Tribal Lawyer Regulation & Nation Building

Matthew L.M. Fletcher

With thanks and apologies to the 1491s

The sorry story of Ervin Lee . . .

This guy needed a lawyer . . .

Wilbur D. Wilkinson, former chairman of MHA Nation . . .

. . . Fort Berthold Reservation allotment holder . . .

and ex-con.

UNITED STATES of America, Appellee,

v.

Wilbur D. WILKINSON, Appellant.

Nos. 96–3448, 96–3774.

United States Court of Appeals,
Eighth Circuit.

Submitted May 20, 1997.

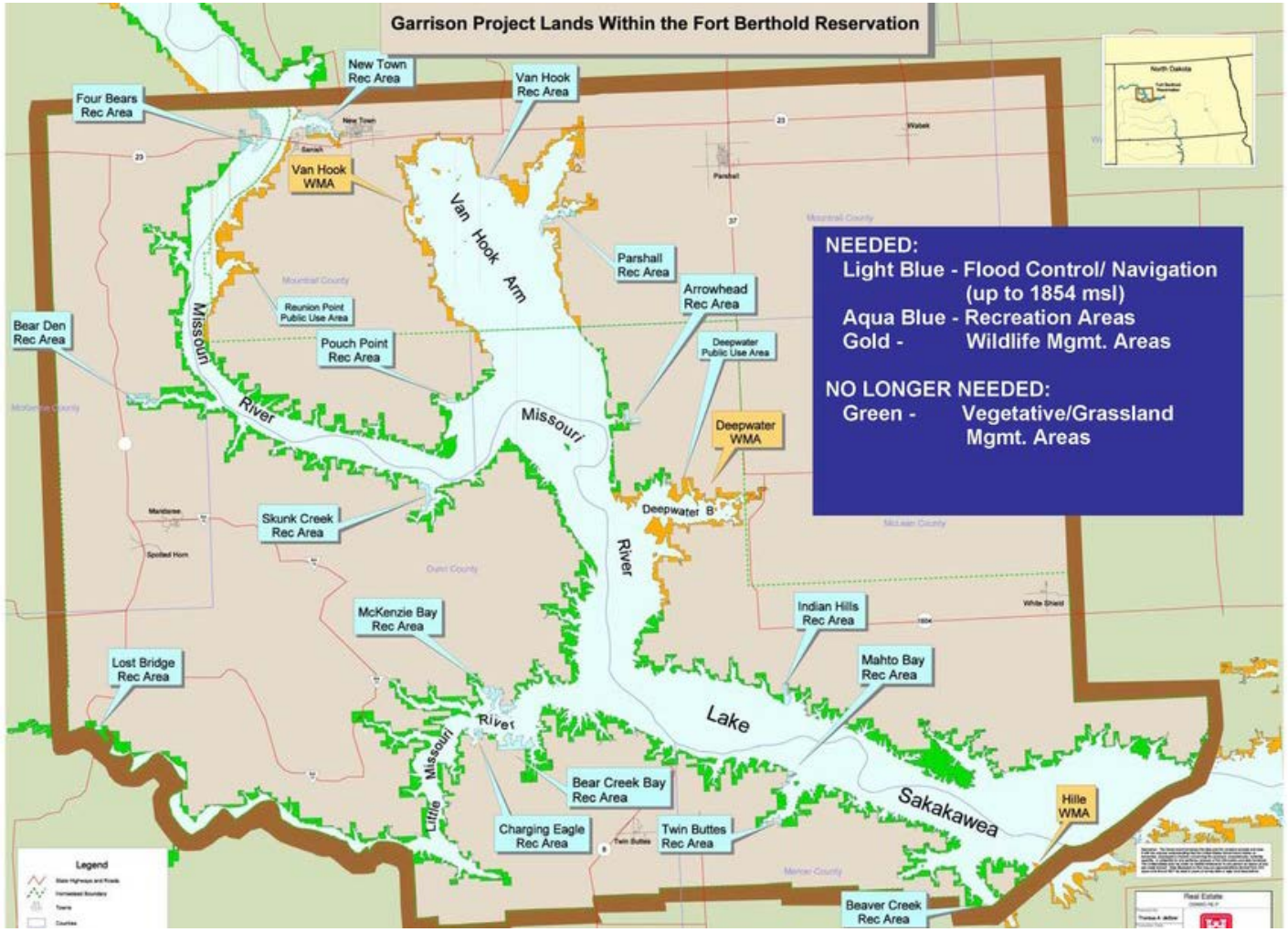
Decided Sept. 5, 1997.

Rehearing and Suggestion for Rehearing
En Banc Denied Oct. 6, 1997.

Following jury trial, defendant was convicted in the United States District Court for the District of North Dakota, Patrick A. Conmy, J., of misappropriation of tribal funds and making false statements. Defendant appealed. The Court of Appeals, Bowman, Circuit Judge, held that: (1) exhibits which district court withdrew were irrelevant; (2) indictment was not multiplicious; (3) jury's general verdict was not impermissibly ambiguous due to "multiple theories"; (4) conviction on charge that defendant did "embezzle, willfully misapply, and knowingly convert" tribal funds to his own use was supported by sufficient evidence, even if government did not show lawful possession of funds; (5) defendant was not entitled to disclosure of testimony before grand jury; and (6) district court's allegedly inappropriate comments did not amount to plain error.

Affirmed.

124 F.3d 971 (8th Cir. 1997)



The matter was complex, with federal, state, and tribal jurisdiction at play. Lots of lawsuits.

After a settlement, Wilkinson is overpaid nearly $3M . . .

Enerplus Resources (USA) Corporation ("Enerplus") brought suit to recover approximately $2.9 million in overpayments to Wilbur D. Wilkinson. The overpayments stemmed from an overriding royalty interest paid in connection with a settlement agreement between, among others, Wilkinson and Peak North Dakota, LLC ("Peak North"). Peak North subsequently merged into Enerplus. The district court[1] awarded summary judgment in favor of Enerplus, holding that it was entitled to a return of the overpayment. The court also awarded Enerplus its costs and fees under a contractual fee-shifting provision. Wilkinson appeals. We affirm.

Enerplus Resources (USA) Corporation v. Wilkinson, slip. op. at 1 (8th Cir. 2020) (unpublished)

. . . and Lee is entitled to 10 percent under a contingency fee arrangement.

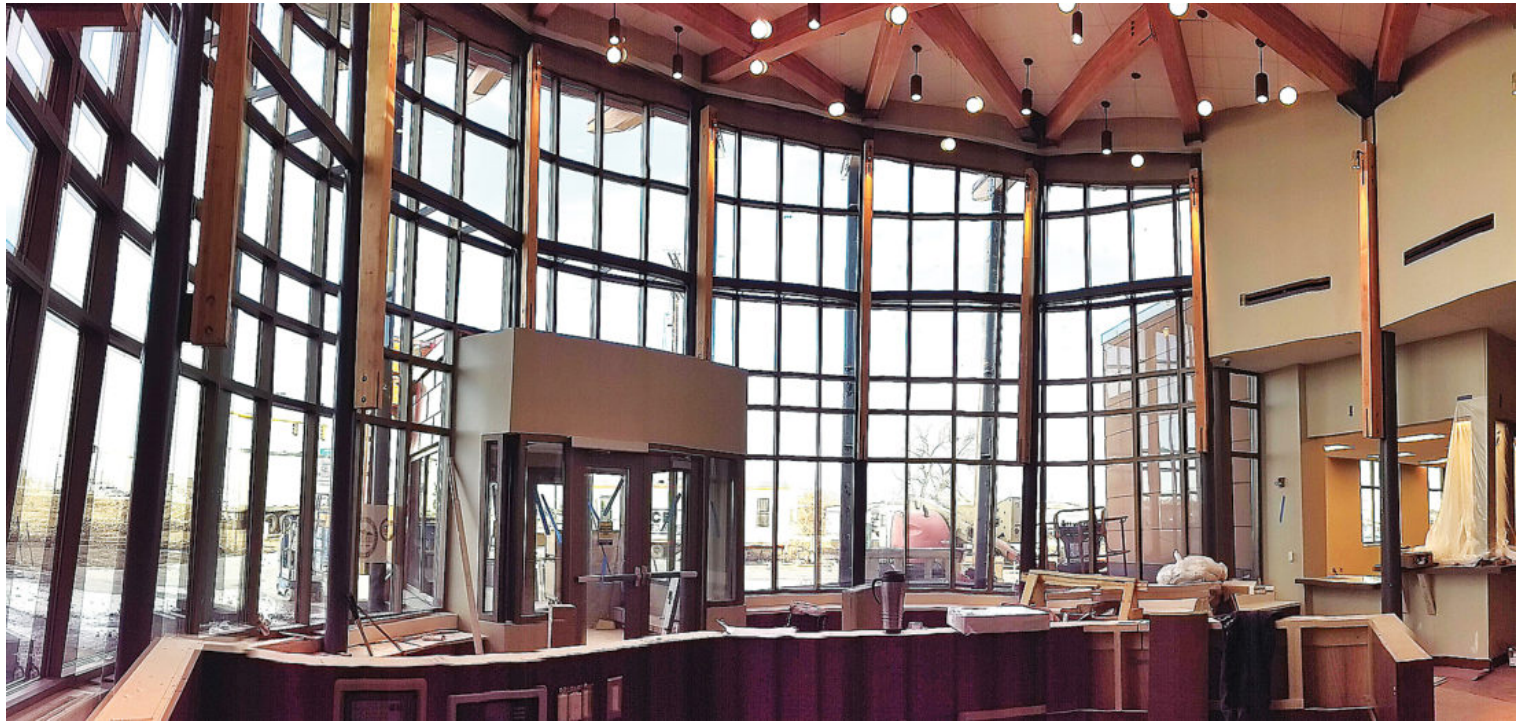
[4]Attorney Ervin Lee represented Wilkinson during the Settlement Agreement negotiation, and ten percent of Wilkinson's ORRI was assigned to Lee as part of the Settlement Agreement. Because Lee's interest is derived from Wilkinson's interest and Lee is similarly situated to Wilkinson in the present action, we need not separately discuss Lee's interest.

That's bad for Lee, because he didn't memorialize the contingency fee arrangement.

[¶1] Disciplinary Counsel objected to a report of a hearing panel of the Disciplinary Board that concluded Ervin Lee had violated N.D.R. Prof. Conduct 1.5(b) and (c) and 1.15(a), (d), and (e), and that recommended Lee be suspended from the practice of law for 60 days and pay the costs of the disciplinary proceeding in the amount of $7,147.51. We conclude there is clear and convincing evidence Lee violated N.D.R. Prof. Conduct 1.5(b) and (c) and 1.15(a), (d), and (e), but there is not clear and convincing evidence Lee violated N.D.R. Prof. Conduct 1.5(a) or N.D.R. Lawyer Discipl. 1.2A(2) or (3). We order Lee be suspended from the practice of law for 60 days and pay the costs of the disciplinary proceeding in the amount of $7,147.51.

In re Lee, 2013 ND 151.

Wilkinson sued Lee in MHA Nation court over attorney fees . . .



. . . which held that it had jurisdiction over Lee (a nonmember) under the Montana 1 test. . .

A business relationship, as evidenced by an oral or written contract, coupled with on reservation activity or service related to the oral or written contract is precisely the type of circumstance that the United States Supreme Court contemplated with respect to the consensual relationship exception to the rule in Montana. The absence of a contingent fee agreement specifying choice of forum for disputes between the attorney and client complicates the questions as to jurisdiction, however based upon the lower court findings it is clear that the parties did in fact have an oral agreement constituting a contract. Whether the Settlement Agreement that followed modified said agreement is not an issue before this Court and is one that has yet to be litigated.[2] While this Court understands the legal representation provided by Respondent on the Fort Berthold Indian Reservation appears to have been minimal, minimum services and contact do not in and of itself deprive the Tribal Court of adjudicatory authority.

Wilkinson v. Lee, No. 2010-0673, at 4 (MHA Nation Supreme Court 2015)

. . . and was unimpressed by Lee's defense that the contingency fee agreement was unwritten and therefore he couldn't consent to tribal jurisdiction.

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In the end, Ervin Lee was disbarred by the North Dakota Supreme Court (for other things)

[¶1] The Court has before it a stipulation, consent to discipline and recommendations of a hearing panel of the Disciplinary Board recommending that Ervin J. Lee be disbarred from the practice of law in North Dakota for violations of the North Dakota Rules of Professional Conduct. We accept the stipulation, consent to discipline, and recommendations. We disbar Lee from the practice of law in North Dakota effective immediately. We order him to pay restitution to the client and to the client protection fund, and we order him to pay costs of the disciplinary proceeding in the amount of $250.

In re Lee, 2017 ND 216

Issues

- Contingency fees should be memorialized – ABA Model Rule 1.5(c)
- State bar disciplinary jurisdiction over on-reservation activities – ABA Model Rule 8.5(a) (admitted to practice in a jurisdiction is subject to the disciplinary powers of that jurisdiction "regardless of where the lawyer's conduct occurs")
- Tribal inherent jurisdiction over nonmember activities on-reservation – the Montana general rule and exceptions


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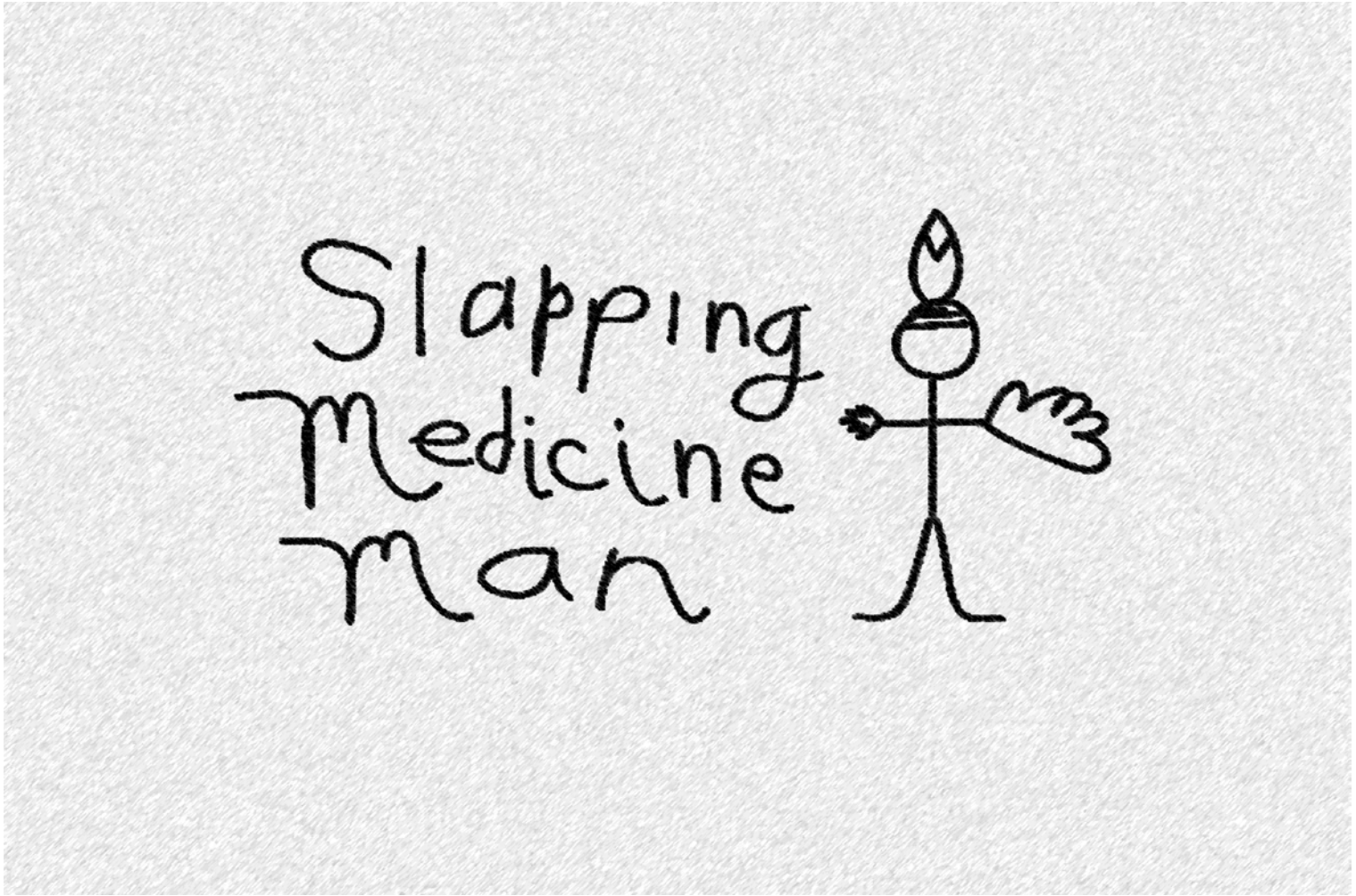
A quick history of Indian lawyer regulation . . .




TRIBAL ATTORNEY REGULATION
JTISS
LYDIA CONLEY
FLETCHER

FEDERAL SUPERVISION OF ATTORNEY CONTRACTS

EMANCIPATION SEEN F

Full Liberation Is Doubted This Century as Policy Disputes Obscure U. S. Goal

COMMISSIONER UNDER FIRE

Myer's Rules Covering Lawyer Contracts Held a Cause of Heightened Tension

This is the first of three articles on the plight of the American Indians and how it has been handled by the Government and Congress.

By ANTHONY LEVIERO

Special to The New York Times

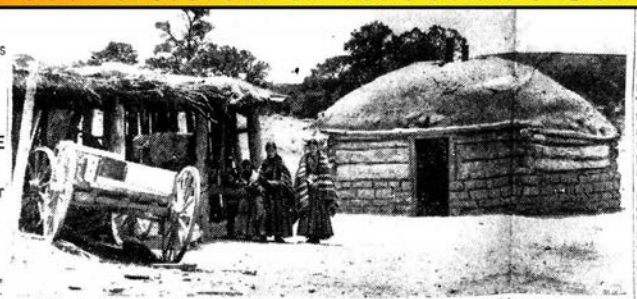
WASHINGTON, Oct. 31 — The American Indians, wards of the Government for 127 years, are not likely to be emancipated fully until the year 2000. That is the prospect held out by the Interior Department today, unless Congress alters the situation.

Lip service has been given to the ultimate goal of emancipation for approximately 4,000,000 Indians for many years by successive national administrations and by members of Congress. Yet today the goal seems as far away as ever.

A survey of the situation as it is seen in policy-making Washington shows plainly that there exists no firm, definitive program, no timetable for achieving the goal. Even more, there appears to be no real trend of policy, or even a vigorous drive among officials really to head for the goal.

Meanwhile, the many little questions that make up The Indian Problem go on simmering more or less intensely in the Bureau of Indian Affairs of the Interior Department, much as they have for more than a century. These prob-

A TYPICAL INDIAN HOME IN THE SOUTHWEST



A Navajo adobe hut on the semi-arid hillsides of the southwest where living conditions are very poor

Associated Press

Oliver La Farge, president of the Association on American Indian Affairs, who says the tribes should have the privilege of hiring lawyers of their own choice.

Dillon S. Myer, Commissioner of Indian Affairs, who is accused of lacking the human touch.

The New York Times

Felix S. Cohen, general counsel of the Association on American Indian Affairs, who has challenged the administration of the Bureau of Indian Affairs.

The New York Times

CITY PLANS NETWORK OF THROUGH STREETS

...k took ... a net-work of through streets in Brooklyn, the Bronx and Queens to speed traffic and reduce accidents.

The department announced that a contract had been awarded for the installation of 4,426 stop signs. These will mark off forty-six through streets in Brooklyn, forty-seven in Queens and seventeen in the Bronx. Other stop signs will be erected in Manhattan and Richmond.

Another contract was awarded for the installation of 3,715 school crossing signs in the five boroughs. The total cost of the two contracts is $102,847.87. All work is to be completed within 150 days.

Acting Traffic Commissioner T. Wiley said that the ... crossing signs would be set ... part of the department's p... of establishing individual ... safety plans for each of th... than 1,000 public and p... elementary and junior high ... in the city. The signs will ... stalled in a place determi... the traffic safety plan ... school area.

SIX WIN POETRY PR...

Magazine Gives $100 Awa... Works Published in ...

CHICAGO, Oct. 31 (AP)— ... magazine announced today ... nual awards of $100 each t... whose contributons it pu... during the year.

The awards, made "with ... ence to each poet's ... achievement, on promise," ... selected from the October, ... September, 1951, issues.

The winners were:

The Levinson prize to ... dore Roethke, Seattle, fo... Poems", the Oscar Blu... Prize for Poetry to Rand... rell, Princeton, N. J., for ... Poems" and "Two Poem... Eunice Tietjens Memorial P...

Boo...

Norman M. LITTELL

v.

Rogers C. B. MORTON, the Secretary of the Department of the Interior of the United States.

Civ. A. No. 19917-W.

United States District Court,
D. Maryland.

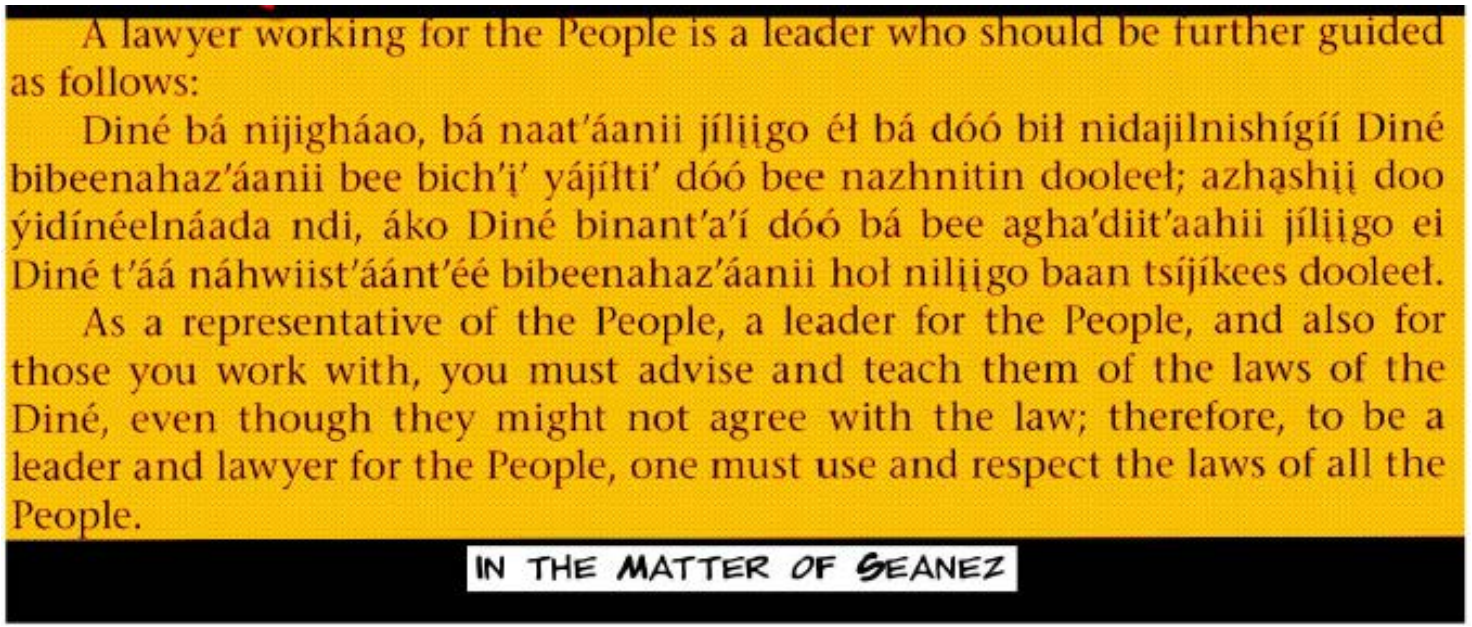
Jan. 14, 1974.

Suit was brought by attorney for judicial review by mandamus of decision of Secretary of Interior disallowing his claims for compensation for professional services rendered Navajo tribe under contract providing for payment of salary for general counsel work plus a contingency fee arrangement for claims work on behalf of tribe. The United States District Court for the District of Maryland, at Baltimore, 314 F.Supp. 1176, dismissed action and the attorney appealed. The United States Court of Appeals for the Fourth Circuit, 445 F.2d 1207, reversed and remanded. On remand, the District Court, Watkins, Senior District Judge, held, inter alia, that certain litigation was properly classified as claims work within the meaning of contingency fee arrangement, and that while attorney was guilty of technical breach of contract and therefore breach of fiduciary duty there was no indication of deliberate scheme to defraud and forfeiture of fees would not be ordered.

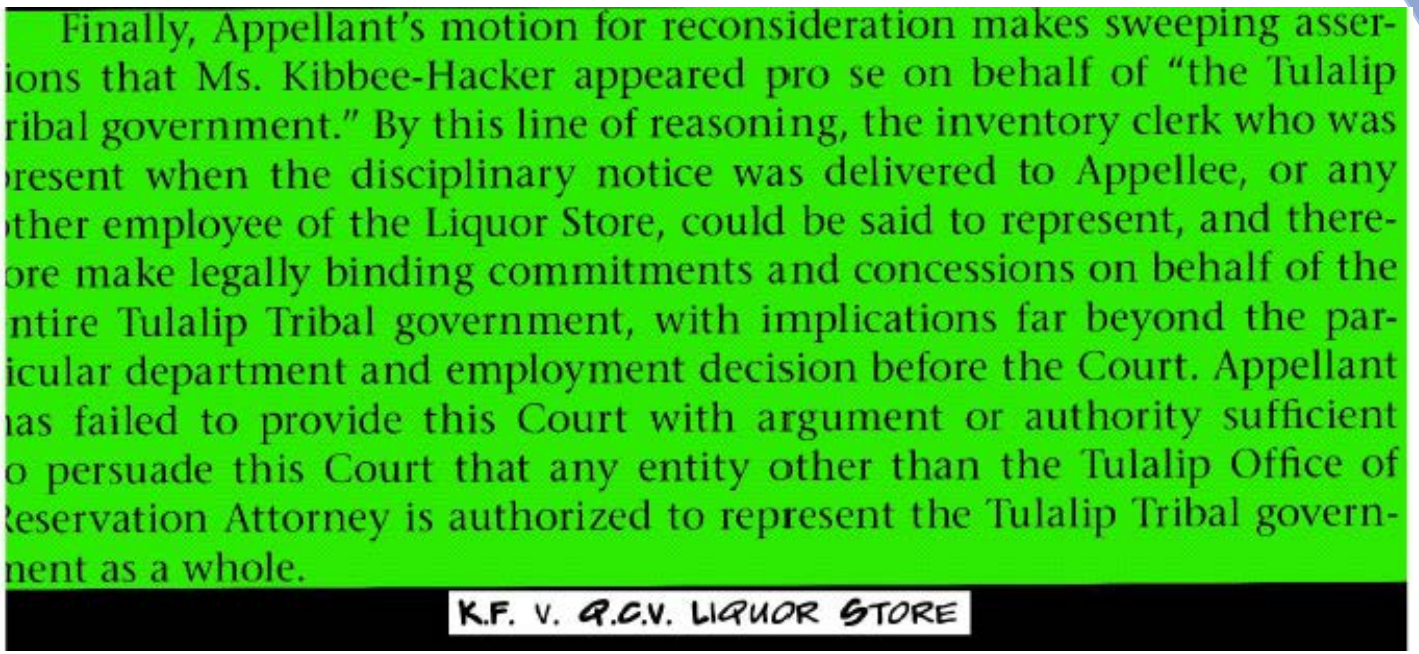
Judgment for plaintiff accordingly.

369 F. Supp. 411
(25 U.S.C. § 81)

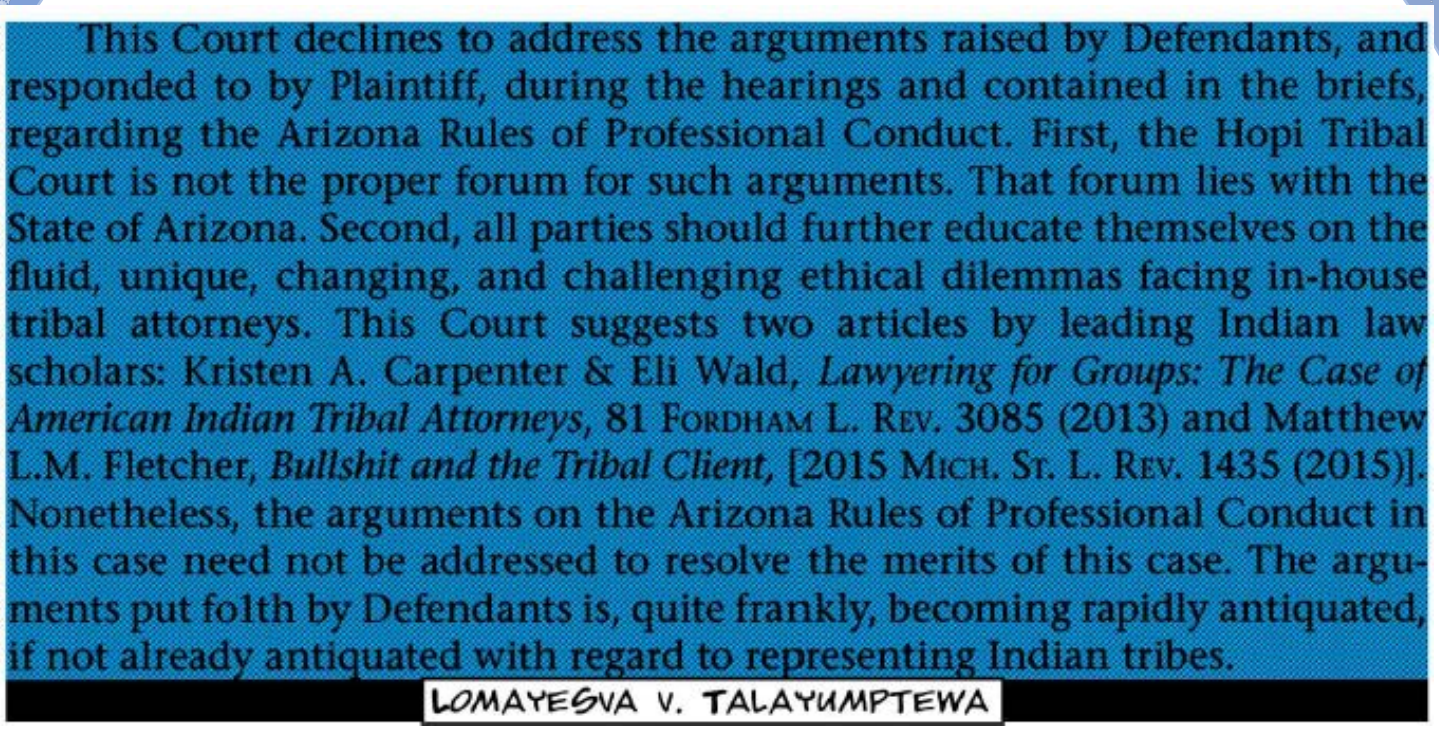
Examples of modern era tribal court lawyer regulation . . .



9 Am. Tribal Law 329 (Navajo Nation Supreme Court 2010)

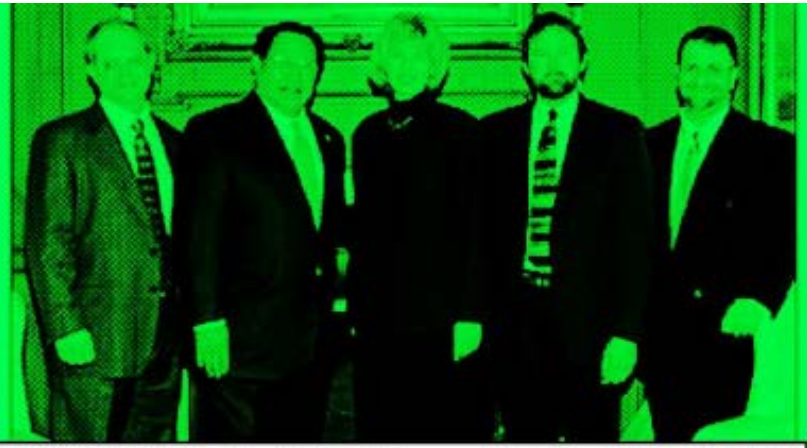


11 NICS App. 27 (Tulalip Court of Appeals 2013)



No. 2015-CR-0088 (Hopi Tribal Court 2015), excerpted in Fletcher, American Indian Tribal Law 870-76 (2d ed. 2020)

Still, 21st Century Indian country lawyering is largely unregulated . . .



POST-SECTION 81 ERA — JACK ABRAMOFF

Secretary of the Interior Gale Norton in one of more than 5,000 photos taken during her tenure. From left to right: Unidentified, Phillip Martin, chief Mississippi Band of Choctaw Indians, Secretary Norton, C. Bryant Rogers, outside counsel for Mississippi Band of Choctaw Indians, and Jack Abramoff. The photo was taken February 5, 2002.

CALIFORNIA MIWOK BAR COMPLAINT . . .

Complaint for Unethical Conduct Under Rule 3-310 §§ (C)(1) and (2) of the California Rules of Professional Conduct

lodged against

Attorney Name	Kevin Michael Cochrane	Robert A Rosette
California Bar Number	#255266	#224437
Address	193 Blue Ravine Rd Ste 255 Folsom, CA 95630	Rosette & Associates PC 565 W Chandler Blvd Ste 212 Chandler, AZ 85225

. . . SEE WILLIAMS & COCHRANE V. QUECHAN TRIBE & ROSETTLE (S.D. CAL.)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CHICAGO TRANSIT AUTHORITY RETIREE HEALTH CARE TRUST; and THE BOARD OF TRUSTEES FOR THE CHICAGO TRANSIT AUTHORITY RETIREE HEALTH CARE TRUST;	)	
Plaintiffs,	)	Case No.
v.	)	JURY DEMANDED
DILWORTH PAXSON, LLP; TIMOTHY ANDERSON; and GREENBERG TRAURIG, LLP;	)	
Defendants.	)	

COMPLAINT

The Chicago Transit Authority Retiree Health Care Trust and the Board of Trustees of the Chicago Transit Authority Retiree Health Care Trust (collectively, "**RHCT**") complain against Defendants Dilworth Paxson, LLP ("**Dilworth**"), Timothy Anderson ("**Anderson**") (Dilworth and Anderson, collectively, the "**DP Defendants**") and Greenberg Traurig, LLP ("**Greenberg**") (the DP Defendants and Greenberg, collectively, "**Defendants**") as follows:

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ABA PROPOSED RULE 8.4(G)

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[5]

RULE 8.4(G)

COMMENT

Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (g).[6]

#MeToo in Indian Country; 'We don't talk about this enough'

All done.
Time for that honor song.