## ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2000-1

# MAY AN ATTORNEY REPRESENTING TRIBAL ENTITIES REPRESENT TORT CLAIMANTS HARMED BY THOSE ENTITIES IF THE U.S. IS LIABLE FOR ANY DAMAGES?

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450, provides opportunities for Native American tribal entities to perform certain functions performed previously by the federal government. The tribal entities perform these functions under "self-determination contracts" with a government agency, such as the Indian Health Service, Public Health Service or Bureau of Indian Affairs. 25 U.S.C. §450f. When a tribal entity is acting under a self-determination contract, the United States is liable for its torts as provided in the Federal Tort Claims Act, and the Attorney General defends the action. 25 U.S.C. §450f(c)(1); 28 U.S.C. §2674; Interior and Relations Agencies Appropriations Act of 1990, Pub. L. 101-512.

The question presented is whether an attorney representing a tribal entity may represent a client with a tort claim against the tribal entity or its employees under a self-determination contract. The question commonly arises in two contexts. The first is a medical malpractice claim arising from a tribal entity-operated health clinic. The second is a tort caused by the tribal entity's actions as a landowner or construction contractor.

The committee concludes that representation of the tort claimant is a conflict of interest as set out in Alaska R. P.C. 1.7.

#### THE GOVERNING RULE

### RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - (2) each client consents after consultation.

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
- (c) A lawyer shall act with reasonable diligence in determining whether a conflict of interest, as described in paragraphs (a) and (b) of this rule, or Rules 1.8, 1.9 and 1.10 exists.

#### DISCUSSION

Representation of both a tort claimant and the tortfeasor is an obvious conflict of interest under the Alaska R.P.C. 1.7. The comment to Rule 1.7 provides:

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.

This obvious conflict of interest can be distinguished from our two hypothetical situations by only one fact. The tortfeasors in our situations—the tribal entity and its employees—are insulated by statute from liability for torts committed within the scope of the self-determination contract. The existence or absence of actual liability alone, however, should not govern whether there is a conflict of interest.

Rule 1.7 protects clients from problems created by competing loyalties. The comment to Alaska R.P.C. 1.7 provides:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interest. The conflict in effect forecloses alternatives that would otherwise be available to the client.

Despite any direct liability, representation of the tortfeasor and the tort claimants will result in competing loyalties. These competing loyalties could affect the choice of claims made, discovery, witnesses, and the handling of witnesses at trial, particularly during cross-examination, thereby interfering with the attorney's exercise of professional judgment.

The problem of competing loyalties will exist regardless of any liability insurance or the particular facts of the claim. The conflict may be stronger in some cases than others, however. The conflict is stronger, for example, if there is a question that the tortfeasor's conduct exceeded the scope of the self-determination contract. A conflict nevertheless should exist in every case. The particular facts, however, may affect whether the client can consent to the conflict under Rule 1.7(a)(2), (b)(2).

In sum, the committee concludes that representing both a Native American tribal entity and a person with a tort claim arising out of the tribal entity's conduct under a self-determination contract with the U.S. government is a conflict of interest as set out in Alaska R.P.C. 1.7.

Approved by the Alaska Bar Association Ethics Committee on December 2, 1999.

Adopted by the Board of Governors on January 21, 2000.

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