates written languages – that can be central to the cultural identifies of indigenous people.

A practical example from the Navajo Nation illustrates may help illustrate the continuing vitality of traditional story-telling to modern law practice. Our law firm recently handled a matter involving Navajo Agricultural Products Industry (“NAPI”), a tribally owned and operated enterprise that runs and leases farming and related businesses on Navajo Nation trust lands south of Farmington, New Mexico. This includes growing corn, along with potatoes and pumpkins, on the NAPI farms. A workplace fatality accident had tragically occurred on trust lands leased by NAPI to our client, a non-Indian farming operation employing hundreds of seasonal workers, nearly all of them Navajo citizens.

When the federal Occupational Safety and Health Administration (“OSHA”) arrived at the site, we made clear that OSHA lacked any civil or criminal jurisdiction to investigate the accident.

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24 See Preamble, Model Rules, id.
According to an 1868 treaty between the United States and the Navajo Nation, only the Nation can regulate workplace and occupational safety on the NAPI tribal trust lands where the accident occurred. Besides citing the Treaty of 1868 directly, we referred OSHA to a federal appellate court decision holding that because of the treaty, the Occupational Health and Safety Act of 1970 did not apply to Navajo tribal lands. I can still hear the OSHA agent’s startled voice: “You’ve got to be kidding.” Soon thereafter, the United States Solicitor of Labor’s Office issued a declination letter and abandoned OSHA’s threatened investigation.

No doubt about it: Citing an on-point federal case rejecting OSHA’s jurisdiction on Navajo tribal lands—based on a treaty that affirms the Nation’s right to exclude all but certain federal officials and restricts their presence on the Navajo Indian Reservation to certain purposes—was helpful in scuttling the OSHA investigation. Yet there was something more. At the moment the president of the company, which the firm had not previously represented, contacted us to report the accident and OSHA’s response, my colleagues and I sensed that any federal enforcement action could have not just legal, but cultural and spiritual implications for the Dine’ (“the People,” as the Navajo call themselves).

Having worked on the Navajo Nation for years and been a frequent guest at traditional ceremonies, I had begun to learn that the growing of crops, and corn especially, is foundational to Navajo culture and tradition. To give but two examples, corn pollen is part of customary prayer ceremonies for many Dine’—reminiscent perhaps of the bread and wine used in the communion sacrament of some Christian denominations—and white and yellow corn meal both appear in accounts of the Navajo creation story. In a way, my colleagues and I had been preparing for this particular engagement long before a new client engaged us. After doing our legal homework and reaching out directly to Navajo Nation officials regarding the threat of an OSHA investigation at NAPI, these traditional cultural concerns only intensified.

One experience remains especially vivid. An elder took me aside and—saying he had heard about the threatened OSHA probe—explained that this was only the latest effort by Bela’gaa’na (White people, literally “outsiders” in the Navajo language) to destroy Navajo farming. I listened closely and, after a colleague began graciously translating, heard enough to follow up later with some reading on my own to connect the dots of what the elder had said. Speaking as if he were describing recent events, the Dine’ gentleman talked about one of the first encounters between the Navajo and the United States—a confrontation that, according to historians, began on August 30, 1849. The U.S. Army had sent hundreds of soldiers campaigning deep into the newly acquired New Mexico Territory so Navajo inhabitants could, in the words of their commanding officer, “become acquainted with our national strength.” Encountering cornfields amid the desert, Army

26 Donovan v. Navajo Forest Product Industries, 692 F.2d 709 (10th Cir. 1982).
27 See, e.g., Paul G. Zolbrod, DINE’ BAHANE’: THE NAVAJO CREATION STORY 49 (Univ. of New Mexico Press, 1984) (describing the use of cornmeal by men and women when the Dine’ emerged into the Fourth World).
28 Quoted in William Aloysius Keleher TURMOIL IN NEW MEXICO 1846-1868 53 (1952) (“Kelcher”).
foragers helped themselves while proclaiming friendly intentions to gathering Navajo horsemen. Frustrated Dine’ leaders, who were counting on the crop to survive the winter, complained to Army commander Colonel John Washington: “If we are friends, why did you take our corn?”29 Yet despite the carefully tended fields around him – ingeniously clustered rather than furrowed to conserve water – the colonel saw only idleness. The Navajo, he insisted, must learn “to cultivate the earth for an honest livelihood, or be destroyed.”30 The very next day, tensions boiled over when a soldier accused a Navajo warrior of stealing a horse. Washington’s troops fired on the crowd with a field cannon and muskets. Dine’ were slaughtered; among the dead was Narona, an elderly warrior-statesman. His corpse was mutilated where he fell by a souvenir collector.31 What started as a disagreement over corn proved to be but a precursor to years of bloodshed – culminating in the “Long Walk,” the forced removal by the U.S. Army of nearly 9,000 Navajo people to Bosque Redondo in eastern New Mexico, with at least 500 dying along the way and many others perishing afterward in captivity.32 Only after the Treaty of 1868 were the surviving Dine’ able to return to a portion of their homelands.

The Navajo elder’s story that day helped explain why the Nation’s officials so passionately and adamantly opposed any and all attempts by OSHA to enter tribal lands. In this instance, the Nation’s willingness to reassert its own jurisdiction to regulate workplace safety under Navajo law, through the Navajo Occupational Health and Safety Administration,33 and to stand firmly against any uninvited federal presence on its lands for legal and cultural and historical reasons, provided key support to a non-Indian company. By signaling that the Navajo Nation would resist any OSHA investigation on tribal lands, the Nation weighed in not as a party but as a government. This leverage may have been crucial to resolving the dispute on terms favorable both to the Nation and our client.

C. ‘Ground Truth’ and the Need to Get Out of Your Office

Before business negotiations even begin, the parties to a given tribal-related transaction would do well to learn more about each other’s preconceptions and the critical assumptions that might be expected to shape their commercial relationships over time. The point is not to engage in stereotyping; generalizations about people and their institutions can be as destructive in commercial dealings as other endeavors. Instead, learning about a particular tribe’s history and culture is the absolute minimum of what should be expected from any non-Indian executive, attorney or consultant who hopes to represent a tribal entity or enter into negotiations with tribal officials and their representatives. “Ground truth,” a term used in the military to describe the importance of gaining local knowledge and experience, is especially important in tribal business settings. Ground truth can and should inform just about everything, including the way business conversations are

30 Keleher, id., supra n. 1.
32 Id. at 449.
33 See Navajo Nation Occupational Safety and Health Act, 15 N.N.C. Section 1401 et seq.
structured, the pace of those talks, even the vocabulary used. Sociologist Duane Champagne, a particularly astute cross-cultural observer, describes how even basic word choices such as “Indian” – which federal statutes commonly use to refer indiscriminately to Native Americans and Alaska Natives – can have different connotations depending on the audience and setting:

Often when an Indian person is talking to a non-Indian who knows very little about Indian history or communities, the Indian person will identify himself or herself generically as an “Indian.” The same Indian person may identify himself or herself as a tribal member, like Tlingit, by clan, and even family or house, to a person who understands the local and consensual structures of Indian communities. Trying to explain tribal identities to non-Indians assumes some knowledge of tribal cultures on their part, but since most do not have such knowledge, it is simpler to identify oneself within the racial and ethnic categories that mainstream American culture understands and projects to all American groups.34

For lawyers and their clients, acquiring ground truth emphatically means getting out of the office and spending time in the field – before serious business conversations begin. Unfortunately, I’ve watched not a few executives venture into Indian country totally unprepared. Most were simply busy and didn’t do their homework. But a few others acted as if learning about Native people and cultures might somehow weaken the non-Indian company’s business objectives by signaling to tribal leaders a willingness to do business on their terms.

Years ago I visited a reservation of one of the pueblos in New Mexico with a brand-new energy client whose senior team had rarely if ever entered Indian country before. My colleagues and I had pushed the client for an introductory site visit; before we were retained, the client had already told the tribe that all business negotiations should take place off-reservation. This was a red flag but I was confident I could manage it. The client’s delegation was led by a self-described “take-no-prisoners” senior executive from a large privately held company. Take-No-Prisoners volunteered that he hadn’t read any of the background materials provided by his attorneys about the culture and laws of the pueblo, explaining that “I’ve done way bigger deals before.” Later the rest of us watched in horror as Take-No-Prisoners – upon being introduced to one of the pueblo’s most respected elders, a World War II veteran adorned with a striking turquoise and coral necklace in the medicine man style – loudly exclaimed, “I didn’t realize we were going to a luau!” The conversation our client sought by coming to the reservation never recovered – or even took place.

The silver lining to Take-No-Prisoners’ pueblo visit was this: Fearing for what was left of my reputation at the pueblo, I promptly withdrew from representing his company. This was an expensive decision in terms of forgone attorney’s fees and probably raised a few eyebrows elsewhere in the firm. But it marked a turning point in my legal career. I had finally awakened to the bedrock importance Rule 1.16 (Declining or Terminating Representation).35 This rule has become my friend, nowhere more than in Indian country. In a profession where personal integrity is everything, Native America always feels like a small town with a very long memory. The best

34 Champagne, id. at p. 20. Champagne, a professor of sociology at the University of California at Los Angeles, is a member of the Turtle Mountain Chippewa Band of North Dakota and frequent contributor to Indian Country Today and other national publications.

35 See Model Rules Rule 1.16 (Declining or Terminating Representation).
way to avoid meltdowns in tribal business dealings is to ferret out the Take-No-Prisoners of the world before they set foot on the reservation or meet with Native leaders. If this can’t be done, the most prudent option may be to decline or terminate the representation. It never pays to proceed down a path where your client’s values and professionalism conflict with your own and fall below what is required for the matter at hand.

More typically in my experience, non-Indian executives and their representatives are ethical and responsible professionals who want to learn as much as they can about the people and places that matter. Soon after the Luau Incident, our firm gained another client, the president of a large publicly traded energy corporation, who prepared for a natural gas pipeline right-of-way negotiation with a tribal government by spending time in several of the communities affected by that pipeline. Before he even hit the ground, this corporate president had read and digested several books about that tribe’s culture and history, along with Blood Struggle, Professor Charles Wilkinson’s landmark history of Indian self-determination movement. It was no surprise that, due in no small part to the president’s careful preparations and willingness to learn, the ensuing business negotiations were a success.

III. BRIDGING DIVERGENT LEGAL AND ETHICAL PERSPECTIVES

Whether you represent a tribal entity or are doing a deal from the other side, a good way to prepare for a visit to Indian country is not only to study up on that tribe’s history and culture, but to seek out its legal codes, ordinances and reported court decisions. The essence of tribal sovereignty, as the U.S. Supreme Court memorably explained a half-century ago, is for Native people living on reservations “to make their own laws and be ruled by them.” Tribal laws reflect values important to Native people and nations, sometimes in ways that diverge from non-Native communities but which can be remarkably consistent across Indian country and even internationally. “There is a worldwide movement of indigenous people,” writes Raymond D. Austin, a retired Justice of the Navajo Nation Supreme Court. “[T]hey are sharing experiences, goals, and strategy as they resurrect, revitalize, and reclaim ancient cultures, languages, religious practices, philosophies and ancestral property.” Culture, language, spirituality and a “sense of place” – being connected not only to the land, but to a specific area or region – “are the core characteristics that distinguish American Indians form other Americans.”

These “core characteristics,” in Justice Austin’s phrase, frequently surface in tribal laws – increasingly including published tribal ethics codes – that sometimes echo Anglo-American concepts but often depart from it. This Section discusses a few brief examples of those characteristics; there are emphatically many others. The point is that by recognizing, respecting and when necessary seeking to bridge differing perspectives about ethics and the law, tribal leaders and their non-Indian counterparts can build more stable and predictable commercial ties.

36 Wilkinson, id.
39 Id.
A. Communal Versus Individual Rights

A core characteristic of the laws of many Native American and Alaska Native nations is a widely shared tendency to define rights in communal rather than individualist terms. Comparing how free speech and other forms of expression are legally defined and protected in tribal communities, as opposed to according to the U.S. Constitution or its various state corollaries, may be illustrative. The First Amendment to the U.S. Constitution declares in part: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”40 The U.S. Supreme Court has frequently cast the First Amendment as an individual right: “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.”41

*Bridges v. California* is a classic example of the Court’s emphasis on protecting individuals’ rights in the redress of grievances, as opposed to recognizing a more encompassing communal right – shared by many individuals – to speak out in furtherance of the community’s shared values, or to reinforce relations within that community. Harry Bridges, leader of a longshoreman’s union, sent a telegram to Frances Perkins, President Franklin D. Roosevelt’s Secretary of Labor, regarding a case pending in the Superior Court of Los Angeles County. Bridges implied he would have his union go on strike if the Superior Court ruled unfavorably. The Superior Court held him in contempt, but Bridges’ successfully appealed. Many other Supreme Court cases speak of the First Amendment as safeguarding the rights of the individual. Even *New York Times v. Sullivan*,42 perhaps the most famous First Amendment case of all, speaks in unabashedly individualist terms. To ensure that debate on public issues remains robust and uninhibited, the Court extols the need to safeguard “the tenets of one man” – the political “pleader” who “as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement.”43

In contrast to these and other First Amendment decisions by the U.S. Supreme Court, many if not most tribal governments also respect individuals’ freedom of expression but traditionally do so by emphasizing the community’s right to benefit from the information presented, or the importance of the individual’s speech to reinforcing values and behaviors the community deems desirable. In other words, the right is similar or may even be the same, but it is perceived to be held by the tribal citizenry as opposed to by any one person.

The Navajo Supreme Court, to give just one example of freedom of expression as a communal or group right, has rejected the argument that only real parties in interest have protected speech rights under Navajo law.44 In a landmark case, *Judy v. White*, the plaintiffs were private citizens who challenged the authority of the Navajo Nation Council to enact legislation raising councilmembers’ salaries subject to referendum approval by the Nation’s electorate. When

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40 U.S. CONST. Amend. I.
43 *Id.* at 271.
plaintiffs sued the Nation’s controller and other officials responsible for payroll, the Nation’s attorneys countered that plaintiffs lacked standing to bring such an action under the Navajo Nation Election Code. The Navajo Supreme Court, relying on traditional Dine’ law, squarely rejected the Nation’s invitation to import traditional state and federal law concepts of standing into Navajo law. Instead, the Court embraced what it characterized as a “deeper, more profound system of governance” based on the Dine’ Life Way rather than codified Navajo law.45 “It is abhorrent to the Dine’ Life Way,” the Court continued, “to violate the right of a community member to speak or to express his or her views or to challenge an injury, whether tangible or intangible.” Traditional Navajo law recognizes a right to freedom of expression that is community-based:

This right is protected to such an extent that the right to speak to an issue is not limited to the ‘real party in interest.’ Rather, the right belongs to the community as a whole, and any member of that community may speak. The non-Navo concept of governance protects one’s right to speak because that right has historically been oppressed. The Dine’ Life Way has always accepted that right unconditionally.46

No legislation enacted by the Navajo Council, Judy v. White concludes, can prevent any Navajo citizen from speaking out against – or apparently suing – its government.

In a similar vein, in Chavez v. Tome the Navajo Supreme Court rejected an attempt by the Navajo Council to pass a law regulating tribal newspaper reporters, ruling that “[a] responsible press is desirable, but it cannot be legislated by the Navajo Tribal Council or mandated by the Navajo Courts” because free speech is a sacred right that belongs to the Navajo people.47 Even community gossip is protected as a communal right because it goes to the heart of traditional storytelling, by and through which the Dine’ endure as a people:

Jini’ (“it is said”) is the basis of the creation story, implying a story formerly told by the others. Each Navajo individual thus has a right to develop his/her story, with its own variations. The creation stories were built upon ‘scandals’ and what may be called ‘gossip’ today. They survived and formed the basis of the Navajo teachings. Ridiculing a wrongdoer is a form of control and discipline. It is to say, “If you are not careful, people will be saying that about you.”48

While the laws of many other Indian tribes echo Navajo courts by characterizing free speech rights as a community-based rather than individual right, several other tribes have taken the additional step of barring individual tribal officials from suing their own government. For example,

45 Id. at 424.
46 Id. at 425 (emphasis in original).
48 Hosteen v. Tapaha, 7 Nav. R. 532, 539-40 (Shiprock Dist. Ct. 1997). See also Downey v. Bigman, 7 Nav. Rptr. 176 (Nav. Sup. Ct. 1995). Downey holds that jurors in Navajo District Courts may ask questions of witnesses at any point during trial: “A reformation of the jury’s duties to permit it to ask questions,” the Court notes, “is more reflective of Navajo participatory democracy. . . . [T]his is a natural step back to traditional ways and a means to secure the future.” Id. at 181.
the Pascua Yaqui Tribe of Arizona, stressing that members of its elected Tribal Council “have been invested with the sacred trust of tribal membership,” categorically forbids individual councilmembers from bringing any legal action against the Tribe in tribal, state or federal court.49 In a similar vein, the Standing Rock Sioux Tribe’s Tribal Council Code of Ethics and Standards of Conduct provides: “Council Members shall not bring an action as a tribal member before any court, federal or state government in any proceeding in a matter in which the Tribe is a party or has an interest.”50

From a practical business standpoint, tribes’ emphasis on communal rights of expression may mean that even when elected tribal governments have properly approved individual commercial transactions as provided by codified tribal law and regulation, those deals are occasionally still struck down by tribal courts or disapproved by tribal members. Thinn v. Navajo Generating Station51 is a case in point. In Thinn, the Navajo Supreme Court struck down a duly approved lease between the Navajo Nation and a non-Indian company. In 1969, Salt River Project Agricultural Improvement and Power District (“SRP”) and the Navajo Nation executed a lease for the Navajo Generation Station on Navajo trust land near Page, Arizona. In the lease, the Nation expressly waived to power to “directly or indirectly regulate or attempt to regulate . . . the operation of” the electrical power plant. In 1985, the Navajo Nation Council enacted a law, the Navajo Preference in Employment Act (“NPEA”), giving employment preferences to Navajo members, replacing at-will employment with termination only for cause, and other requirements.

When SRP later fired two Navajo employees without following NPEA, those workers sued in the Navajo Nation Labor Commission to enforce their NPEA rights. SRP moved to dismiss on the grounds that the Navajo Nation Council had explicitly waived its power to regulate operations at the Navajo Generating Station by approving the 1969 lease, including employment. The Navajo Labor Commission agreed with SRP, but the Navajo Supreme Court reversed. Parsing the lease language, the Court held that the term “operations” did not specifically mention employment.

Instead of stopping there, however, the Navajo Supreme Court issued a second holding: that the Navajo Navajo Council lacked the authority under Navajo traditional law (Dine’ Bi Beenahaz’aa’ nii) to waive the Nation’s right to regulate employment. The Navajo people, the Court explained, cannot delegate powers to their elected government when to do so would conflict with the natural order of society as reflected in traditional Navajo teachings, including taking responsibility for how and where Navajo people work on their lands.52 Thinn, moreover, implicitly relies on the community’s right to speak and redress grievances. The two employees’ standing to bring the lawsuit is neither raised nor discussed, and a decades-old lease approved at the highest levels of Navajo Nation government is set aside based by a pair of litigants in a private employment action.

49 See Pascua Yaqui Tribal Code, Title 2, Part I, Chapter 1-2 – Tribal Council Code of Ethics and Standards of Conduct, Sections 10, 40(C).
50 See Standing Rock Sioux Tribe Code of Justice, Title XXXIX, Chapter 1, 39-040, Ethical Obligations, Section C.
52 Id. at p. 11.
As a postscript, SRP took this identical case to the federal courts and, after several years of litigation, finally prevailed. In *Salt River Project Agricultural Improvement and Power District v. Lee*, the U.S. District Court for the District of Arizona held that the Navajo Nation waived its right to regulate a non-Indian employer in the same 1969 lease.\(^{53}\) The direct conflict between the Ninth Circuit and the Navajo Supreme Court is particularly instructive, and may strike some readers as counter-intuitive. Actually it is not. Navajo courts, as with other tribal courts, are the final arbiters of the laws of their respective Native nations, just as State courts have the final say in interpreting state laws – unless, of course, those laws directly conflict with federal law. In practice, this means tribal courts frequently hold they are not bound by the legal determinations of federal courts on interpretations of tribal law, unless those federal courts have specifically ruled that the tribal law in question conflicts with controlling federal law and is therefore preempted by it.

**B. The Role of Traditional Law as Tribes’ ‘Unwritten Constitutions’**

The Navajo Supreme Court’s ruling in *Thinn* just discussed, with its alternative holding that Navajo traditional law may trump legislation enacted by the Council and codified in the Navajo’s Code, raises a second and related point about the role of traditional law as what amounts to tribes’ unwritten constitutions. This may or not be true in a literal sense, but the analogy certainly holds. Many but not all tribes have adopted written constitutions, frequently enacted pursuant to the Indian Reorganization Act of 1934 (“IRA”), a New Deal Era federal law that promoted limited tribal self-governance for Native American and Alaska Native nations in exchange for tribes’ ratifying boilerplate constitutions.\(^{54}\)

IRA constitutions often differ in their details; some tribes have repeatedly amended their over the years. But because the IRA was enacted decades before the tribal self-determination

\(^{53}\) No. CV-08-08028 PCT-JAT, Order (D. Ariz. Jan. 28, 2013). By that time, the case had been appealed twice to the U.S. Court of Appeals for the Ninth Circuit. *SRP v. Lee*, 371 Fed. Appx. 779 (9th Cir. 2010); and *SRP v. Lee*, 672 F.3d 1176 (9th Cir. 2012).

\(^{54}\) See Act of June 18, 1934, 48 Stat. 984 (codified and amended at 25 U.S.C. Sections 461-79 (2006). Sometimes known as the Indian New Deal, the IRA reversed the federal government’s various allotment acts of the late 19th and early 20th Centuries, including the General Allotment Act of 1887 or Dawes Act. The Dawes Act “generally established a process whereby federal Indian trust alnd was to be divided into individual homestead parcels and converted into private (fee simple) property that could sold at the end of 25 years, at which time Indian families received a patent to the land and could become U.S. citizens.” Troy A. Eid and Carrie Covington Doyle, “Separate But Unequal: The Federal Criminal Justice System in Indian Country,” 81 University of Colorado Law Review 1067, 1075 (Fall 2010). “The basic idea of the Allotment Act was to make the Indian conform to the social and economic structure of rural America by vesting him with private property.” Vine Deloria, Jr., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 46 (1969). At the time the 1887 law was passed, Indian tribes controlled nearly 138 million acres, almost 90 million of which was subsequently lost. Frank Pommersheim, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 136 (2009). Almost half of the remaining 48 million acres consisted of desert lands. John R. Wunder, RETAINED BY THE PEOPLE: A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 33 (1994).
movement, many if not most IRA constitutions contain variations on the same institutional themes: elected tribal councils with both legislative and executive responsibilities; limited separation of powers, including with respect to judicial independence; and law and order codes – listing civil and criminal offenses and sanctions for tribal members – that largely mirror the state crimes of the mid-20th Century. Finally, many IRA constitutions that have not recently been amended by their tribes’ electorate expressly limit tribal court jurisdiction. The San Carlos Apache Tribal Constitution, one of many IRA constitutions, describes the scope of civil jurisdiction of its courts as follows: “This court shall have jurisdiction over all disputes between Indians on the reservation, and over such disputes between Indians and non-Indians as may be brought before the court by stipulation.”

Given the inherent limitations of IRA constitutions, and the fact that were strongly encouraged, if not imposed, by the federal government in exchange for greater tolerance by Washington, DC of tribal autonomy in certain areas of self-government, it may not be surprising that Native nations and particularly their courts are increasingly turning to the traditional laws of their tribes – and more generally their inherent sovereign powers to self-government that have not been divested by Congress – not just to fill gaps in their written tribal codes, but as a body of reserved law akin to unwritten constitutions containing normative concepts and principles. Exactly what constitutes the “traditional law” of a given tribe, or in a certain situation, may or may not be accessible to non-Indians or even many tribal members. At least one tribal court has attempted a definition of traditional law that perhaps raises more questions than it answers:

[T]he word (traditional law) actual refers to higher law. It means something which is ‘way at the top’; something written in stone, so to speak; something which is absolutely there; and, something like the Anglo concept of natural law. . . . In other words . . . there is a concept similar to the idea of unwritten constitutional law.

Tribal courts’ almost casual references to informing and deciding cases based on traditional law – “something like the Anglo concept of natural law” – can be jarring to business leaders and their attorneys whose entire experience with natural law consists of watching televised confirmation hearings for U.S. Supreme Court Justices. The very concept of unwritten “higher” laws that can be invoked to invalidate complex business deals years after the fact, as tribal courts and even some elected tribal councils have sometimes done, is simply beyond the experience of many non-

58 See, e.g., Grand Canyon Skywalk Dev., LLC v. ‘Sa’ Nyu Wa Inc., 715 F.3d 1196, 1199 (9th Cir. 2013). This contract dispute between a non-Indian company, Grand Canyon Skywalk Development (“GCSD”) and ‘Sa Nyu Wa Inc., an Indian company owned and operated by the Hualapai Tribe (“SNW”) over the management of the Grand Canyon Skywalk tourist attraction – a glass viewing platform 4,300’ above the canyon – resulted in the Tribal Council
Indians and may at times look and feel like judicial activism – judges reaching their own results in particular cases based on obscure or inaccessible source material.

Part of the disconnect between tribal leaders and non-Indians on the appropriate role of traditional law may be that natural law, which to academics smacks of religion or philosophy, appears seldom if at all in the curriculum of U.S. law schools. This is a legacy of the Legal Realism Movement that still informs legal education since Oliver Wendell Holmes, Jr. penned what may be the most influential legal essay in history.59 “I think it desirable at once,” the future Justice Holmes writes in *The Path of the Law*,

> ... You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with a public force, and therefore you can see the practical importance of the distinction between morality and law... If you want to know about the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict.[60

Holmes’ insistence on separating what is legal from what is moral or ethical means secularizing the law – focusing on its text and structure to determine its meaning – results in setting aside the personal philosophical or spiritual beliefs of judges and advocates. This runs counter to tribes’ urging attorneys in their courts, Native and non-Native alike, to brief and argue how unwritten traditional laws – relating, among other things, to moral, ethical and spiritual matters – might be applied to interpret and perhaps take priority over duly enacted tribal codes.

At the ground level, tribes’ growing reliance on traditional law raises practical questions in negotiating commercial transactions and – when matters don’t go as planned – litigating them. Many tribal courts are increasingly order supplemental briefing on questions of traditional law, even when those issues are not raised by any of the parties in a given case. This means presenting and cross-examining expert testimony from elders or medicine people and then relying on the court to determine what the law is.

Witnessing elders and spiritual leaders duel in tribal court is not an experience for the faint of heart. In my experience, sources of traditional law, and expert opinions about it, often diverge. There are few if any guideposts as to what is and isn’t admissible or prejudicial. This includes stories relating to the tribes’ place in the universe – and humankind’s relationship to the Creator, the earth, and (in one case we had involving the proper assignment of oil-and-gas mineral leases) natural resource development; ceremonies and worship practices; allegories obtained from storytelling about moral and ethical issues. All of this and more is fair game, may require translation into English, and often raises cultural or spiritual conflicts that may be difficult or impossible to resolve.

“taking drastic measures: passing an ordinance to condemn GCSD's property rights, purporting to substitute the Tribe in the place of GCSD to carry out the management of the overlook, and spending more than two years in litigation[.]” *Id.* at 1204-05.

60 *Id.* at 460.
While recognizing and preparing for the role that tribal traditional law may play in commercial transactions, particularly as recognized in reported court decisions or as codified by tribal councils, such laws have historically played a critically important role in proceedings involving families and children. Reviewing some of these cases also sheds light on the different personal values and perceptions that may arise when non-Indians venture into new and unfamiliar settings. In *Naize v. Naize*, to give just one illustration, the Navajo Supreme Court reversed the Family Court’s spousal maintenance provision in a divorce decree, which required the ex-husband to deliver a truck load of coal and firewood to his ex-wife each winter indefinitely. *Ho’zho*, the *Dine’* concept of harmony and balance, requires finality, according to the Justices. For the couple’s sake, and so as not to disturb the right of the community to live peacefully and in balance, the Supreme Court said that traditional *Dine’* law requires that relations between the former spouses be severed:

To permit a former spouse to keep such ties that she or he may be said to lurking behind the *hogan* waiting to take a portion of the corn harvest is unthinkable. Each former spouse should return home [to their parents] after making the break and disturb others no more.

*Naize* is also typical of many tribal court decisions in its repeated emphasis on the community’s rights rather than those of the divorced couple. Rather than focus on the ex-husband’s open-ended maintenance obligation as punitive or prejudicial to his personal rights, or the ex-wife’s need to the wood and coal he was ordered by the Family Court to deliver each winter, the Supreme Court’s ruling emphasizes the disharmony to the community that might be expected to result if the two of them don’t make their “break.” According to Navajo custom, each former spouse should return to their parents’ area of residence. By moving on with their lives, they are more likely according to traditional teachings to “disturb others no more.”

C. Expectations That Non-Indians Should Support Tribes’ Internal Capacity-Building

Another strikingly consistent feature of tribal law, and more generally in tribal leaders’ attitudes across Indian country in my experience, relates to tribes’ expectations that non-Indians who aspire to do business with tribes and tribal enterprises should internalize the costs of their doing so – for themselves and the tribal officials involved. Businesspeople working in Indian country for the first time are often surprised when tribal leaders expect non-Indians to pay for the time and expenses that tribal officials devote to a given project or transaction, even when tribes are seated on the opposite side of the bargaining table. This concept sometimes extends to paying for the other side’s attorneys, consultants and others needed to proceed with the deal.

Representing non-Indian companies on mining and energy projects over the years, for instance, my colleagues and I have frequently been approached by tribal officials to seek reimbursement to cover or defray the cost of the tribes’ own legal expenses. I have also represented tribal entities on these same kinds of matters where the non-Indian corporation pays for our firm’s legal fees and those of non-lawyer consultants, such as engineers, who are then selected, directed

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62 *Id.* at 252-54.
and managed solely by the tribe. Some tribal laws reinforce this approach by creating a duty on the part of tribal officials to have their travel and other business-related expenses paid for by outsiders when possible and appropriate.63

There is an obvious practical benefit when both sides recognize that some tribes may lack the internal expertise in certain areas to pursue a given venture, or may be unable to dedicate the resources needed for the required governmental approvals, due diligence, and other steps necessary to develop and sustain the quality of commercial relationship all parties desire. At the same time, it is also important to proceed very cautiously in this area and keep ethical considerations foremost in mind.

Another example may be helpful. Representing an energy infrastructure company, I once dealt with more than 40 Indian tribes on single project, a pipeline crossing multiple states across public and private lands, none of them tribal. Numerous federal laws and policies require that the federal government – in this case the Federal Energy Regulatory Commission, which certifies interstate natural gas pipelines – and public land management agencies such as the U.S. Forest Service and the Bureau of Land Management engage in government-to-government consultation with Indian tribes and nations affected by the project, regardless if tribal lands are directly impacted. As counsel to the project proponent, members of our law firm met individually with each of these tribes. Many sought specific payments or reimbursement where there was a clear nexus between the project and the tribal staff, and in some instances outside consultants ranging from technical experts such as ethnographers and archaeologists (to help identify traditional cultural properties and other cultural resources) to tribal monitors – citizens representing each tribe whose job it was to help catalogue, avoid or mitigate any adverse impacts to tribes’ cultural resource in members’ ancestral homelands during project construction. Such direct impact costs to tribes should only be expected.

On a few occasions in a multi-year project, however, what tribal representatives requested, reportedly on behalf of their tribes, raised red flags for our client. I recall a tribe in Nevada whose assertive employee, who was not a citizen of that tribe, presented several “bills” from the tribe to the company. These bills were expensive, thinly itemized or lacking any detail at all, and included an unexplained overhead cost added as a percentage on the entire bill. We pushed on the client’s behalf for more details as to what was being paid for and to whom. Instead of providing more information, the tribe’s employee got angry with us and repeatedly complained to federal officials with whom the tribe was consulting on a government-to-government basis.

Our client held its ground and finally several new bills appeared with supporting detail. Among the items for which the tribal employee was demanding payment included the entire cost of installing a new toilet in a tribal office building. Upon closer questioning, the link between the

63 See, e.g., Confederated Tribes of the Umatilla Indian Reservation, Board of Trustees Procedure Code, Res. No. 10-095 (11/22/10), Chapter 4, Section 4.01(A) (“Board of Trustees are encouraged and authorized to seek third party reimbursement for their travel expenses in connection with travel to a meeting) and Section 4.03(B) (“On a monthly basis the Finance Office shall report to the Board concerning all Board-related travel reimbursements, honoraria and stipends that the Office has received in the prior month”).
project and the toilet was discovered. It was me. It turned out I had used this bathroom on one occasion while visiting the tribe’s reservation. No one else – neither the client nor any of its representatives – had ever entered that particular building. Rather than demand a mea culpa, the client stood by me. Eventually the tribe terminated the official, who was later implicated in a federal investigation involving the misuse of federal funds administered by the tribe.

This was by no means typical behavior by tribal officials in my experience. The vast majority of tribes’ reimbursement requests on that same project were absolutely fair and appropriate to all concerned. One example includes paying for tribal elders’ visits to the area affected by pipeline construction. As part of understanding, avoiding and mitigating project impacts, it was invaluable for the client to support visits by tribal elders from all affected tribes along the proposed right of way. Over time, several of these elders became tribal monitors themselves, representing their respective tribes as opposed to working for the company. Some elders supported the pipeline; other disagreed, sometimes vehemently. What mattered to the company, consistent with its own corporate statement of core values, was to treat everyone with respect. Transporting elders to the project site, sometimes across hundreds of miles in rough terrain, and feeding and providing them lodging in often remote areas often presented logistical challenges, but there was no doubt from the client’s perspective that this was exactly the right thing to do.

IV. TRIBAL ETHICS REGULATION 101

This Section briefly surveys some of the key elements in the ethics laws, policies and practices of various Native American and Alaska Native nations. The need to inquire as to each tribe’s restrictions in this area before moving forward with any business relationship cannot be overstressed. An unscientific survey reveals that at least 100 federally recognized Indian tribes have promulgated written ethics-related laws or other guidance. Several of these policies expressly apply to tribal enterprises; others do not. Some tribes have well-developed disclosure, monitoring and compliance regimes; many others lack any such protections at all. I personally know of a few tribal councils whose councilmembers have debated for years without enacting even a rudimentary set of ethics principles. In sum, it is exceedingly challenging to generalize in this area. This Section therefore samples the current state of the law to provide illustrations rather than a detailed analysis of any one tribe’s ethical standards and enforcement systems.

Avoiding and disclosing conflicts of interest. Most published tribal ethics policies require the avoidance and timely disclosure of tribal council members’ actual and perceived conflicts of interest.64 Some tribes extend these provisions to appointed governmental employees, including those working for tribal enterprises. The ethics code of the Siletz Tribe of Oregon, for example,

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64 See, e.g., Confederated Tribes of Siletz Indians, Siletz Tribal Code, Ethical Obligations, Section 2.204(b) (“When a conflict of interest exists for a Tribal Council member with regard to a particular issue, the member shall not participate in any discussion or action with regard to such matter”) and (c) (“No Tribal Council member shall engage in any decision, which would be likely to result in a financial benefit or advantage to them, or their immediate family”).
contains what is sometimes called an “arms-length” clause, expressly barring tribal council members from interfering in any of the tribes’ business enterprises.65

Tribal anti-conflict restrictions ordinarily extend to immediate family members, a term that may or may not be defined in the laws of a given tribe, or which sometimes appears separately in anti-nepotism policies. The Squaxin Island Tribe’s Code of Conduct, for instance, specifies extensive anti-conflicts provision, such as clarifying that actual and perceived conflicts of interest arise “when any of the parties set forth below has a financial or other interest in the firm or entity selected” for any contract or award supported by federal or state funds.66 The enumerated parties include immediate family members, romantic partners, and any organization – public or private, Indian or non-Indian – that is “about to employ them.”67 Squaxin Island’s ethics code separately defines “Organizational Conflicts of Interest” as occurring “when the nature of the work to be performed under a proposed third party contract may, without some restrictions on future activities, result in an unfair competitive advantage to the third party contractor or impair the objectivity in performing the contract work.”68

**Gift restrictions.** Whether and when to give gifts or buy meals, entertainment and other relationship-enhancing benefits for tribal officials may present ethical dilemmas for non-Indian companies and their representatives and, in extreme cases, legal risks. As discussed above, some tribal officials are actually encouraged by their employer’s policies to seek third-party reimbursement, presumably when doing so does not create actual or perceived conflicts of interest for themselves or the tribe. Many tribes allow elected and appointed officials to accept personal gifts for themselves or their immediate family members below a certain dollar amount (typically from $50 to $300) so long as those gifts are properly reported.69 Gifts above those amounts may become tribal property or be returned.

Some ethics codes prohibit tribal officials from soliciting gifts or anything of monetary value from prospective or actual tribal contractors.70 All the same, tribal leaders’ expectations that outsiders seeking to do business with their nations should pay their own way and foot the bill for meal, travel and entertainment expenses for themselves and their immediate families remain stubbornly rooted in much of Indian country. Properly shaping and managing tribes’ expectations, and harmonizing them with the legal and ethical demands of today’s business world, can be fascinating, frustrating and, if minimized or ignored, a trap for the unwary.

65 *Id.* at Section 2.204(h).
66 Squaxin Island Tribal Code of Ethics Section 2.06.010.
67 *Id.*
68 *Id.*
69 See, e.g., Pascua Yaqui Tribe, Tribal Council Code of Ethics and Standards of Conduct, Title 2, Part I, Section 40(l) (banning individual gifts to Tribal Council members and their immediate families valued at over $150 except for ceremonial and customary gifts generally granted to dignitaries, food and refreshments of nominal value in the ordinary course of a luncheon or dinner meeting, personal achievement awards for meritorious service, and loans on customary terms to finance proper and usual activities on the same basis as any enrolled member of the Tribe).
70 See, e.g., Squaxin Island Code of Ethics, *id.*
Breaking bread together – so important to strengthening relationships in practically any organization – is a case in point. The scope of just how much a non-Indian companies’ executives and representatives might be expected to pay for eating with tribal officials on a given occasion, or in connection with a certain event, varies considerably depending on your acquired knowledge and experience with the tribal leaders with whom you are dealing.

Such knowledge can be expensive but rewarding to acquire. Several years ago, driving through Montana, I called ahead to the executive director of a tribal oil and gas commission that our firm represented. After explaining my trip would take me through his tribe’s reservation that same afternoon, I invited him and his family for dinner. When the client accepted, I suggested he pick a good restaurant in the city where I planned to stay, about an hours’ drive from the Indian reservation where he lived and worked. When I arrived at the restaurant, 27 tribal officials and their families were waiting to greet me. It was a terrific evening and no one was unfairly or improperly influenced about anything, not even the Denver Broncos, on whose behalf I was advocating (as on so many other occasions, to no apparent avail). Business was not and could not be discussed in that setting; family members ranged from infants to elders spanning a quarter of the restaurant. Few of my guests knew or likely cared who I was; we all seemed to enjoy the food and each other’s company.

Driving to my motel from the restaurant that night, I made a mental note that future invitations to my client should be more precise. Yet I was also mistaken in that. A couple hours later, I was fast asleep when my cell phone rang. It was my friend, our client. Could I come down to the motel lobby right away? I had no idea what was going on until I saw them standing there: My client and his wife, handing me gifts of their own – including a handsome Pendleton vest she’d sown and gifts for my children. Upon leaving the restaurant, they had driven all the way home and returned with these gifts – a two-hour roundtrip drive on a snowy night – to thank me for dinner. Small miracles like this, impossible in most other business settings, are what keeping me coming back again and again to Indian country.

Tribal campaign contributions. One of the grayest areas in dealing with tribes and trial enterprises concerns whether non-Indians should contribute to tribal council members’ political campaigns for office. The problem is aggravated by the many tribes that restrict tribal council members from soliciting such contributions, but which do not purport to regulate let alone sanction non-Indian companies that might attempt to gain favor by contributing to tribal leaders’ campaigns.\textsuperscript{71} One of the most extensive of all tribal ethics codes, the Navajo Ethics in Government Act, expressly allows political campaign contributions from any source, including non-Indian companies doing business with the Navajo Nation.\textsuperscript{72} My personal practice is strictly to avoid

\textsuperscript{71} See, e.g., Poarch Band of Creek Indians Ethics Code, Section 28-1-5(e) (“No Tribal official or key employee shall coerce or attempt to coerce any individual into making a political contribution or commitment in return for employment, favors, or other preferential treatment”).

\textsuperscript{72} 2 N.N.C. Section 3757(E) provides in its entirety: “A political campaign contribution, in accordance with all applicable election laws and provided that such gift or loan is actually used in the recipient’s campaign for elective office of a governmental body or political
making any campaign contributions to tribal officials. On several occasions in recent years, I have also drafted proposed ethics compliance policies for non-Indian companies that deal with tribes and tribal enterprises and have always included prohibitions on getting involved in tribal elections, and requirements to report any such solicitations to the company’s general counsel’s office. I seriously doubt if any good can come to outsiders who seek to influence tribal elections. Conversely, not a few reported federal criminal cases show that bad things can and do happen to non-Indians who steer corporate funds into the campaigns of tribal council members they believe will directly benefit their companies.73

In United States v. Whiteagle, for example, the non-Indian company – a cash-machine and services vendor under contract with the tribe’s casino – hired a consultant, a citizen of that tribe, to protect its contract, including managing relations with the tribal council. The consultant, with the non-Indian company’s knowledge and approval, engaged in an elaborate multi-year scheme to bribe a key councilmember, while pocketing some of the money himself. In one email, the consultant, Timothy Whiteagle, urged his client to loan him $14,000 so he could donate it to that councilmember’s campaign: “Wisconsin state campaign laws do not apply to reservation properties as proven over the years thru US Supreme court rulings.”74 The non-Indian company’s liaison with the consultant, to whom Whiteagle was paying kickbacks, complied. In the end, Whiteagle, his partner, and the tribal councilmember were all convicted of bribery and other federal crimes. Instead of prospering, the non-Indian company lost its contract – in part because Whiteagle and his partner were sabotaging their client with the tribe in order to replace it with another non-Indian company with whom they had secretly contracted.75

Duty to protect confidential information and privacy. Virtually all published tribal ethics codes impose at least some restrictions on elected tribal officials’ disclosure of confidential business information, including that related to contracting and procurement as well as maintaining tribal employees’ privacy.76 What is striking, however, is how few of those policies apply to appointed tribal officials and employees, including those working with or for tribal business enterprises. Ordinarily when representing non-Indian companies and individuals, it is prudent to insist on entering into enforceable non-disclosure agreements to cover all the tribal officials involved. While such agreements can be difficult to enforce, particularly if the tribe only agrees that they may be adjudicated in tribal court pursuant tribal law, it is still important to put officials on notice that they are expected to keep such discussions and documentation confidential. An increasing number of tribes are likewise insisting on such non-disclosure agreements for their own protection.

subdivision thereof and provided further that no promise or commitment regarding the official duties of office or employment is made in return for such contribution.”
73 No. 12-3554 (7th Cir. July 21, 2014)
74 Id. at p. 11.
75 Id. at p. 14.
76 See, e.g., Standing Rock Sioux Tribe Code of Justice Section 39-040 (K)(“Council Members shall not knowingly make public any confidential information received in connection with one’s duties as a council member[.]”)
‘Roveling-door’ restrictions on post-tribal employment. A relative handful of Native nations prohibit former tribal officials from leaving the tribe’s employment to work for any other employers, public or private, on specific business-related or other official matters in which they were previously directly involved. Such “revolving-door” restrictions may also include a waiting period that prevents former tribal officials from working on matters that were pending at the time of their employment but in which they were never personally involved. The Navajo Nation Ethics in Government Act, which imposes a permanent bar in the former case and a two-year waiting period in the latter, takes the additional step of preventing the hiring employer from contracting or doing any business with the Nation.77

Ethics compliance and enforcement mechanisms. Most Indian tribes with published ethics standards and codes currently leave ethics investigations to the Tribal Council, either acting in full executive session or through subcommittees. In the latter case, subcommittee recommendations ordinarily still require a supermajority vote of the full tribal council to take effect. The Little Traverse Bay Bands of Odawa, for instance, have adopted an ethics code that retains tribal council-level ethics investigations through a subcommittee to which individual council members are randomly selected, referring final recommendations to the full council.78

Less frequently, several tribes have adopted more independent systems of ethics compliance and enforcement with an emphasis on issuing advisory opinions and providing other information to avoid potential problems. In addition to the Navajo Nation, the Prairie Band of Potawatomi Nation has created a stand-alone ethics commission whose members are elected by popular vote of tribal members, but who are themselves banned for running for any office for four years after serving on the Tribal Ethics Commission.79 The Poarch Band of Creek Indians has created a position of “Ethics Officer,” an attorney-advisor employed by the tribe and counseling an Ethics Board of five volunteers appointed by the Tribal Council for five-year terms.80

The Pascua Yaqui Tribe has enacted one of Indian country’s most comprehensive ethics enforcement codes. This includes an open complaint process in which the Tribal Council performs an initial review of ethics complaints in executive session.81 If the Council determines by simple majority vote that there is probable cause to proceed with an investigation involving one of its fellow Councilmembers, an ethics probe may be conducted through several methods depending on the severity of the particular allegations, including an ad-hoc committee of the Council, the Tribe’s Internal Audit Department, or an independent, outside investigator, which shall have the authority to take testimony under oath, issue subpoenas, and compel the production of documents and other evidence. Any hearings resulting from an investigation are likewise handled with full due process for the accused, including the right to counsel at all stages, with all proceedings remaining confidential except for a public recorded vote on the disposition of the investigation.82 While the

77 2 N.N.C. Section 3751(C).
79 Prairie Band of Potawatomi Constitution Art. IX, Section 3.
80 See Poarch Band of Creek Indians Ethics Code Section 28-1-7-8.
81 Pascua Yaqui Tribe, id at n. ___, Section 60 (detailing investigative process).
82 Id. at Section 70.
Tribal Council determines the sanction, up to and including expulsion from the Council upon a two-thirds majority vote, any Councilmember found to have violated the ordinance may appeal to the Pascua Yaqui Tribal Court of Appeals, which shall uphold the Council’s decision unless the Tribal Court finds it to have been arbitrary and capricious.83

Most written tribal ethics laws and enforcement systems in the United States are either relatively new or brand new; experience will show their effectiveness. However, the apparent trend among Native nations across the United States is toward more published ethical standards and practices. Tribal leaders privately and sometimes publicly are demanding that tribal enterprises be buffered from the ebbs and flows of tribal governmental policies and politics. The success or failure of these attempts at self-regulation will depend not only on tribal citizens, but the ethical behavior of non-Indian companies and their leaders seeking expanded commercial opportunities with Native American enterprises.

V. CONCLUSION: TOWARD AN ETHIC OF CORPORATE RESPONSIBILITY

The movement toward encouraging greater corporate responsibility in tribal relations – if it can even be called that – is still in its infancy. Published company policies and annual reports focus largely on the need for increased employment and economic development opportunities, as opposed to how business should be properly conducted or the need for non-Indian companies to avoid potential legal and ethical pitfalls in tribal dealings.84 Apart from publicizing more generic corporate codes of conducts or values statements, comparatively little emphasis has been placed on how non-Indian companies should model and enforce their own ethical behaviors in tribal settings.

This is currently a lost opportunity given for Corporate America, yet it doesn’t have to be that way. By developing credible ethics policies and compliance and enforcement systems, non-Indian companies can be much better-positioned to prevent and detect possible misconduct in their own ranks. And because such formalized ethics systems are still mostly new for many Native nations – while others are or may be considering adopting written standards of conduct and more independent enforcement methods – business leaders and their attorneys have much to contribute to fast-growing tribal economies. Just as certain kinds of targeted private capital investment can enhance tribal capacity-building, so too should non-Indians support tribal leaders’ efforts to adopt more transparent and accountable standards of professional conduct.

83 Id. at Section 100.
84 See, e.g., “Global Outreach in the Americas,” PEABODY ENERGY CORPORATE AND SOCIAL RESPONSIBILITY REPORT 4 (2012) (noting that the company is one of the nation’s largest non-governmental employers of Native Americans and that Peabody has injected $3.3 million into the economies of the Navajo Nation and Hopi Tribe since the opening of the Kayenta Coal Mine on the lands of these two tribes in Arizona), www.peabodyenergy.com/media/CSR2013/economic.html#!/s1; and “RIO TINTO: ABORIGINAL POLICY AND PROGRAMMES IN AUSTRALIA 8 (2008) (noting that employment of indigenous employees in Rio Tinto’s Australian operations had reached 8 percent of the corporation’s total Australian workforce), www.bsl.org.au/pdfs/RioTinto_Aboriginal_Policy_and_Programmes_in_Australia.pdf.
One of the most effective ways non-Indian companies and their representatives can work more effectively with tribes is to consciously build ethics into their business relationships, including their contracts and course of dealing. This approach, while rarely publicized, is becoming more common, or at least less uncommon. Frank conversations about the need to avoid the ups and downs of tribal elections, and more generally to buffer business operations from vagaries and emotions of tribal politics, should be encouraged – albeit in a respectful and culturally appropriate manner – and not discouraged.

Prohibiting campaign contributions to tribal council candidates and other elected officials is a case in point. We have not just advised corporate clients to avoid participating in tribal elections, but often negotiated explicit contractual protections against soliciting or participating in any such electioneering activities, including soliciting or making cash or in-kind contributions. Internal corporate policies, in turn, have been implemented to ensure these behaviors are monitored and enforced within the non-Indian companies. Such internal corporate policies are supported by disclosure and reporting systems with the information maintained by a single “center of excellence” within the company, usually the corporate general counsel’s office or outsourced through that office, or from a particular business division or unit, to an outside law firm that serves the same role.

Corporate guidelines for tribal-related meals, entertainment and travel expenses, along with charitable contributions to tribal officials and their families and friends, offer other examples. Anyone who has worked in Indian country has probably been asked to contribute to a school trip or sports team, an elder’s funeral, or any number of other worthy causes. One time I purchased a sheep, which an elder somehow coaxed into the back of my rental car, so as not to arrive at a traditional Navajo wedding empty-handed.

A rule of reason ought to apply to gift-giving in tribal settings. Yet it is also a best practice for all gifts – money, in-kind contributions, anything of substantial value – to be properly reported by employees of non-Indian companies to their employers. In this and other matters, companies should again establish a single point of contact and then monitor the information. The concern here is not to micro-manage, but to have a second set (or more) of eyes consider how the contribution might be perceived, and the impact it might have on the company’s overall relationship with the tribe. Sometimes what seems to be a solicitation for something could be a scam.

Tribes often have massive unmet needs where companies’ targeted charitable-giving can make a substantial impact. Rather than giving solely on an ad-hoc basis, listening to tribal leaders and engaging in a more focused charitable giving strategy is not only more effective, but more prudent for the company and the tribe. For instance, I worked with a client to donate a surplus bulldozer to a chapter, the unit of local government on the Navajo Nation akin to a county. Chapter officials used it, among other things, to maintain grazing lands and improve a pond for livestock. On another occasion, a different client donated a surplus construction trailer to a tribe on a remote reservation in Northern Nevada that used it for multiple purposes, including an internship program where young people learned about cultural resources from their elders. Intrigued by the program, the company began funding some of the internships through the tribe. The unmet needs are vast and the possibilities endless.
In terms of contracting and procurement, non-Indian companies should consider providing enhanced training and educational programs to assist their employees in avoiding actual or perceived conflicts of interest and recognizing it in the people and organizations with which they and their employers do business. Many tribal governments and enterprises already provide such training on their own, or support their tribal council leaders and employees obtaining certification in ethical contracting and procurement practices.\footnote{The Falmouth Institute (http://falmouthinstitute.com/training/certifications/CP_cert.html), a national consultancy that specializes in providing educational services on an open-enrollment basis to Native American and Alaska Native tribes and tribal organizations, has created a Tribal Contracting and Purchasing Certification Program that specifically includes instruction on ethics matters.}

Finally, structuring – and in many cases, restructuring – tribes’ business operations and enterprises so that elected councilmembers’ governing roles are limited to arms-length policy oversight, rather than business development or contract management, is perhaps the single most important step that can be taken to depoliticize tribal commerce and ensure its stability and predictability, values that can be critical to any outside investor. Corporate America’s potential, and that of graduate schools of business and other educational institutions, to work creatively with tribes and tribal organizations to develop possible changes in the structure of tribal business operations and how elected tribal leaders exercise policy oversight, is still largely untapped. Indeed, the entire tribal enterprise model, which like many tribe’s constitutions dates back to the Indian New Deal of the 1930s, has been modernized in some respects but could stand a serious reexamination in light of emerging models of corporate governance and organization.

The years ahead will no doubt bring continued economic miracles large and small across Native America. The challenge for Native leaders and non-Indians alike is to keep pace – and raise the bar – so business ethics keep pace with the growth of the tribal economy.

\footnote{Under the Indian Reorganization Act, tribal enterprises may incorporate under federal law under Section 17 of the IRA. 25 U.S.C. Section 477. While Section 17 enterprises are treated the same as tribes for tax purposes, their operation can be cumbersome: The tribe must pass a resolution, draft a corporate charter, obtain tribal approval for that charter, submit the resolution and charter to the Bureau of Indian Affairs for approval, and finally ratify the BIA-approved charter. Amending such charters can be slow and politically charged. COHEN’S HANDBOOK Section 21.02[1][b]. See, e.g., “Navajo Nation Oil and Gas Co. Board Chairman Wants to Hold Off on Charter Amendments,” Farmington Daily Times (Aug. 20, 2014). http://www.daily-times.com/News/ci_26368077/Navajo-Nation-Oil-and-Gas-Co-board-chairman-wants-to-hold-off-on-charter-amendments.}