



# NATIONAL NATIVE AMERICAN BAR ASSOCIATION

*National Native American Bar Association  
Formal Ethics Opinion No. 1  
Adopted June 26, 2015*

*Duties of Tribal Court Advocates to Ensure Due Process Afforded to All Individuals Targeted for Disenrollment*

## *Syllabus*

On April 8, 2015, the National Native American Bar Association (“NNABA”) adopted Resolution #2015-06, *Supporting Equal Protection and Due Process For Any Divestment of the American Indigenous Right of Tribal Citizenship*. Resolution #2015-06 reflects many aspects of NNABA’s mission. NNABA was founded in 1973 and serves as the national association for Native American attorneys, judges, law professors and law students, tribal court practitioners, and tribal advocates and strives to be a leader on social, cultural, political and legal issues affecting American Indians, Alaska Natives, and Native Hawaiians. NNABA’s work is centered on representation of indigenous communities and individuals, broadly covering issues important to the Native American community.

The right to citizenship is sacrosanct. Indeed, federal, tribal, and international law recognize that the right to inclusion as an inviolable right. *Terry-Carpenter v. Las Vegas Paiute Tribal Council*, Nos. 02-01, 01-02, 10 (Las Vegas Paiute Ct. App. 2003); *Afroyim v. Rusk*, 387 U.S. 253 (1967); United Nations Declaration on the Rights of Indigenous Peoples (“Declaration”), arts. 34, 46; *see also* Shai Lavi, *Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel*, 13 NEW CRIM. L. REV. 404 (2010) (citizenship in every economically developed nation is absolute). Much tribal positive law, including many tribal constitutions, statutes, and memorialized customs similarly vest and mandate rights to identity, culture, and citizenship. *See e.g.* Constitution of the Spokane Indian Tribe, art. III, §3; Constitution of the Federated Indians of Graton Rancheria, §6.

Yet the right to tribal citizenship is one that is increasingly under attack. NNABA enacted Resolution #2015-06 to protect this fundamental right for indigenous people and to establish ethical guidance for tribal advocates confronting disenrollment issues. It is NNABA’s intent that this guidance will be instructive to tribal advocates and to the bars of the various jurisdictions to which they might be admitted. Accordingly, it is

incumbent upon NNABA to set forth this Formal Ethics Opinion No. 1, providing context and guidance for lawyers and tribal advocates confronting disenrollment issues and supporting and explaining NNABA's Resolution #2015-06. This NNABA Formal Ethics Opinion No. 1 does not purport to establish any universal Model Rules for Indian country or displace existing tribal ethics provisions. Rather, NNABA has determined it is necessary and appropriate to address advocacy on disenrollment matters specifically, when such matters are more frequently arising, to remind lawyers and any bar associations to which they belong that lawyers' ethical obligations to their licensing jurisdictions do not stop at reservation boundaries. Therefore, NNABA has selected the Formal Ethics Opinion convention, employed by bars of other jurisdictions to deliver guidance to lawyers and tribal advocates addressing disenrollment issues.

### *Opinion*

Tribal advocates include attorneys, lay advocates, consultants, members of tribal bar associations, individuals presenting to tribal courts, tribal court judges, and advocates representing or appearing before any tribal bodies that exercise executive, legislative, judicial or quasi-judicial functions. This Formal Ethics Opinion No. 1 addresses this context, and calls on lawyers and tribal advocates confronting disenrollment issues to respect and consider indigenous rights to culture, identity, and citizenship and to reject any path that deprives indigenous people of such rights without due process.

NNABA offers this Formal Ethics Opinion No. 1 because, much like the duty of a public prosecutor is to "seek justice," so too do tribal advocates carry a duty to "seek justice." American Bar Association Standards for Criminal Justice, 2d Ed. Vol. I, 3-1.1(c). The Preamble of the Model Rules of Professional Conduct likewise states: "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 responsibility of a tribal advocate differs from that of the usual advocate; his or her duty is to further justice in the greater Native American community, not merely to win his or her case. This is particularly true in the context of disenrollment cases in which a sovereign tribal government seeks to deny Native Americans who hold rights and recognition in their communities, as citizens, their rights to participate in their indigenous community in the future. This special duty exists in disenrollment cases because: (1) the tribal advocate who represents the sovereign (like a public prosecutor) should use restraint in the discretionary exercise of the governmental powers; and (2) positive tribal law, federal law, and international human rights law provide for rights to identity and culture that should not be taken away from an individual of indigenous heritage without due process of law.

In the United States, the federal Indian Civil Rights Act of 1968, as adopted by various tribal constitutions and other laws, provides that: "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal

protection of its laws or deprive any person of liberty or property without due process of law.” This federal law has been incorporated into many tribal constitutions, statutes, and common law. *See e.g.* Constitution of the Otoe-Missouria Tribe of Indians, Art. III, §5; Constitution of the Sipayik Members of the Passamaquoddy Tribe, Art. IV, §1; Constitution of the Wampanoag Tribe of Gay Head (Aquinnah), Art. III, §1; St. Regis Mohawk Tribe Constitution, Art. VII, §1.

Furthermore, the indigenous right to identity, culture and citizenship has been confirmed again and again in international law. While international law is not necessarily binding or even tested by licensing jurisdictions of tribal advocates, it is an important source of law and norms for indigenous peoples around the globe. The international law basis for indigenous rights to culture, identity and citizenship is clear:

- The United Nations Declaration on the Rights of Indigenous Peoples (“the Declaration”), as endorsed by the United States in 2010, affirms that all at indigenous persons enjoy an inherent “right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned”
- Article 34 of the Declaration provides: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards”
- Article 46 of the Declaration further provides: “In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected”
- The Universal Declaration of Human Rights provides: “All are equal before the law and are entitled without any discrimination to equal protection of the law. . . . Everyone has the right to an effective remedy . . . for acts violating the fundamental rights granted him by the constitution or by law.”

Yet despite this clear and consistent guidance in tribal, federal, and international law, Native Americans’ right of tribal citizenship is being increasingly divested or restricted without equal protection at law or due process of law, or any effective remedy for the violation of such rights, most commonly through a tribal process known as “disenrollment.” This cannot stand.

Any tribal advocate holds similar duties of professional conduct to those required by admission to the bars of other jurisdictions, including but not limited to the

following duties, which are similarly set forth in the Model Rules of Professional Conduct:

- To be an advisor. In representing a client, a tribal advocate shall exercise independent professional judgment and render candid advice. In rendering advice, a tribal advocate may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation. In a matter involving or expected to involve disenrollment proceedings, a tribal advocate should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought, and also inform the client of the tribal, federal and international law surrounding the right of indigenous peoples to their culture. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. A tribal advocate should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a tribal advocate to refer to relevant moral and ethical considerations in giving advice. Although a lawyer or tribal advocate is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied. This is especially true in the disenrollment context. The tribal advocate has a duty to inform his or her client of the moral and human rights norms potentially violated by disenrollment proceedings. This includes, but is not limited to, review and consideration of the various sources of tribal, federal and international law set forth in this Formal Ethics Opinion No. 1, as well as, more broadly, review and consideration of the inter-generational harm caused to individuals whose cultural identity is taken from them, as seen in the legacy of conquest of indigenous peoples. **Most importantly, this responsibility as adviser carries with it specific obligations to see that the individual targeted for disenrollment from his or her tribe is accorded procedural justice, that any order to disenroll a tribal citizen is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to address the politically or economically motivated disenrollment of innocent persons otherwise entitled to their right to culture, identity and citizenship as a matter of tribal, federal and/or international law.**
- To not bring or defend a proceeding or assert or controvert an issue therein unless there is a basis in law and fact for doing so that is not

frivolous. The tribal advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which a tribal advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change. What is required of tribal advocates, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. The action is frivolous, if the tribal advocate is unable either to make a good faith argument on the merits of the action taken. Disenrollment proceedings initiated for politically or economically motivated reasons are patently frivolous. Examples of patently frivolous disenrollment actions include:

- Tribal Leader A wants Family B disenrolled because he believes they mostly voted against him in the last election. Tribal Advocate initiates a strategy to disenroll Family B without due process. Tribal Advocate violates this duty.
- Tribal Council A, comprised mostly on members of one family, Family A, desires to disenroll Family B because they believe that reducing the number of tribal members will increase the amount of tribal per capita payments available to Family A. Lawyer initiates a strategy to disenroll Family B without due process. Lawyer violates this duty.

There are instances in which disenrollment might be entirely appropriate, and conducted in a manner in which the disenrolled individual is afforded due process. An example scenario would be as follows:

- Tribal Council A might initiate banishment proceedings against Individual B engaged in significant on-reservation trafficking of narcotics. Lawyer initiates a strategy to disenroll Individual B, involving proceedings at which evidence is presented and Individual B is allowed a right of confrontation and to offer evidence in his or her defense.
- To represent an organization as client. In the tribal advocate context, this is a special responsibility to represent the interest of the tribal governmental sovereign as it exists today, as the indigenous community has existed from time immemorial and how the indigenous people of that community envision it for the future. A tribal advocate employed or

retained by a tribe represents the tribe acting through its duly authorized constituents. If a tribal advocate for an organization knows that an officer, employee or other person acting for the tribe is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the tribe or its members, or a violation of law that reasonably might be imputed to the tribe, and is likely to result in substantial injury to the tribe or its members, the tribal advocate shall proceed as is reasonably necessary in the best interest of the tribe. Removing indigenous people from their community may be regarded as a harm to the community as a whole as well as to the individuals targeted for disenrollment. Removing indigenous people from their community may also violate tribal and federal law or international norms. Unless the tribal advocate reasonably believes that it is not necessary in the best interest of the tribe to do so, the tribal advocate should refer any disenrollment matter to appropriate authority in the tribe, including, if warranted by the circumstances, to the highest authority that can act on behalf of the tribe as determined by traditional law, including for example, referring the issue to a general council of the entire adult membership of the tribe, presenting the issue to a council of elders, or undertaking traditional community dispute resolution ceremonies or healing ceremonies with traditional medicine people or spiritual leaders.

In sum, a tribal advocate has the responsibility of a minister of justice and not simply that of an advocate. NNABA recognizes that it is each indigenous community's sovereign right to establish its own requirements for citizenship, community recognition, and participation and does not presume to erode or replace any existing tribal law or practice that a tribal community has established for itself. Rather, this Formal Ethics Opinion No. 1 is intended to give tribal advocates ethical guidance in matters that implicate fundamental rights of indigenous people established in tribal, federal and international law.