

# BULLSHIT AND THE TRIBAL CLIENT

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that no one can possibly know are true or not. All that matters is the outcome:

[A bullshitter] is neither on the side of the true nor on the side of the false. His eye is not on the facts at all, as the eyes of the honest man and of the liar are, except insofar as they may be pertinent to his interest in getting away with what he says. He does not care whether the things he says describe reality correctly. He just picks them out, or makes them up, to suit his purpose.<sup>6</sup>

Lawyers are bullshitters, too. And lawyers utilize bullshit for the same reason politicians do—to persuade someone to select them. Politicians want a vote; lawyers want a client. A divorce attorney might claim their standard prenuptial agreement is bulletproof.<sup>7</sup> A lawyer–lobbyist might claim his or her connections on Capitol Hill, and no one else’s, are the right connections to push through legislation benefitting a potential client.<sup>8</sup> A lawyer might tell a potential client—one who is dissatisfied with his current counsel and is shopping around for another—that the lawyer will win the appeal while current counsel will not. A lawyer might claim during oral argument before the Supreme Court that there will be dramatic and widespread consequences if the Court rules against the lawyer’s client. If at the moment an attorney makes these representations, he or she does not know if the representations are true, or even likely to be true (and in most instances here the lawyer simply cannot know), then the lawyer is bullshitting. Lawyers will likely respond to my claim that they are bullshitting by arguing that they are merely stating a legal opinion based on their education and experience and, at worst, are merely engaging in a little harmless puffery.<sup>9</sup> Lawyers that are outside counsel for corporate entities may make the additional claim that in-house counsel is there to protect corporate clients from bad lawyering and bullshit promises. Lawyers peddling bullshit to judges may argue that judges are lawyers, and so are their clerks, and so their professional training and experience will allow them to cut through the bullshit and reach the truth. Conflicts

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6. *Id.* at 56.

7. *See* INTOLERABLE CRUELTY (Universal Pictures 2003).

8. *Cf.* Lerman, *supra* note 1, at 722 (“Some lawyers deceive clients about the extent of their professional contacts or access to influential people.”).

9. *See id.* at 721 (“Many lawyers do not consider what they characterize as ‘puffing’ to be lying; they espouse a ‘macho philosophy’ that they ‘can learn anything in a week,’ and therefore, that any representations they make about expertise will be true in a negligible amount of time. Puffing does not harm clients, they argue, because usually they do not bill clients for time spent learning new law, or ‘study time.’” (footnote omitted)).

## INTRODUCTION

While it is well established that lawyers may not lie to their clients,<sup>1</sup> it is not well established whether counsel can bullshit their potential and active clients.

I do not mean bullshit as a “term of abuse,” but rather as philosopher Harry Frankfurt meant it:

[A bullshitter] cannot be regarded as lying; for she does not presume that she knows the truth, and therefore she cannot be deliberately promulgating a proposition that she presumes to be false: Her statement is grounded neither in a belief that is true nor, as a lie must be, in a belief that it is not true. It is just this lack of connection to a concern with truth—this indifference to how things really are—that [is] . . . the essence of bullshit.<sup>2</sup>

Bullshit is most easily defined in contrast to lies, in that a liar is a person who knows the truth and intentionally deceives the listener about it. For Frankfurt, “Telling a lie is an act with a sharp focus[,] . . . designed to insert a particular falsehood at a specific point in a set or system of beliefs, in order to avoid the consequences of having that point occupied by the truth.”<sup>3</sup> A lawyer might lie through “overt misstatements and deliberate omissions or failures to disclose information” to a client or potential client.<sup>4</sup> A bullshitter is recklessly indifferent about the truth.

Frankfurt identified politicians and public relations (PR) professionals as examples of modern day bullshitters.<sup>5</sup> Politicians and PR professionals care only about reaching their goals, and while that may include telling lies, it definitely includes making statements

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1. “Lawyers are not supposed to lie to their clients. Ever.” Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 661 (1990).

2. HARRY G. FRANKFURT, ON BULLSHIT 2, 33-34 (2005) (originally published in 6 RARITAN Q. REV. 81 (1986)). The academic study of bullshit is an ongoing inquiry. *E.g.*, Robert A. Levin & Michael J. Zickar, *Investigating Self-Presentation, Lies, and Bullshit: Understanding Faking and Its Effects on Selection Decisions Using Theory, Field Research, and Simulation*, in THE PSYCHOLOGY OF WORK: THEORETICALLY BASED EMPIRICAL RESEARCH 253 (Jeanne M. Brett & Fritz Drasgow eds., 2002) (studying utility of “response distortion,” including bullshit, on potential employers by job candidates); Curtis Bridgeman & Karen Sandrik, *Bullshit Promises*, 76 TENN. L. REV. 379 (2009) (studying bullshit promises made in written contracts); Philip Eubanks & John D. Schaeffer, *A Kind Word for Bullshit: The Problem of Academic Writing*, 59 C. COMPOSITION & COMM. 372, 374 (2008) (“[O]ur culture often singles out academe as the mother lode of bullshit.”).

3. FRANKFURT, *supra* note 2, at 51.

4. Lerman, *supra* note 1, at 663.

5. FRANKFURT, *supra* note 2, at 22-23.

between in-house counsel and outside counsel often arise from the fact “that a fundamental and pervasive conflict of interest exists between lawyer and client—the lawyer’s profit motivation.”<sup>10</sup> Moreover, there appears to be an additional conflict between the Supreme Court specialists and the tribal client—the specialist’s interest in enhancing his credibility before the Supreme Court independent of any individual client’s interests.<sup>11</sup>

In American Indian law and policy, to be sure, lawyers are not the only bullshitters—elected tribal officials are politicians and many of them are bullshitters as well. Tribal leaders may make election promises to bring tribal gaming per capita payments back up to pre-Great Recession levels. Tribal leaders may make promises to cleanse certain families from the tribal membership rolls. Tribal leaders may promise to open up a second casino in a metropolitan market that will make the tribe flush with cash. Politicians are expected to make promises like this, even if they are bullshit much of the time.

There is potentially a third source of bullshit—in-house counsel.<sup>12</sup> In-house counsel might tell tribal officials that the employee handbook they cut and paste from another tribal government’s handbook is bulletproof. In-house counsel might tell tribal council members that firing the woman from accounting who claimed her supervisor sexually harassed her will not result in liability to the tribe or its officers. In-house counsel might claim that the tribe’s immunity will absolutely prevent the state from shutting down the tribe’s off-reservation casino. In-house counsel might bullshit opposing counsel in contract negotiations by agreeing in the contract to resolve disputes in federal court. However, as readers will see later in this paper, I may be wrong to label these representations bullshit. In-house counsel’s motivation is often but not always to protect its livelihood under difficult circumstances and competing pressures from clients and the bar.<sup>13</sup>

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10. *Id.* at 671.

11. See Aaron Tang, *The Ethics of Opposing Certiorari Before the Supreme Court*, 35 HARV. J.L. & PUB. POL’Y 933, 946 (2012).

12. I leave for another day yet another potential source of bullshit in Indian law—the academy. See generally Robert Laurence, *Indian-Law Scholarship and Tribal Survival: A Short Essay, Prompted by a Long Footnote*, 27 AM. INDIAN L. REV. 503 (2002-2003).

13. I strongly recommend that every lawyer representing Indian tribes and tribal interests study the leading article in the area, Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085 (2013).

While there is a lot of bullshit going around, I am mostly (but not entirely) concerned about bullshit from outside counsel, usually specialized counsel, directed at tribal clients. This paper is intended to identify a few areas where counsel employs bullshit when dealing with tribal clients. By counsel I mean both outside counsel and in-house counsel, and by clients I include both in-house counsel and tribal leadership. The relationship between in-house counsel and nearly all tribal government clients renders tribal clients uniquely vulnerable to bullshit by outside counsel. I offer suggestions, mostly for the benefit of in-house counsel, on how to deal with bullshit from both outside counsel and tribal officials. However, I will be the first to acknowledge that in-house may be placed in a no-win scenario, especially once appellate specialists take control of a case involving tribal interests.

## I. THE TRIBAL CLIENT

The history of the relationship between Indian tribes and their attorneys is an amazing, fantastical history, riddled with federal intervention and meddling in tribal attorney contracts and drama.<sup>14</sup> As Judge Canby noted in the first edition of his influential nutshell: “The hiring of attorneys by the tribal council is generally authorized by tribal constitutions,” but is made subject to approve of the Secretary of Interior, as required by statute, 25 U.S.C. §§ 81-81a.<sup>15</sup> “Th[is] requirement . . . became an obvious source of conflict . . . when tribes began to engage in litigation against federal authorities for breach of their trust responsibilities.”<sup>16</sup> The Department of Interior could, by design or inadvertence, forestall hostile litigation simply by failing to approve the attorney’s contract.<sup>17</sup> Felix S. Cohen, after reviewing public disclosures of Interior Department officials in the early 1950s, alleged that “the Indian Bureau has apparently been spying on the activities of tribal attorneys as they go through public files in the Interior Department Building and then advising opposing

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14. See generally *id.* at 3097-109.

15. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 69-70 (6th ed. 1981).

16. *Id.* at 70.

17. See *id.*; see also Carpenter & Wald, *supra* note 13, at 3100 (“In 1871, Congress not only ended treaty-making with tribes but also passed legislation requiring tribes to obtain federal approval before they could engage attorneys, even in suits against the United States. Ostensibly passed to protect tribal leaders from unscrupulous professionals, this statute often delayed, impeded, and compromised Indians’ access to legal services into the contemporary era.” (footnote omitted)).

counsel concerning such activities in order that Indian claims may be more easily defeated.<sup>18</sup> On occasion, federal courts have ordered the Secretary of Interior to refrain from terminating the contract of tribal counsel.<sup>19</sup>

Congress reduced Interior's authority over tribal attorney contracts in 1968,<sup>20</sup> and then ended it in 2000.<sup>21</sup> That history is well worth an article (or a book) by itself, but this paper is concerned only with the modern relationship between tribal governments, tribal officials, and their attorneys. This Part offers details on the relationship between elected tribal officials and in-house counsel.

Not all tribes employ in-house counsel, but many do, and the trend is toward ever-larger tribal legal department staffing and budgets, often to the chagrin of tribal leaders and constituents who chafe at the expense. I have personal and professional experience with four Indian tribes, and will focus my initial comments on those four legal departments. Those tribes are the Grand Traverse Band of Ottawa and Chippewa Indians (GTB), the Suquamish Tribe, the Hoopa Valley Tribe, and the Pascua Yaqui Tribe. I particularly focus on GTB, my own tribe and the tribe for whom I worked the longest as in-house counsel.

### A. Tribal Leadership

Tribal leadership usually consists of elected officials, typically referred to as tribal council members (or councilors) and tribal chairs. Some tribal leaders are unelected, but I have no experience with those tribes, so I will confine my analysis to elected tribal leaders.

In each of the four tribes, tribal leadership consists of a tribal council and a tribal chair. The tribal council at GTB consists of six councilors elected to staggered, four-year terms in at-large elections held every other year, and a tribal chair elected separately, also for a four-year term.<sup>22</sup> The chair presides at the meetings of the tribal council and has several other powers and duties—such as supervising tribal council committees—but generally the constitution

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18. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *YALE L.J.* 348, 372 (1953).

19. See, e.g., *Udall v. Littell*, 366 F.2d 668, 674-75 (D.C. Cir. 1966), cert. denied, 385 U.S. 1006 (1967).

20. 25 U.S.C. § 1131 (2012).

21. See 25 U.S.C. § 81(f)(1) (2012); 25 C.F.R. § 84.004(g) (2015).

22. GRAND TRAVERSE BAND CONST. art. VII, § 1(c)-(d) (1988).

provides little independent authority to the chair.<sup>23</sup> The tribal council is vested with most of the same powers that many other tribal council structures established by IRA-style constitutions employ<sup>24</sup> and “shall act only by ordinance, motion, or resolution.”<sup>25</sup> There is very little separation of powers between the executive and the legislature in the GTB constitution, unlike the clear separation of powers between the executive and legislative branches established in other Michigan tribal constitutions.<sup>26</sup>

The Hoopa Valley Tribe’s leadership also consists of a seven-person tribal council, and a chairman.<sup>27</sup> Like GTB, there is no real separation of powers provided for in the tribal constitution.<sup>28</sup> However, there is a chairman’s ordinance that establishes the chairman’s authority as the tribe’s chief administrator.<sup>29</sup> The ordinance requires the chairman to oversee tribal employees, among other things.<sup>30</sup>

The Suquamish Tribe’s governing body is the seven-member tribal council, which consists of a chair, vice-chair, secretary, treasurer, and three at-large council members.<sup>31</sup> They are nominated and elected by the tribe’s general council.<sup>32</sup> The Suquamish chair is authorized by the constitution to preside over tribal and general council meetings, sign checks, “and exercise any authority specifically delegated to him by the Tribal Council.”<sup>33</sup> The tribal constitution empowers the Tribal Council, in exercising its regular powers and duties, to act in both the legislative and executive areas of government, with some powers delegated to the chair.<sup>34</sup>

The Pascua Yaqui Tribe’s elected leadership consists of eleven persons elected at-large every four years, all at once.<sup>35</sup> The eleven officials then elect the chair and the vice-chair from within.<sup>36</sup> The

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23. *Id.* art. III, § 3(a).

24. *Id.* art. IV, § 1.

25. *Id.* art. III, § 5(e)(1).

26. *See, e.g.*, LITTLE RIVER BAND OF OTTAWA CONST. art. IV (legislative branch); *id.* art. V (executive branch); LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS CONST. art. VII (legislative branch); *id.* art. VIII (executive branch).

27. CONST. AND BYLAWS OF THE HOOPA VALLEY TRIBE art. V, § 2.

28. *Id.* art. V, § 2; *id.* art. IX, § 1; *id.* art. XI, § 1.

29. Hoopa Valley Tribe, Ordinance 1-80 amend. 2 (Mar. 5, 1998).

30. *See id.* at 2.

31. CONST. AND BYLAWS OF THE SUQUAMISH TRIBE art. V, § 1.

32. *Id.* art. V, § 2.

33. *Id.* art. VI, § 1.

34. *Id.* art. III.

35. CONST. OF THE PASCUA YAQUI TRIBE art. V, § 2.

36. *Id.* art. V, § 3.

council may also elect a secretary and a treasurer at its discretion.<sup>37</sup> These executive officers form the executive branch, although they retain their positions as legislators on the tribal council.<sup>38</sup> The constitution vests the chair with supervisory authority over the secretary and treasurer and all other tribal employees.<sup>39</sup> The Yaqui tribal leadership displays some aspects of a separation of powers between the executive and legislative branches, but the executive officers serve in both capacities, rendering this structure a hybrid of sorts.

These four tribal leadership structures are fairly typical for modern tribal governments. Most tribal governments that date back to the 1934 reorganization era do not employ completely separate legislative and executive branches, and often have significant commingling of powers.<sup>40</sup> Others, such as the Muscogee (Creek) Nation, authorize each of the three branches of tribal government to retain separate counsel *and* establish an additional and separate attorney general or tribal attorney who represents the entire tribe.<sup>41</sup> Occasionally, although I am not aware that this is standard practice, the tribal council may authorize the tribal in-house counsel to hire outside counsel and act in a largely independent manner from the tribal council.<sup>42</sup>

## B. In-House Counsel

As noted above, not all Indian tribes retain in-house counsel, but those that do are to be congratulated and commended for both

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37. *Id.* art. VII, §§ 1, 3.

38. *Id.* art. V, § 2; *id.* art. VII, § 1.

39. *Id.* art. VII, § 1.

40. Jason P. Hipp, *Rethinking Rewriting: Tribal Constitutional Amendment and Reform*, 4 COLUM. J. RACE & L. 73, 80 (2013).

41. *See* *Bryant v. Childers*, 1 Okla. Trib. 316, 319-20 (Sup. Ct. of the Muscogee (Creek) Nation 1989) (“It is the opinion of the Supreme Court that all three branches of the Muscogee (Creek) Nation, Executive, National Council and Judicial, have the right to employ legal counsel to assist that branch in accomplishing their responsibilities under our Constitution, and that they must do so within the confines of the funds appropriated to the various branches of our government. The attorney for the Judicial Branch, Executive Branch or National Council is not the tribal attorney or attorney general, but merely represents the governmental branch employing the attorney. The tribal attorney or attorney general, however, represents the entire Muscogee (Creek) Nation and as such must have a contract approved by the National Council.”).

42. *See* *Pearsall v. Tribal Council*, 6 Am. Tribal Law 116, 118 (Confederated Tribes of the Grand Ronde Community Tribal Court 2005).



enjoying sufficient resources to hire full-time counsel and for exercising their sovereignty in a manner that promotes strong self-governance. That said, serving as in-house counsel is an incredibly demanding job riddled with ethical complications and professional responsibility traps.<sup>43</sup> All attorneys know that a client is entitled to counsel of choice and that the client may terminate the attorney–client relationship for any reason or no reason at all, in general. In-house counsel confronted with conflicts of interest in tribal governance issues may have no legal leg to stand on.

### 1. Tribal Political Pressures

The first thing in-house counsel must be clear about is who or what is the client, and who or what speaks for the client. Consider the GTB leadership structure, where the tribal chair is not expressly authorized by the constitution to supervise employees or to direct counsel for the tribe; nor are the individual members of the tribal council.<sup>44</sup> Under the plain language of the GTB constitution, only the tribal council may act, and the council may only act through resolution or ordinance.<sup>45</sup> Certainly the tribal council could establish a more efficient leadership structure by statute through delegating power by ordinance, resolution, or motion; but there is no established line of authority other than the constitution (except in the case of the tribe’s § 17 corporation, which is governed by the board established by its charter and retains its own in-house counsel<sup>46</sup>). The general counsel’s office—directed almost exclusively by GTB member John Petoskey since the 1980s—has, by virtue of practice and intense discipline, required the tribal leadership to act only in accordance with the terms of the constitution, and therefore requires valid tribal council instruction before taking action. There, the tribal client is the tribal council.

My experience as in-house counsel at GTB was that individual tribal councilors (and tribal government employees as well) attempted to direct legal department staff to take action with some regularity. Importantly, GTB tribal councilors were full-time employees of the tribe in their elected capacities, giving them the time and opportunity to interact with the legal department with a

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43. See Claudeen Bates Arthur, *The Role of the Tribal Attorney*, 34 ARIZ. ST. L.J. 21, 23-25 (2002); Carpenter & Wald, *supra* note 13, at 3109-13.

44. See GRAND TRAVERSE BAND CONST. art. III, § 3; *id.* art. IV, § 1.

45. See *id.* art. III, § 5(e).

46. 15 Grand Traverse Band Code §§ 239, 247.

great deal of frequency.<sup>47</sup> Because of the general counsel's leadership and clarity about the attorney-client relationship, individual employees of the legal department (lawyers and non-lawyers both) knew to report these interactions with individual council members to the general counsel, who would then seek full-council authority and direction on the matter. This practice largely prevented individual councilors from interfering with legal department operations absent valid tribal council action. For junior attorneys and for staff, the general counsel's presence served as important insulation from the daily politics of the tribal government.<sup>48</sup>

GTB's legal department culture may have been an anomaly and does not completely control for the single biggest problem for in-house counsel—their lack of insulation from the political activity of elected tribal leaders. Federal and state government attorneys, excepting political appointees, are usually insulated from the political activity of the elected leaders in those governments. Federal and state governments have far more lawyers and layers of bureaucratic distance between elected officials and political appointees than tribal governments do. While there are occasional breakdowns in that relationship—the firing of several Indian country United States Attorneys during the Bush Administration in 2006 may

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47. During this same period, the tribal council and the tribal court, which is constitutionally independent from tribal council, engaged in a difficult dispute over the authority of the council over tribal court employees. *Grand Traverse Band of Ottawa and Chippewa Indians Tribal Council v. Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court Administrator*, No. 02-09-1351-CV, 2003 WL 25838644 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court, May 22, 2003) (adopting Memorandum of Understanding regarding tribal court hiring practices).

48. Of course, a few years after I left the GTB legal department, the tribal council terminated the general counsel after twenty-three years because of what appeared to be a worsening relationship between the legal department and the tribal council. See Matthew L.M. Fletcher, *John Petoskey's Legal Career (So Far....) – Updated*, TURTLE TALK (Feb. 3, 2010), <http://turtletalk.wordpress.com/2010/02/03/john-petoskeys-legal-career-so-far/>; Eric Carlson, *Attorney Who Guided Tribal Growth Loses His Job*, LEELANAU ENTERPRISE (Feb. 4, 2010), <http://turtletalk.files.wordpress.com/2010/02/leelanau-enterprise-article-on-jp.pdf>; Brian Upton, Letter to the Editor, *Attorney Was Valued*, TRAVERSE CITY RECORD-EAGLE (Feb. 11, 2010), <https://turtletalk.wordpress.com/2010/02/11/brain-upton-letter-re-john-petoskey/>. A few years after that, the tribal council re-hired the general counsel—only now he serves not as an employee, but as an independent contractor through his law firm.

be an example<sup>49</sup>—those breakdowns are relatively rare. Not so in Indian country, where there are almost no protections for in-house counsel from the political actors in tribal government. Imagine the conflict of interest endured by Keweenaw Bay Indian Community tribal in-house counsel Joseph O’Leary, who was charged with investigating possible kickbacks in a gaming scheme involving a tribal elected official.<sup>50</sup> There, the tribal official attempted to argue in federal court later that O’Leary’s testimony in the criminal case was attorney-client privileged.<sup>51</sup> Some enterprising tribal lawyers have negotiated for contractual protections in the event the tribal client terminates their employment, but even those protections are often illusory.<sup>52</sup>

At Pascua, I experienced a difficult scenario involving the relationship between the tribal client and the tribal attorney’s office.<sup>53</sup> As noted above, there were four tribal executive officers who were also members of the tribal council at Pascua. Politics being politics,

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49. See generally U.S. DEPT. OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (Sept. 2008), <https://oig.justice.gov/special/s0809a/final.pdf>.

50. See *United States v. Dakota*, 197 F.3d 821, 824-25 (6th Cir. 1999) (“Tribal attorney Joseph O’Leary testified to conversations with Dakota which took place in 1991. After O’Leary questioned Dakota about kickbacks, Dakota asked him whether it would be appropriate if Dakota were to obtain a share of the profits generated by installing certain video lottery devices on the reservation. O’Leary advised him twice that he would need to make a disclosure to the tribal council before they voted to install such devices.”).

51. See *id.* at 825 (“The only evidence Dakota submitted in support of his claim of privilege was the affidavit of O’Leary, which is insufficient to support the claim of attorney-client privilege. O’Leary was counsel for KBIC, and his affidavit does not establish that Dakota contacted O’Leary for legal advice as an individual as opposed to seeking advice from O’Leary in his position as tribal attorney. The district court correctly ruled that Dakota’s conversations with O’Leary were not protected by the attorney-client privilege.” (footnote omitted)).

52. The experience of former Little River Band attorney Joseph Martin, who apparently negotiated for contractual protections, may be an example of how the contractual protections did little to protect him. *Little River Band of Ottawa Indians Tribal Council v. Little River Band of Ottawa Indians Tribal Ogema*, 8 Am. Tribal Law 287 (Little River Band of Ottawa Indians Tribal Court 2009). The tribal and state court litigation, and the proceedings before the Illinois state bar disciplinary commission, that followed his termination is another story for another time. See generally Complaint, In the Matter of Martin, No. 2011PR00048 (Hearing Board of the Illinois Attorney Registration and Disciplinary Commission, May 20, 2011), <https://turtletalk.files.wordpress.com/2011/06/ardc-complaint1.pdf>.

53. In recent years, the tribe reorganized the tribal attorney’s office into the Office of Attorney General. See 2 Pascua Yaqui Tribal Code §§ 2-1-10 to 2-1-80.

several tribal members targeted the executive officers for recall.<sup>54</sup> In normal, day-to-day operations, because of the chair's duties as chief executive, the tribal attorney's office took direction on legal matters from the chair. But since the chair faced the possibility of a recall election, the tribal attorney's office faced a series of potential conflicts of interest. The tribal attorney represents the tribe, of course, and if a conflict between tribal entities arises (say, for example, the human resources department and the health clinic management), the chair—presumably in consultation with the tribal council as a whole—would make the call on which position the tribe would take. In this instance, however, the tribal entity seeking legal advice was the election board.<sup>55</sup> Potentially, the election board could exercise its discretion to initiate a recall election involving the chair, forcing in-house counsel to face the possibility that the chair might order the tribal attorney to take action to stop the recall. President Nixon put the Department of Justice in this position during the Watergate era in the infamous Saturday Night Massacre.<sup>56</sup>

Luckily, the chair, Mr. Benito F. Valencia, was a man of impeccable integrity and ethics and probably would not have imposed his own self-interest on in-house counsel. In any event, the conflict did not arise as it could have, relieving the tribal attorney's office from advising the tribal client against the personal interests of the chair. Even so, the tribal council, after the next regular election in which Chairman Valencia did not retain his chairmanship, terminated the contracts of the lead and deputy tribal attorneys about a year later.

There are two ways out of a position as in-house counsel for an Indian tribe—resignation and termination. In the event the tribal client demands advice or legal action that conflicts with in-house counsel's professional responsibilities (or individual ethics), the Saturday Night Massacre scenario may come to pass, forcing counsel to either resign or be terminated from employment. Similarly, in-house counsel pushing back against the wishes of the tribal council on the grounds that the goals have little or no chance of success, or are simply bad public policy, face the same dilemma. As Carpenter and Wald put it: “[T]ribal clients are not insulated from the dominant

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54. CONST. OF THE PASCUA YAQUI TRIBE art. X, § 1.

55. See 2 Pascua Yaqui Tribal Code §§ 4-3-10 to 4-3-70.

56. Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit: President Abolishes Prosecutor's Office; FBI Seals Records*, WASH. POST, Oct. 21, 1973, at A01, <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>.

culture of aggressive individualism and narrow pursuit of self-interest, let alone America's love affair with litigation, such that a tribal attorney who does bring these issues to the attention of clients may be dismissed or ignored."<sup>57</sup> That Sword of Damocles hangs over many a tribal attorney due to pressure to conform to the demands of the tribal client.

Individual tribal members may also attempt to influence or even issue direction to in-house tribal counsel. In my experience, tribal members are often under the misperception that they are the clients of the "tribal attorney" and may ask for representation.<sup>58</sup> If the tribal client authorizes and directs in-house counsel to represent individual tribal members, then it may be permissible. Individual tribal members may also focus their ire on in-house counsel.<sup>59</sup> As Ken Bellmard, veteran in-house counsel, wrote years ago:

[A]s a tribal attorney half the tribe thinks you are a devil. This was true in regard to my employment with the Absentee-Shawnee Tribe. A tribal attorney is essentially a political appointee and when politics change you are likely to be an early casualty in any political fallout. You are also likely to become a pawn in any power struggle that may be unfolding between Tribal elected officials.<sup>60</sup>

In my own experience, a GTB council member demanded to know why the tribe should sign on to a tribal-state tax agreement I had helped negotiate on behalf of the tribe.<sup>61</sup> The tax agreement included an "agreement area" that stood in the place of reservation boundaries for purposes of identifying lands, activities, and individuals eligible for the benefits of the tax agreement.<sup>62</sup> The council member demanded to know why the legal department instead did not sue the State of Michigan for a decision that the tribe's six-

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57. Carpenter & Wald, *supra* note 13, at 3137.

58. See Dale T. White, *Tribal Law Practice: From the Outside to the Inside*, 10 KAN. J.L. & PUB. POL'Y 505, 509 (2000) ("Because you are on-site, tribal members sometimes assume that you are available to work on their personal issues. As a matter of policy, the tribe should restrict this type of representation.").

59. Cf. *Diver v. Peterson*, 524 N.W.2d 288, 292 (Minn. Ct. App. 1995) (dismissing defamation suit against tribal in-house counsel by tribal members who had been fired from tribal employment).

60. Ken Bellmard, *Endeavoring to Persevere: Becoming and Being a Tribal Attorney*, 9 KAN. J.L. & PUB. POL'Y 752, 757 (2000).

61. See generally Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1 (2004).

62. See *Tax Agreement Maps*, GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS, <http://www.gtbindians.org/taxmaps.asp> (last visited Nov. 2, 2015).

county service area constituted the tribe's reservation, perhaps thinking that since the tribe had been part of successful treaty rights cases in years past that the tribe would be assured of victory now.<sup>63</sup> The tribe's treaty-established reservation boundaries, at their furthest extent, never extended to what is now the six-county service area.<sup>64</sup> Had the tribe brought a suit to establish the six-county service area as the modern reservation, success would have been an uphill struggle.

Had the GTB council member sought a second opinion from outside counsel, outside counsel might have provided a different opinion, one potentially tainted with bullshit.

## 2. *Outside Counsel*

In-house counsel also faces pressures and conflicts from another direction—specialized counsel, usually in the form of outside counsel. Not all tribal clients assign to in-house counsel the obligation to supervise outside counsel, but typically entities like tribal governments organized in a corporate form rely upon in-house counsel to at least nominally supervise outside counsel's work. In my experience, the greater the experience of the in-house attorney, the more likely the tribal client is to require in-house counsel to supervise outside counsel. For example, as a new, inexperienced attorney with the Pascua Yaqui Tribe, I would have been at a loss to supervise outside attorneys with many more years experience as they prepared a fee-to-trust application for the tribe. Another example—for a brief period of time, I served as the (acting) lead attorney for the Hoopa Valley Tribe after my supervisor suddenly resigned after a spat with the tribal chairman. Outside counsel had represented the tribe through decades of litigation in federal court over the tribe's dispute with its neighbors as well as years of litigation over the water rights of the tribe.<sup>65</sup> Had the tribal council asked for my advice on the

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63. *E.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. Director*, Mich. Dept. of Nat. Res., 141 F.3d 635 (6th Cir. 1998), *cert. denied sub nom.* Twp. of Leland v. *Grand Traverse Band of Ottawa & Chippewa Indians*, 525 U.S. 1040 (1998); *cf.* *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

64. The 1836 and 1855 treaties established reservations in portions of Antrim, Leelanau, and Grand Traverse Counties, far smaller than the current six-county service area negotiated between the tribe and the Interior Department. *See generally* MATTHEW L.M. FLETCHER, *THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS* 2-55 (2012).

65. *E.g.*, *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 927 (2002); *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied sub nom.* *Karuk Tribe of Cal. v. United States*,

work of esteemed outside counsel, I would have had virtually no basis to render a judgment. Conversely, attorneys with twenty-plus years in-house like John Petoskey at GTB or Michelle Hansen at Suquamish had enormous experience and expertise supervising outside counsel, from litigation specialists to financing specialists to taxation specialists.

Regardless, even experienced in-house attorneys face doubts about their ability to supervise the work of legal specialists. In-house attorneys, while likely to be specialists on Indian law, are generalists. One study of corporate counsel found that outside firms routinely recommend work that might constitute a waste of the client's resources under the rubric of "business development" with the assumption that in-house counsel is sophisticated enough to check against wasted resources.<sup>66</sup> It is easy enough for outside counsel, once retained by a tribal client, to continually make recommendations on how to improve tribal governance through the drafting of tribal codes and policies—most tribes usually need that work done, but that kind of work is not worth billing three or four hundred dollars an hour, or more. Setting aside for a moment the assumption that in-house tribal counsel is "sophisticated" enough to push back against outside counsel's pressure to bill "business development" work, more important are the very real pressures on in-house counsel to accede to recommendations from outside counsel, as well as the time and resources in-house counsel needs to effectively push back.

In-house counsel that chooses to comply with a tribal client's demands that plainly violate the rules of professional responsibility is not my concern here; that is for the state disciplinary committees to consider.

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532 U.S. 941 (2001); *Shermoe v. United States*, 982 F.2d 1312 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993).

66. See Lerman, *supra* note 1, at 725 ("Adams acknowledged that the practice was deceptive, but urged that it was 'fair business development that everybody understands.' He pointed out that most of his firm's clients are corporations, and therefore the contact person is usually the client's general counsel. He felt that in-house counsel are quite sophisticated and realize that firms are always trying to get more business. Therefore, although the intent of this practice is deceptive (in that the firm attempts to convince clients that certain work will benefit them, when in fact it may not), Adams argued that the practice is justifiable because letters of suggestion usually do not actually deceive clients.").

### 3. *The Supreme Court Bar*

In the context of Supreme Court specialists, the incentives are slightly different and potentially much more complicated. It is well established that practice before the Supreme Court is highly specialized, and only a few attorneys can passably claim to be a member of the “Supreme Court bar,” those who have argued a large number of cases before the Court.<sup>67</sup>

The so-called “Supreme Court bar” often measures success simply by the number of oral arguments made by counsel. Supreme Court specialists benefit from serving as counsel of record and arguing a case in the Supreme Court more than general appellate specialists and other outside counsel who may argue a handful of Supreme Court cases in a career:

The boundaries of the Supreme Court bar are thus well defined. Indeed, there is a small, stable, and elite community that handles Supreme Court litigation on a regular basis. Juxtaposed to this elite is a larger, more fluid group of lawyers who have only passing contact with the Court. These are the inner and outer circles.

Importantly, sophisticated clients—the wealthy and powerful litigants—recognize the importance of this stratification. They appreciate the skills that lawyers in the inner circle possess and use those skills to secure advantages in access to the Court’s agenda.<sup>68</sup>

Experience matters in the Supreme Court, perhaps disproportionately so:<sup>69</sup> “[L]awyers ‘make a significant contribution to success in [Supreme Court] litigation.’ There is a correlation between written and oral experience before the Supreme Court and success there: attorneys who litigate before the Court more frequently than their adversaries ‘prevail substantially more often.’”<sup>70</sup>

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67. See generally Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008); Joan Biskupic, Janet Roberts & John Shiffman, *At America’s Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, REUTERS (Dec. 8, 2014, 10:30 AM), <http://www.reuters.com/investigates/special-report/scotus/>.

68. KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 201 (1993).

69. See generally Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995). See also Biskupic, Roberts & Shiffman, *supra* note 67 (“[A]n elite cadre of lawyers has emerged as first among equals, giving their clients a disproportionate chance to influence the law of the land.”).

70. Christine M. Macey, *Referral Is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical Obligations*, 22 GEO. J. LEGAL ETHICS 979, 982 (2009) (footnote omitted).



The Justices recognize names as well. Then D.C. Circuit Judge John G. Roberts noted the dramatic rise in repeat players—those attorneys who had argued more than one case before the Supreme Court—in Supreme Court litigation since 1980:

[There has been a] dramatic rise in the number of experienced Supreme Court advocates appearing before the Court, both in absolute terms and proportionately. That, in any event, was my impression, and I decided to test it by comparing the lawyers who argued in the 1980 Term and those who argued in the 2002 Term. In 1980, looking at oral arguments by non-federal government attorneys—that is, basically excluding the Solicitor General’s Office—fewer than 20 percent of the advocates had ever appeared before the Supreme Court before. In 2002, that number had more than doubled, to over 44 percent.

The change is even more dramatic if you look at what I will call experienced advocates, or recidivists—those with at least three previous arguments before the Court. In 1980, only 10 percent of non-Solicitor General arguments were presented by experienced counsel. In 2002, that number had more than tripled, to 33 percent. In 1980, only three lawyers outside the Solicitor General’s Office argued twice before the Court, out of some 240 argument slots for non-Solicitor General lawyers, accounting for 2.5 percent of the arguments. (For two of those three, it was their first and second arguments ever.) But in 2002, there were fourteen different non-Solicitor General repeat performers who argued at least twice—many more than twice—accounting for fully 24 percent of the non-Solicitor General argument slots, a tenfold increase.<sup>71</sup>

Veteran Supreme Court advocates might be willing to handle an appeal—even a doomed matter—for free because the advocate benefits in increased experience and cache for each case the advocate argues, even cases the client is almost certain to lose.<sup>72</sup> That the Supreme Court bar has the reputation of battering in-house counsel and other Supreme Court neophytes with offers to draft briefs and serve as counsel when the Court has granted certiorari<sup>73</sup> reinforces

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71. John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 75-76 (2005).

72. Macey, *supra* note 70, at 988 (“Because the Court hears relatively few cases in a term, elite Supreme Court advocates take on pro bono cases at little or no charge to bolster prestige and keep their Supreme Court practices large enough to impress paying clients.”).

73. *Id.* at 990 (“There are ‘many attorneys who not infrequently barrage lower court counsel, or the client directly, with offers to assist with a case at the Court.’ In fact, first-time Supreme Court advocate Rod Sullivan learned that cert had been granted in his client’s case when he received calls from lawyers offering to write the brief at no cost. Once cert has been granted, ‘litigants receive volumes of unsolicited information and numerous opinions regarding the abilities of their attorneys and the pros and cons of hiring a specialist.’” (footnotes omitted)).

the notion that experienced Supreme Court advocates are aggressive in advancing cases through the Supreme Court pipeline once the case reaches that point. Supreme Court advocates might be in the unique position of advising a tribal client (in line with or against in-house counsel's advice) to proceed with a strategy that benefits no one except the attorney.<sup>74</sup>

Moreover, political science studies support my view that a member of the Supreme Court bar may be incentivized to value candor to the Supreme Court over zealous advocacy. McGuire argues that members of the Supreme Court bar are, by definition, repeat players; their experience is valuable in terms of outcomes; and the Court values their experience because these lawyers are expected to provide the Court with the best information about a case:

Because of their long-term links, lawyers whose Supreme Court practices transcend the single case have considerable incentive to provide candor in both their briefs and oral arguments. This is certainly not to suggest that the Court, of necessity, resolves cases in favor of the more experienced (and presumably more trustworthy) counsel; if that were so, the solicitor general would never lose a case on the merits. What this approach does assume, consistent with our notions of the benefits associated with repeat player status, is that the greater the degree of previous experience a lawyer has in litigating before the justices, the greater his or her credibility and likelihood of success.<sup>75</sup>

To be frank, a member of the Supreme Court bar *wins* even if the client *loses*. Even more, a member of the Supreme Court bar may feel incentivized to concede highly divisive positions at oral argument in order to preserve the lawyer's credibility before the Court in future cases, likely cutting against the attorney's obligation to be a zealous advocate for the tribal client.<sup>76</sup> Tribal interests are

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74. Cf. Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 720 (1987) ("Grasping neither the true nature of their clients' problems, nor the contours of the solutions that would best meet their clients' wishes, lawyers may wield a power that benefits no one so much as themselves.").

75. McGuire, *supra* note 69, at 189.

76. This is a question for a different paper, but my reading of the oral arguments in *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014), and *United States v. Navajo Nation*, 556 U.S. 287 (2009), by counsel for the tribes possibly fits this bill. In *Bay Mills*, counsel first conceded that the State of Michigan could utilize its law enforcement authority to arrest tribal officials, tribal employees, and casino patrons on tribally owned lands. Transcript of Oral Argument at 32-33, *Bay Mills*, 134 S. Ct. 2024 (No. 12-515). Second, counsel conceded that his client's position on immunity would allow any tribe to open and operate a casino anywhere in the United States. *Id.* at 44. The first concession, consistent with a strategy designed to win the case through preserving immunity at all costs, was the

among the least favored constituents of the Supreme Court, and members of the Supreme Court bar have less to lose when representing tribal interests and less to gain when tribal interests win.

Of course, this theory might be entirely incorrect and inapplicable to the best Supreme Court advocates. But the incentives to underplay tribal clients appear to be real, and in-house counsel should be aware of them. And so should tribal clients.

#### 4. “Zealous Advocacy” and In-House Counsel

At Federal Indian Bar 2013, I argued that the greatest bulwark against the threat the Supreme Court poses to tribal interests is in-house counsel, with an assist from tribal court judges. My view places in-house counsel at the forefront of Indian country disputes. In-house counsel is part of the decision-making team at numerous critical decision points—when a dispute arises; the strategy for resolving the dispute; the strategy for approaching a dispute in litigation; and finally, how and whether a dispute should be adjudicated in the appellate courts and in the United States Supreme Court.

Consider a dispute between a local township and a tribe over the township’s assessment of a personal property tax on the tribe’s copy machine vendor, which the vendor passes on to the tribe. The tribe leases a copy machine from a national company, say Xerox.

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acceptance of a position that—I believe it is fair to say—no Indian tribe would accept if given the chance to deliberate. The second concession was perhaps simply a strategic blunder, especially as it came as an answer to Justice Alito’s question that apparently sought to flesh out a limiting principle to tribal immunity in similar cases. By “strategic blunder,” I mean the concession might influence Justices to rule against the tribe on the merits; but had counsel attempted to take an alternative position with the Court on that point, counsel’s credibility to the Court takes a tumble. Counsel might lose the *Bay Mills* case by answering so forthrightly but gains credibility before the Court. Similarly, counsel for the Navajo Nation in 2009 made several jokes, including one about needing a haircut to explain why he used a barber shop hypothetical, Transcript of Oral Argument at 28, *Navajo Nation*, 556 U.S. 287 (No. 07-1410) (no one laughed), repeated jokes about the testimony of former Interior Secretary Udall, *id.* at 40-41, 46 (which did elicit laughter), and one joke that appeared to be about the unusual character of this case—that the Navajos lost before the Court previously, and came up with a new theory for a second shot at the prize, *id.* at 40 (more laughter). Openly joking about the weaknesses in a client’s position preserves and perhaps privileges the advocate’s place in the Supreme Court bar while distinguishing himself from the tribal client. A few years later, the same advocate prevailed on behalf of a related client in *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2185, 2195 (2012), so perhaps the strategy can pay off for repeat tribal players in Supreme Court litigation.

The township taxes the company in accordance with state law that grants it the authority. But the tribe only uses the copier for governmental purposes, say for the exclusive use of the tribe's legal department. Each year the tribe pays hundreds of dollars (and more in some instances) to the township, in effect, for the right to use a copier for its legal work. Sovereignty warriors should be outraged. Sue the township in federal court, and then let the federal appellate court sort it out a few years down the road? Assuming the tribe wins there, the township—now bolstered by the Attorney General of the State—petitions for a writ of certiorari. Indian country observers know where this is going.<sup>77</sup> Indian country tax protesters fare no better in the Supreme Court than other tax protesters. Was it worth it? Probably not. Maybe the better play is to negotiate. At GTB, the tribal government might be able to persuade the local government not to tax the vendor because the tribe shares gaming revenue with local units of government.

Tribal in-house counsel may disagree with my assessment. Many attorneys representing Indian tribes from within may not be well situated to reach conclusions about how a small dispute—such as between a county official and a tribal member—can grow into a Supreme Court matter.<sup>78</sup> Many in-house tribal attorneys may not view it as their obligation to attempt such considerations or will be unwilling to second-guess the tribal council except where the tribal council seeks to engage in flatly illegal action.

Zealous advocacy from sovereignty warriors spearheaded by tribal client-centered representation is certainly reasonable and well within the rules.<sup>79</sup> But in too many cases, zealous advocacy renders a disservice to Indian country. As Carpenter and Wald point out in the context of state and federal prosecutors, zealous advocacy and government advocacy is a poor fit—a government lawyer's overriding goal is to seek justice first.<sup>80</sup> To be sure, "justice" is not

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77. Cf. *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 115 (2005).

78. E.g., *Bryan v. Itasca Cty.*, 426 U.S. 373, 375 (1976); see also Kevin K. Washburn, *The Legacy of Bryan v. Itasca County: How an Erroneous \$147 County Tax Notice Helped Bring Tribes \$200 Billion in Indian Gaming Revenue*, 92 MINN. L. REV. 919 (2008).

79. See generally Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006).

80. See Carpenter & Wald, *supra* note 13, at 3146. Former Solicitor General Seth Waxman, following a long line of SGs, made this explicit in 1998. Seth P. Waxman, Solicitor Gen. of the U.S., Address to the Supreme Court Historical Society: Presenting the Case of the United States as It Should Be: The

really what prosecutors are after, and in-house counsel rarely serves as tribal prosecutors, but I am in broad agreement with Carpenter and Wald that “effective representation might require, at times, not narrow zealous advocacy but tentative and mindful facilitation.”<sup>81</sup> They point to the efforts of the Onondaga Nation and its counsel as an example of how zealous advocacy can be tempered with facilitation:

[O]ne might reimagine the conversation between a tribal nation and its lawyers. Rather than merely advising the client about the Supreme Court’s view of Indian rights (and the likelihood of losing most cases), the lawyer might listen carefully to the tribal leaders’ description of the interests and goals associated with rights claims, and then advise the client accordingly. As one example, the Onondaga Nation of New York is working with its lawyers to resolve historic land claims, but rather than focus purely on tribal rights, it has identified objectives including the clean-up of local natural resources and restoration of relationships with non-Indian neighbors. At the insistence of tribal leaders, the Onondaga land-claim complaint drafted by attorneys Joe Heath and Curtis Berkey calls for “healing of the land and water . . . with all people who live within the Onondaga original territory.” While still pursuing litigation, the Onondaga Nation’s lawyers are working on a strategy that includes community meetings, relationship building, and a discussion of shared interests.<sup>82</sup>

I have argued, and will continue to argue, that litigation is a critical element to improving Indian country governance by the three sovereigns.<sup>83</sup> But the adversarial process is a poor process with which to improve governance—the winner-take-all scenario guarantees losers, and that result is simply unacceptable in good governance.

However, this paper is not about how in-house counsel and the tribal client can come together to engage in nation building through mutual respect, cooperation, and facilitation. This paper is about bullshit, and the threat bullshit poses to nation building.

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Solicitor General in Historical Context (June 1, 1998) (“The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client’s chief business is not to achieve victory, but to establish justice.” (quoting Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General’s Office*, 41 A.B.A. J. 229, 229 (1955))).

81. Carpenter & Wald, *supra* note 13, at 3147.

82. *Id.* at 3147 (footnotes omitted).

83. See Matthew L.M. Fletcher, Kathryn E. Fort & Nicholas J. Reo, *Tribal Disruption and Indian Claims*, 112 MICH. L. REV. FIRST IMPRESSIONS 65 (2014), [http://repository.law.umich.edu/mlr\\_fi/vol112/iss1/8](http://repository.law.umich.edu/mlr_fi/vol112/iss1/8).

## II. BULLSHIT

This Part details how the vulnerability of in-house counsel to tribal politics, coupled with their potential inability to adequately supervise outside counsel, can create conditions that severely compromises counsel's ability to deal with bullshit.

### A. The Goals of the Tribal Client

Most modern American Indian tribal leadership structures have changed dramatically from traditional or customary leadership systems. Modern tribal leaders generally are elected in tribal elections, a much different process for leadership selection than the processes used by traditional tribal communities. For example, the nineteenth century Odawa and Ojibwe leaders who spoke for the various tribal bands—the *ogimaag* or *ogemuk*—during treaty negotiations were not selected because they won a majority vote of the adult members of their communities; the communities selected them (one hopes) because they appeared to possess the relevant skill set needed to negotiate an acceptable treaty.<sup>84</sup> During treaty times, the Anishinaabeg did not vest leadership in individuals in the same way as a modern elected leader, who is legally entitled to sit for an entire term of years; instead, treaty-era Anishinaabe communities could (and did) strip *ogimaag* of leadership summarily and, in the case of a Grand River Odawa *ogema*, possibly murder a leader for decisions not supported by the community.<sup>85</sup> The *ogema* might have lied, bluffed, or bullshitted his or her way into a leadership position, but once the tribal community realized it, the community could easily call out the *ogema* and terminate the leadership.<sup>86</sup>

Some modern Indian tribes are at least partially governed by the collected body of tribal members, usually called a general council. For example, the Suquamish Tribe—meeting as a collected body of the membership—voted in favor of marriage equality, a vote that influenced the elected tribal council to enact a marriage equality statute.<sup>87</sup> Another example is the initial approval by the Bay Mills Indian Community leadership of the 1985 consent decree that

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84. See FLETCHER, *supra* note 64, 13-17 (2012).

85. See *id.* at 16.

86. E.g., ANTON TREUER, *THE ASSASSINATION OF HOLE IN THE DAY* (2011).

87. Steven Gardner, *Suquamish Tribe Approves Same-Sex Marriage*, KITSAP SUN (Aug. 1, 2011, 7:13 PM), <http://www.kitsapsun.com/news/2011/aug/01/suquamish-tribe-approves-same-sex-marriage/#axzz2qfQaE1WI>.

concluded the gillnetting portion of the *United States v. Michigan* litigation, only to be reversed by the general council.<sup>88</sup> In some ways, a general council replicates traditional tribal governance, which one could characterize in modern parlance as popular democracy, but modern general councils rarely replace or supplant the decisions and positions of elected tribal leaders.

Importantly, the modern elected leaders serve as the face of the modern tribe and are empowered to announce and implement the position of the tribe in court and elsewhere. Whatever the structure and duties of the tribal leadership, it is the leadership that represents the tribe in court, at the negotiating table and elsewhere—the leaders are the tribal client for the purpose of the attorney–client relationship.

Elected tribal government leaders are politicians and primed to espouse bullshit. Moreover, if elected tribal leadership agrees on a bullshit legal or political position and the leadership speaks for the tribe, then the tribe is espousing bullshit. Consider the purchase of land in Vanderbilt, Michigan by the Bay Mills Indian Community in 2010. Local news reports stated that there were rumors the tribe had plans to open a casino there, but tribal leaders denied the rumors and even stated the land would be used for treaty hunting purposes:

While rumors have circulated that the tribe may choose to open a casino on the land, leaders of Bay Mills said they will use the land for hunting purposes.

Tribal leaders said they have been looking for a parcel of land for more than 10 years and the current economic climate allowed the tribe to buy the property at a reasonable price. Leaders have not prepared any trust application in regards to the site.

“It’s no secret we have wanted to be a part of the community for a long time,” said BMIC Tribal Chairman Jeff Parker. “We have nothing to hide, our trucks are parked right outside the building. We own it and are currently working to make the structure functional.”

The tribe has been hunting elk in the region since 2007. The tribe is also in talks with private landowners to buy large tracts of land for hunting purposes.<sup>89</sup>

But just a few days later, the tribe opened the doors on a casino on the Vanderbilt parcel.<sup>90</sup> Were the references to elk hunting

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88. See *United States v. Michigan*, 12 Indian L. Rep. 3079, 3079 (W.D. Mich. 1985).

89. Matthew L.M. Fletcher, *Bay Mills Buys Land in Vanderbilt*, TURTLE TALK (Oct. 26, 2010), <http://turtletalk.wordpress.com/2010/10/26/bay-mills-buys-land-in-vanderbilt/>.

bullshit? Well, perhaps not, in that maybe the Bay Mills leadership initially intended to use the land for the exclusive purpose of facilitating elk hunting. In the press release, the tribe again mentions elk hunting but now in the context of the tribe's connection to the area: "Tribal members are familiar with the Vanderbilt area as they have been hunting elk in the region since 2007, exercising off-reservation treaty rights established with the 2007 Inland Consent Decree."<sup>91</sup> Now elk hunting is in the mix, but seemingly in a different manner than originally implied. Taking these two statements together, one can reach a conclusion that they are bullshit, or perhaps evasion—a nuanced form of bullshit.<sup>92</sup>

Concluding that the statements of Bay Mills leaders were bullshit is irrelevant to the thesis of this paper. What is relevant is that the statements of the tribal leaders *could be and appear to be* bullshit, and these statements are examples of how tribal leaders *might* bullshit and how a tribal legal or political position itself, therefore, can be bullshit.

Tribes like the Bay Mills Indian Community are located far from a large metropolitan area that can serve as a profitable if not lucrative gaming market. In my view, it is perfectly justifiable for Indian tribes to seek the best gaming market possible—federal law arguably encourages tribes and states as their business partners to utilize their sovereignty for this purpose<sup>93</sup>—but to do so at the expense of other tribes is less justifiable.<sup>94</sup> A few weeks after opening the casino in Vanderbilt, the tribe acknowledged that it planned to open a much larger casino in Port Huron, Michigan if the legal

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90. Press Release, Shannon Jones, Bay Mills Indian Cmty. (Nov. 3, 2010), <http://turtletalk.files.wordpress.com/2010/11/bmic-casino-press-release.pdf>.

91. *Id.*

92. See Thomas L. Carson, *Lying, Deception, and Related Concepts*, in *THE PHILOSOPHY OF DECEPTION* 153, 186 (Clancy Martin ed., 2009).

93. See Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 *HARV. J. ON LEGIS.* 39, 40 (2007); see also *id.* at 63 (describing the Seneca Nation and the State of New York's collective and cooperative efforts to expand off-reservation gaming opportunities).

94. The Little Traverse Bay Bands of Odawa Indians alleged that the Bay Mills tribe's casino directly siphoned off profits from the Little Traverse casino. See Brief in Support of Motion for Preliminary Injunction at 3, *Little Traverse Bay Bands of Odawa Indians v. Bay Mills Indian Cmty.* (W.D. Mich.) (No. 1:10-cv-01278-PLM), <http://turtletalk.files.wordpress.com/2010/12/2010-12-21-brief-in-support-of-preliminary-injunction.pdf>. That case was later consolidated with *Michigan v. Bay Mills Indian Cmty.*, No. 1:10-cv-01273-PLM (W.D. Mich.) (issuing injunction against Bay Mills), *rev'd*, 695 F.3d 406 (6th Cir. 2012), *aff'd*, 134 S. Ct. 2024 (2014).



theory behind the Vanderbilt casino survived challenges from the State of Michigan and the Little Traverse Bay Bands of Odawa Indians.<sup>95</sup> As the editorial board of the Port Huron paper noted, the tribe had “little to lose and much to gain” by opening a casino.<sup>96</sup> Importantly, the legal theories supporting the opening of the casino are not bullshit, but the statements made in the press by tribal leaders could be interpreted and identified as bullshit.

Organizational clients can place in-house counsel in very difficult positions. Lawyers anywhere can relate to a client who seeks a certain outcome—tax exemptions, regulatory relief, purchase of an asset for less than half the market value, to name just a few examples—and to find a way legally, any way at all. Lawyers with clients like these may be forced to consider how far they can go before they run up against the limitations of the code of professional responsibility.

Tribal in-house counsel’s vulnerability to unreasonable, irresponsible, and even alarming demands from the tribal client is exacerbated by the fact that it often takes a special kind of person to seek an in-house counsel position for an Indian tribe. Many attorneys seeking in-house counsel positions may be, in the words of more than one former tribal chair, “sovereignty warriors.”<sup>97</sup> Sovereignty warriors are dedicated to the cause of justice for Indian tribes and individual Indians.<sup>98</sup> They are knowledgeable about the history of federal and state government actions—usually engineered by other lawyers—that dispossessed Indians and tribes of their culture, language, lands, and resources.<sup>99</sup> They may also be knowledgeable of incidents in the modern era where tribal counsel exploited tribal clients.<sup>100</sup> Tribal leaders that promise dramatic advances in tribal

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95. Matthew L.M. Fletcher, *1500-Slot Casino Planned for Port Huron if BMIC Vanderbilt Casino Succeeds*, TURTLE TALK (Nov. 28, 2010), <http://turtletalk.wordpress.com/2010/11/28/1500-slot-casino-planned-for-port-huron-if-bmic-vanderbilt-casino-succeeds/>.

96. *Id.*

97. I borrow from Rob Porter. See Robert B. Porter, *Tribal Lawyers as Sovereignty Warriors*, 6 KAN. J.L. & PUB. POL’Y, no. 4, 1997, at 7.

98. *Id.* at 9-10.

99. *Id.* at 9-11.

100. *E.g.*, *Ho-Chunk Mgmt. Corp. v. Fritz*, 618 F. Supp. 616, 618 (W.D. Wis. 1985) (“There is nothing in the record to suggest that on or before July 9, 1983 Mr. Koberstein disclosed that there was even a potential conflict of interest between his duties as Tribal attorney and his position as president and sole stockholder of Ho-Chunk Management. By his failure to disclose the conflict prior to execution of the Agreement by the WWBC, Koberstein took unfair advantage of the Tribe at a time when it was most susceptible to his influence. It is this fundamental unfairness

fortunes might or might not be bullshitting in order to get elected, but sovereignty warriors are for real. And in my experience, sovereignty warriors do not want to be the ones to advise tribal clients that a goal is unattainable or extremely costly to attain.

In sum, the tribal client, embodied by elected tribal leaders who quite possibly employ large pots of bullshit to secure election, may very well lead an Indian tribe down a very treacherous political and legal road. In-house counsel, in the event the tribal electorate does not act to curb tribal leaders, can find himself or herself in the unenviable position of standing as the last barrier to a tribal client proceeding on a legally indefensible position. In these circumstances, should they ever arise, outside counsel can be the best friend or the worst enemy of in-house counsel.

## B. The Goals of Outside Counsel

Outside counsel that represents or seeks to represent tribal clients are typically, but not always, structured as for-profit law firms. There may be the occasional nonprofit entity like the Native American Rights Fund or perhaps lawyers doing pro bono work, but in the large majority of instances, outside counsel is profit-seeking. There may be the occasional firm that dedicates its mission to representing tribal clients and to related social justice measures, but a for-profit firm remains a profit-seeking firm. And there can be no profits without clients, putting enormous pressure on law firm attorneys to impress potential clients and exact maximum revenue from the client.<sup>101</sup>

As noted earlier, the tribal client may expressly direct in-house counsel to supervise the work of outside counsel. The tribal client might also expressly seek advice from outside counsel as a countermeasure to advice by in-house counsel the tribal client does not find satisfactory.

Despite the decent likelihood that in-house counsel serves as the ostensible supervisor of outside counsel, outside counsel enjoys a series of enormous advantages over in-house counsel. First, outside counsel is usually specialized counsel. For example, outside counsel may have twenty-five years experience litigating and negotiating

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which the Tribe later recognized and acted to eliminate.” (quoting Letter from Earl Barlow, Minn. Area Dir. for the Bureau of Indian Affairs (May 18, 1984)).

101. See Lerman, *supra* note 1, at 662 (“Impressing prospective clients is a prerequisite to successful private law practice. In most types of practice, lawyers face considerable pressure to bring in new clients.”).

Indian taxation issues with the Internal Revenue Service. Second, outside counsel usually will have significantly larger resources to access than in-house counsel. Outside counsel may be part of a large, full service law firm that can handle every potential angle to a dispute with an experienced specialist, perhaps ranging from intellectual property to federal appellate litigation to governmental ethics to any number of other specialties. Third, outside counsel has access to a greater and more relevant network of connections, arguably useful in lobbying a tribe's position to federal and state political and administrative entities. There are other advantages in this vein as well, ranging from superficial assets like degrees from elite law schools and better suits to disturbing assets like race or gender.<sup>102</sup> Fourth, neither the tribal client nor in-house counsel might have the relevant information needed to assess whether outside counsel's advice is "irresponsible."<sup>103</sup>

However, the biggest advantage of all is the unique vulnerability of in-house counsel to the tribal client. Couple that advantage with the possibility that outside counsel will employ bullshit and confirm that the tribal client's goals are attainable, whether or not the goals are reasonable, in-house counsel may be put in an impossible situation.<sup>104</sup>

The biggest area of in-house counsel vulnerability to outside counsel may be in the area of Supreme Court practice. Perhaps nowhere else is experience in that specific court more valuable and palpably critical to success.

### C. The Stakes

Tribal litigation involves high stakes. Occasionally, the legal, political, and cultural viability of the tribal interest is at stake. Carpenter and Wald point out that tribal litigation has been wrought with risk, beginning with the origins of Indian law:

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102. Yes, in my experience, the tribal client may doubt the advice of an in-house counselor who is a person of color or a woman and seek a second opinion from a lawyer that is not a member of a racial, gender, or sexual minority.

103. Lerman, *supra* note 1, at 682-83 ("Clients who do not have accurate information about their lawyers' qualifications or about what the lawyers have or have not done on their behalf are in a poor position to evaluate the services that they are getting or to get better services if their lawyers are incompetent or irresponsible. This lack of information is one reason why market forces are so ineffective in helping to maintain high standards in law practice." (footnote omitted)).

104. The sovereignty warriors may be as susceptible to outside counsel's bullshit as the tribal client, but we will leave aside for now.

As the *Cherokee* cases begin to suggest, the relationship between Indian tribes and their lawyers has long implicated issues of the greatest magnitude. By most accounts, the Cherokees had an excellent lawyer in these cases. Additionally, as described in greater detail below, the Cherokee leaders went into the litigation with their eyes wide open about the strategy, believing that an appeal to the courts was the best remaining chance of preserving the Cherokee Nation, particularly after having already petitioned the executive and legislative branches for relief.<sup>105</sup>

As is well known, the Cherokee Nation largely prevailed in the *Worcester v. Georgia*,<sup>106</sup> only to be subjected to the genocide of the Trail of Tears, “a devastating experience during which 4,000 people, or approximately one-quarter of the population, died.”<sup>107</sup>

Modern tribal interests face a terribly difficult path in litigating their rights in federal and state courts. The United States Constitution contains no express provisions protecting or outlining tribal sovereignty. As a result, tribes face difficult hurdles in litigating against federal and state governments over governance issues such as taxation, criminal jurisdiction, environmental regulation, and historic claims. As Carpenter and Wald (channeling Jim Anaya) point out, the law is designed to work *against* tribal interests as a structural matter:

As S. James Anaya wrote with respect to his work in *Nevada v. Hicks*, tribal lawyers face a number of challenging conflicts questions in tribal representation. As Anaya put it, “[H]ow do we advise our Indian or tribal clients when we see Federal Indian Law, which was once understood to be a friendly body of doctrine, being emasculated by the federal courts to the detriment of tribal interests?”<sup>108</sup>

Moreover, tribal lawsuits—especially those that reach the Supreme Court—tend to result in rules with a broad reach. In fact, settling a question that has and may recur in similar circumstances is one of the roles of the Supreme Court. In Indian law, the broad reach of these rules may extend to every one of the federally recognized tribes.<sup>109</sup> Carpenter and Wald point out that Indian law’s “cause lawyers”—for example, the litigators and their advisors that

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105. Carpenter & Wald, *supra* note 13, at 3098 (footnote omitted).

106. 31 U.S. 515 (1832).

107. Carpenter & Wald, *supra* note 13, at 3098.

108. *Id.* at 3136 (footnote omitted) (quoting S. James Anaya, *The Ethical Dilemma of Doing Federal Indian Law*, Paper Delivered to the Federal Bar Association’s Annual Indian Law Conference (Apr. 4-5, 2002)).

109. *Cf.* Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 *HAMLIN L. REV.* 543 (1985); Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 *HARV. L. REV. F.* 141 (2006).

participate in the Tribal Supreme Court Project—assert a duty to “similarly situated . . . nonpart[ies].”<sup>110</sup>

#### D. Off-Reservation Casino Scenarios

Consider the scenario of the off-reservation casino. Tribe A, imagine the Sault Ste. Marie Tribe of Chippewa Indians, is considering opening a casino in Lansing, Michigan.<sup>111</sup> Tribe A’s best legal argument is that it is the beneficiary of a federal statute, sometimes called a mandatory trust acquisition statute.<sup>112</sup> In such a case, Congress provides that the Department of Interior “shall” acquire land in trust for the benefit of the beneficiary tribe, such as Tribe A.<sup>113</sup> Even with that statute, Tribe A faces significant hurdles in its quest to open an off-reservation casino in Lansing. Outside counsel provides a legal opinion that reasonably concludes there is a good chance, say fifty-fifty, that Tribe A will prevail. Outside counsel is very, very expensive and makes clear from the outset that this initiative will be very costly. In-house counsel for Tribe A, perhaps, should be grateful. Outside counsel does not appear to have bullshitted the tribal client by claiming, for example, that Tribe A is almost destined to prevail and that the legal theory is bulletproof. Tribe A proceeds with its claims, fully advised of their chances for success and failure, and the costs associated with both.

In contrast, consider Tribe B’s situation, which is more complicated. Tribe B, modeled on the Bay Mills Indian Community, also wants to open a casino downstate, say in Port Huron, Michigan.<sup>114</sup> Tribe B, however, is not the beneficiary of a mandatory trust acquisition statute as clear-cut as the one Congress enacted for Tribe A, but the legal theory the tribe employs relating to the status

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110. Carpenter & Wald, *supra* note 13, at 3140 (“Other lawyers sometimes struggle with questions about the impact of dispute resolution and precedent on nonparty group members who may be similarly situated. Cause lawyers, for example, often worry about strategic selection of cases for litigation and about the filing of a case by an individual that may be inconsistent with the cause.”).

111. *See generally* Michigan v. Sault Ste. Marie Tribe of Chippewa Indians, 737 F.3d 1075 (6th Cir. 2013).

112. *See* Michigan Indian Land Claims Settlement Act, Pub. L. 105-143, § 108(f), 111 Stat. 2652, 2661-62 (1997) (“Any lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe.”).

113. *See id.*

114. *See generally* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014).

of the tribe's off-reservation land is plausible, if doubtful.<sup>115</sup> Tribe B plans instead, as a back up to the possible failure of the legal theory, to simply open up the casino on rural land off-reservation and force its adversaries to take legal action to stop them. In-house counsel, sovereignty warriors one and all, advise the tribal council (the tribal client) that if the state or another tribe sues to shut down the casino, Tribe B's sovereign immunity will act as a shield to the legal actions. And if the federal government—against which Tribe B is not immune—sues, in-house counsel believes that through a quirk in federal Indian law, the federal government does not have jurisdiction to sue the tribe to shut down the casino.

In-house counsel is right, at least for a time. While Tribe B initially suffers a loss at the federal district court level to the State and another Indian tribe, and is forced to shut down the casino, the federal court of appeals reverses on exactly the legal theory in-house counsel has devised. Luckily for Tribe B, the federal government has chosen not to intervene. Unfortunately for Tribe B, the State seeks Supreme Court review of the appellate decision, and the Court grants certiorari.

Until this point, Tribe B and its in-house counsel have limited the utilization of outside counsel. However, litigation before the Supreme Court is one of the most specialized areas of law, with just a few dozen lawyers in the world that can claim to be a member of the so-called "Supreme Court bar." Tribe B and its sovereignty warriors reluctantly concede that it is prudent to seek specialized Supreme Court counsel. Tribe B interviews several candidates and settles on an attorney with an outstanding track record of prevailing against incredible odds at the Supreme Court, but who has never argued an Indian law matter before.

Meanwhile, tribal leaders from other tribes as well as leaders of national tribal advocacy groups plead with the tribal leadership of Tribe B to concede the matter. The State's petition for a writ of certiorari, in part, concedes that perhaps Tribe B's immunity defense is a winning position, and that the only way for the State to shut down the casino is for the Supreme Court to reconsider the doctrine of tribal sovereign immunity and abrogate the tribe's immunity as a matter of common law. These outside tribal interests argue with a great deal of force that the Supreme Court is not sympathetic to tribal

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115. See Michigan Indian Land Claims Settlement Act § 107(a)(3) ("Any land acquired with funds from the Land Trust shall be held as Indian lands are held.").

interests at all and has not been for decades. Tribal interests suffer a terrible win rate before the Roberts Court<sup>116</sup> and about a 20% win rate since the mid-1980s.<sup>117</sup> Moreover, in 1998, the Supreme Court listed several serious policy objections to the continued viability of the doctrine of sovereign immunity and may be looking for a vehicle to rein in the doctrine, if not significantly abrogate tribal immunity.<sup>118</sup> Finally, it is gospel that the Supreme Court usually grants cert. with an eye toward reversal of the lower court decision; the 65%-70% reversal rate attests to this common understanding.<sup>119</sup>

Perhaps because the personal pleas from tribal leaders and advocates around the nation strike a chord with the tribal leadership of Tribe B, in-house counsel asks outside counsel for its opinion. Outside counsel reminds the tribal client of the incredible successes he earned before the Court and *guarantees* that Tribe B will prevail before the Court.

This is bullshit.

Again, I intend use of the term bullshit in the manner championed by philosophers like Professor Frankfurt. Here, I argue that promising a tribal client a win before the Supreme Court, given the objective and subjective factors pointing to almost insurmountable odds of victory, is simply bullshit. In this hypothetical, outside counsel has “act[ed] coercively into our reasoning process by using irrelevant facts or assertions, and by telling half truths in such a way that we feel forced to ‘complete’ the story in a way that interest the opponent, perhaps contrary to our own interests.”<sup>120</sup>

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116. See *Supreme Court*, TURTLE TALK, <http://turtletalk.wordpress.com/resources/supreme-court-indian-law-cases> (last visited Nov. 2, 2015) (collecting all Indian law cases decided by the Supreme Court since 1958). The Roberts Court has issued substantive opinions on ten Indian law cases, nine of them against tribal interests. The sole exception is *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012).

117. See Carpenter & Wald, *supra* note 13, at 3136 (citing David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280-81 (2001)).

118. See *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

119. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 271 (5th ed. 2012).

120. Walter Carnielli, *On a Theoretical Analysis of Deceiving: How to Resist a Bullshit Attack*, in 314 *STUDIES IN COMPUTATIONAL INTELLIGENCE: MODEL-BASED REASONING IN SCIENCE AND TECHNOLOGY: ABDUCTION, LOGIC, AND COMPUTATIONAL DISCOVERY* 291, 292 (Lorenzo Magnani, Walter Carnielli & Claudio Pizzi eds., 2010).

Perhaps because national advocates for tribal interests make public their deep concerns about the risks of catastrophe for Indian tribes all over, several members of Tribe B call a general council meeting to vote on whether Tribe B should concede the case. During the general council meeting, tribal leaders argue that to concede the case amounts to a waiver of the tribe's sovereignty, perhaps intentionally confusing the notions of tribal sovereign immunity and tribal sovereignty as a tool to both embolden support for the tribal client's position and to undermine the credibility of its political opponents. In-house counsel backs tribal leadership and alleges that the political opponents have a pecuniary interest in the tribe backing down.

These representations, too, are bullshit.

Tribal sovereignty is much broader than tribal sovereign immunity, and to waive tribal immunity is not the same as waiving the full extent of the sovereignty of the tribe. To intentionally confuse these points in order to defeat political opposition to a legal position is bullshit. To allege that political opponents have a financial stake in the tribe's opposition without any regard to the truth of that allegation for the purpose of undermining the credibility of the opposition also is bullshit.

Did this actually happen in the run up to *Michigan v. Bay Mills Indian Community*? Did outside counsel promise a win? Did in-house counsel and tribal leadership employ bullshit to defeat a challenge to the tribe's legal position by the general council? Did in-house counsel express grave doubts about the strategy to the tribal client in private, but support the strategy in public?

How the hell should I know?

But for purposes of this paper, I think it is a very useful exercise to assume that a scenario like this can and does occur.

In the real world, the Supreme Court issued an opinion affirming the Sixth Circuit and roundly reaffirming the immunity of the Bay Mills Indian Community from suit.<sup>121</sup> For the Bay Mills

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121. The Court's decision was 5–4, came with numerous caveats; for example, observers believe Congress will take up the matter of tribal sovereign immunity in coming sessions and that the Court will have numerous opportunities to reexamine tribal immunity in the contexts of tort claims and payday lending. *E.g.*, Thomas F. Gede, *Michigan v. Bay Mills Indian Community—Post Decision SCOTUScast*, THE FEDERALIST SOC'Y (June 2, 2014), <http://www.fed-soc.org/publications/detail/michigan-v-bay-mills-indian-community-post-decision-scotuscast>; Amy Howe, *Opinion Details: Victory for Native American Tribes . . . for Now?*, SCOTUSBLOG (May 27, 2014, 12:01 PM), <http://www.scotusblog.com/2014/05/>



Indian Community, however, the Supreme Court victory has not translated into more secure gaming opportunities. As of this writing, the tribe has not reopened its Vanderbilt casino nor attempted to develop its Port Huron property.<sup>122</sup>

For the Sault Ste. Marie Tribe of Chippewa Indians, however, the decision has opened the door for even more ambitious off-reservation gaming proposals. In addition to the Lansing proposal, the Sault Tribe proposed a new casino on lands near the Detroit airport in Wayne County, Michigan.<sup>123</sup> Was Bay Mills bankrupting itself financially and politically to win a Supreme Court victory on the bullshit advice of counsel while Sault Tribe kept its financial and political assets in reserve for a later date? Unless Bay Mills' current strategy is to quietly negotiate all the particulars of a Port Huron or other off-reservation casino with the State and other players, it sure looks like Sault Tribe has played the better hand, with Bay Mills winning a classic Pyrrhic victory.

What to do?

### III. THE ROLE OF IN-HOUSE COUNSEL IN DEALING WITH BULLSHIT: STRATEGIES AND OBLIGATIONS

The problem as I see it is that there is an enormous structural and professional burden on in-house counsel for Indian tribes. Counsel must learn to identify bullshit from outside counsel and the tribal client. Counsel must retain independence of thought from the tribal client. In-house counsel must stay away from piling on its own bullshit. And in-house counsel must be courageous, motivated to fight back against bullshit, perhaps even at the expense of one's own tribal employment. It is unlikely attorneys will be accountable

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opinion-details-victory-for-native-american-tribes-for-now/; Ryan Seelau & Ian Record, *The Bay Mills Case: An Opportunity for Native Nations*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 24, 2014), <http://indiancountrytodaymedianetwork.com/2014/06/24/bay-mills-case-opportunity-native-nations>.

122. In-house counsel for the tribe suggested at a conference on the Supreme Court's decision and its aftermath in September 2014 that the tribal council no longer wished to pursue high-risk gaming opportunities, and would wait to see how the State of Michigan would proceed in the matter.

123. Matthew L.M. Fletcher, *Sault Tribe Lansing Casino Trust Application Documents*, TURTLE TALK (June 11, 2014), <http://turtletalk.wordpress.com/2014/06/11/sault-tribe-lansing-casino-trust-application-documents/>; Matthew L.M. Fletcher, *Sault Tribe Huron Township, Wayne County Trust Application Documents*, TURTLE TALK (June 11, 2014), <https://turtletalk.wordpress.com/2014/06/11/sault-tribe-huron-township-wayne-county-trust-application-documents/>.

through malpractice claims or the state bar disciplinary process for bullshitting unless the attorney's statements enter into the realm of misrepresentation and outright lies.<sup>124</sup> In-house counsel must be ready for a change in paradigm.

### A. Fighting Self-Deception

“Self-deception” is the biggest threat to in-house counsel’s obligation to provide a balanced and informed opinion of the tribal counsel’s chance to prevail in litigation: “Awareness of th[e self-deception] hazard is our only safeguard against falling into bullshit attack.”<sup>125</sup> When bringing logical principles into my analysis of advising the tribal client, I borrow Brazilian logician Walter Carnielli’s analysis of self-deception—and he in turn borrows from Russian chess Grandmaster Xavier Tartacover:

A chess game is divided into three stages: the first, when you hope you have the advantage, the second when you believe you have an advantage, and the third . . . when you know you’re going to lose!<sup>126</sup>

It is my view that in-house counsel *should always assume tribal interests will lose in litigation*. And in-house counsel is obligated to make the tribal client aware of the worst-case scenario.

In the off-reservation gaming hypotheticals above, Tribe A and Tribe B have engaged in similar lines of legal strategy, with Tribe A fully aware of the limited probability of their ultimate success in reaching the goal of opening a casino in Lansing. But Tribe B may have fallen into a logical trap—perhaps the conjunction fallacy, where the tribal client and its attorneys have violated a basic rule of probability: “the fact that the probability of the intersection of events (that is, their conjunction) cannot exceed the probabilities of the constituent events.”<sup>127</sup> Like Grandmaster Tartacover, Tribe B initially believes the Indian Gaming Regulatory Act and the tribe’s gaming compact with Michigan do not abrogate the tribe’s immunity from

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124. Cf. Bridgeman & Sandrik, *supra* note 2, at 381 (recognizing that bullshit promises in contract negotiations and terms are not actionable under the doctrine of promissory fraud).

125. Carnielli, *supra* note 120, at 297.

126. *Id.*

127. Gary Charness, Edi Karni & Dan Levin, *On the Conjunction Fallacy in Probability Judgment: New Experimental Evidence Regarding Linda*, 68 GAMES & ECON. BEHAV. 551, 551 (2010) (citing Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293 (1983)).

the State of Michigan's suit; Tribe B then hopes the Supreme Court will not use its common law authority to abrogate off-reservation tribal immunity; but Tribe B ultimately relies on a promise from outside counsel that Tribe B will win in the Supreme Court. These "errors are substantially reduced by . . . consultation."<sup>128</sup> Tribe A's outside counsel presented probabilistic advice is more in line with the reality of federal Indian law than Tribe B's outside counsel. This should be the goal of in-house counsel—to ensure that such advice is provided to the tribal client.

### B. Exposing Economic Self-Interest & The Problem of the Supreme Court Bar

Another possible avenue for conscientious in-house attorneys to pursue is to highlight the economic self-interest of outside counsel. Outside counsel, as noted above, is profit-driven and benefits from pursuing dangerous or doomed appeals regardless of the outcome.

In the analogous context of lying to clients (which is not our concern here), commentators suggest two lines of potential regulation, the first regulatory and the second moral. Professor Lisa Lerman recommended in 1990 that deceiving clients for economic self-interest should be prohibited.<sup>129</sup> Professor Carrie Menkel-Meadow recommended a broader rule akin to the golden rule—"lawyers should in all respects deal with their clients in the way they themselves would want to be treated if they were in the client's position."<sup>130</sup> Mind you, both commentators are talking about lying, where this paper is confined to the more complicated question of bullshit—but the analogy is strong. Professor Menkel-Meadow's golden rule is not particularly helpful, for instance, in the case of a corporate board of directors (such as a tribal council) that affirmatively seeks a bullshit answer from outside counsel in order to deal with unruly shareholders (or tribal general council or membership). Regulating economic self-interest moves us closer to dealing with the problem of bullshit by outside counsel to the tribal client.

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128. Charness, Karni & Levin, *supra* note 127, at 552.

129. See Lerman, *supra* note 1, at 685 ("Self-interested deception of clients by lawyers should be prohibited.").

130. Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 764 (1990).

A relatively easy inquiry for in-house counsel to advise the tribal client in the context of the establishment of the attorney–client privilege between the tribal client and outside counsel the extent of the economic self-interest of outside counsel. Is outside counsel entitled to payment, win or lose? Even if outside counsel is working pro bono or at a substantially reduced rate, exactly how does outside counsel financially benefit from the representation of the tribal client? In my view, this is nothing more than due diligence but still an obligatory act on the part of in-house counsel, especially in relation to Supreme Court specialists.

### C. Toward an In-House Counsel Bar Association

From my experience as in-house counsel for four different Indian tribes, I applaud the establishment of the Tribal In-House Counsel Association (TICA).<sup>131</sup> The only people who can candidly talk to each other and offer informal advice about the ethical complexities facing in-house counsel are others in the same position. The establishment of a specialized bar will provide inexperienced tribal counsel resources and advice on their new jobs as well. TICA is four years old and should fulfill this goal moving forward.<sup>132</sup>

One issue that can be addressed immediately is the information asymmetry that plagues Indian nations on the question of outside counsel. What is the market for outside counsel in handling specialized matters? What did Tribe C pay to Firm D to handle a tax dispute with the Internal Revenue Service? What did Tribe E pay to Firm F to defend a quiet title action brought by a local unit of government? What did Bay Mills pay its specialized counsel to handle its Supreme Court case? Beyond mere fees, who works well with the tribal client and tribal in-house counsel, making appropriate disclosures and keeping its clients informed?

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131. Dale White, former in-house counsel for the Mohegan Tribe, mentioned the creation of a small organization of in-house attorneys of gaming tribes more than a decade ago, so this is not a new idea. *See* White, *supra* note 58, at 510 (“I have tried to form a tribal in-house attorney group as well, made up of gaming tribes. The Mashantucket Pequots, the Grande Ronde Tribe in Oregon, the Prairie Band Pottawatomie Nation in Kansas, and the Ho-Chunk Tribe in Wisconsin are some of the tribes who are participating.”).

132. TRIBAL IN-HOUSE COUNSEL ASSOCIATION, <http://www.tribalinhousecounsel.com/> (last visited Dec. 3, 2015) (“TICA was formed in 2012 . . .”).

#### D. Tribal Attorney Regulation

Indian tribes have remarkable regulatory authority over nonmembers that do business within tribal boundaries.<sup>133</sup> But relatively few tribal governments regulate attorney activities within reservation borders.<sup>134</sup> More tribes should.

Indian nations could enact procurement procedures on retaining outside counsel—much like state and local governments do—share information with each other on the quality and cost of private firms with which they do business, and enact professional responsibility regulations that impose tribal cultural norms on all attorneys who represent the tribe or its entities.

#### CONCLUSION

The driving force behind this paper is that tribal interests fare very badly in Supreme Court litigation. Counsel for Indian tribes must recognize the legal and political impediments tribal interests face before the nine Justices. Unlike the federal and state governments, tribal governments have little structural protection expressed in the United States Constitution, putting tribal interests in a deep hole in any matters involving disputes with federal, state, and local governments. Moreover, much of federal Indian law is judge-made common law, putting the Supreme Court in a position to act as a policy court, but apparently not a super-legislature.<sup>135</sup> Wins and losses tell one story—one where tribal interests prevail just a couple times a decade in the current Supreme Court<sup>136</sup>—but a more important and useful story is that tribal interests have options.

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133. *E.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (taxation); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (hunting and fishing licenses); *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014) (tribal court jurisdiction over tort claims against business), *cert. granted*, 135 S. Ct. 2833 (2015).

134. Wenona T. Singel, Address, Michigan State University Indigenous Law and Policy Center/Tribal In-House Counsel Association Conference (Nov. 6, 2015), [https://turtletalk.files.wordpress.com/2015/03/15-ip-35-program-comp3-2\\_page\\_2.jpg](https://turtletalk.files.wordpress.com/2015/03/15-ip-35-program-comp3-2_page_2.jpg).

135. *Cf.* *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (“[W]e do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.”).

136. The Roberts Court, so far, has issued substantive opinions on eleven Indian law cases, nine of them decided against tribal interests. *See Supreme Court*,

A few years back, the Supreme Court granted certiorari in *Madison County v. Oneida Indian Nation of New York*, a tribal sovereign immunity case.<sup>137</sup> After the Court granted certiorari, the tribe enacted legislation to waive its immunity and moot the case; a strategy that worked in that the Court dismissed the matter.<sup>138</sup> In the off-reservation gaming hypotheticals discussed here, attorneys should be aware of the possibility that even cases on the brink of decision by the Supreme Court can be thwarted.

Bullshit, however, has the potential to undermine foundations of law that so many Indian tribes depend on—doctrines like tribal sovereign immunity and other aspects of inherent tribal authority, the federal trust responsibility, and congressional plenary power. At any given moment, bullshit is beneficial to Indian country actors ranging from tribal elected leaders, outside counsel, and in-house counsel. Politics is riddled with bullshit, and Indian country is riddled with politics.

In sum, in-house counsel has a unique problem—pressures from the tribal client and from outside counsel to pursue strategies that are risky, justified by bullshit, the most difficult form of deception to overcome—and difficult impediments to respond to them. In-house counsel is the best job in the world.

*Miigwetch.*

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*supra* note 116. The exceptions are *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014), and *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012). In 2004 and 2005, tribal interests prevailed twice—in *United States v. Lara*, 541 U.S. 193 (2004), and *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005).

137. 562 U.S. 42 (2011).

138. *See id.* at 42-43.