

## **DRAFT – Conflict of Interest Protocols**

\*\*This draft has been prepared for the Secretarial Commission on Indian Trust Administration and Reform and does not represent the opinions or views of the Commission. This is only a draft and has no binding legal authority on any party. \*\*

At the June 2012 Trust Commission meeting, Commissioners and guest speakers focused discussion about the problematic conflicts of interest created when the federal government attempts to fulfill both its fiduciary obligations to tribes while also fulfilling its obligations to the public. At that meeting the Commission agreed to begin thinking about what a conflict of interest protocol might entail. This draft is the first step in that process, and these protocols aim to eliminate or mitigate those conflicts where they arise, and in so doing reaffirm the federal government's fiduciary obligations to beneficiaries of Indian trusts.

### **Conflict of interest protocols.**

#### **I. Mandatory disclosure of conflicts: what must be disclosed; continuing obligation to disclose**

##### **A. Conflicts.**

A conflict of interest subject to the mandatory disclosure rules outlined below shall be deemed to exist where the representation of governmental and/or tribal interests in any particular case would:

- a) be directly adverse to a position advocated in any other ongoing legal proceeding;
- b) create, or carry a significant risk of creating, a division of loyalties to different entities whose interests may require contradictory actions;
- c) create, or carry a significant risk of creating, even the appearance of impropriety or improper conduct.

##### **B. Continuing obligation to disclose.**

The government's responsibility to disclose conflicts shall be a continuing obligation throughout the course of any legal action; the government is not absolved of this duty until a final order is entered or all parties to the action waive the right to disclosure in writing.

#### **II. Mandatory disclosure of conflicts: form and timing of disclosure; rights of parties upon disclosure.**

##### **A. Form and timing of disclosure.**

When legal proceedings are initiated, the government must state whether or not any conflicts of interest exist that would prevent impartial litigation of any matter at issue. Any existing conflicts must be disclosed in a detailed Conflict of Interest Statement, which must be provided to both the agency and tribal interests within a reasonable time after discovery of the conflict.

The Statement may be transmitted through physical or electronic means, but must be transmitted in a manner reasonably calculated to actually reach its intended recipient no more than thirty days after discovery of conflict, unless extraordinary circumstances intervene to prevent disclosure.

##### **B. Rights of parties upon disclosure.**

After a conflict has been disclosed, any party to the action whose interests might be affected by the

conflict can:

- a) request the appointment of independent counsel;
- b) waive the right to request the appointment of independent counsel. Waiver is only effective in a writing signed by the party or agent of the party to be bound by the waiver.

Powers of the Secretary to appoint independent counsel.

A. When counsel may be appointed.

The Secretary is empowered to appoint independent counsel where:

- a) the Secretary determines that legal action is warranted, or legal proceedings have already been initiated against the Department; and
- b) the Department cannot participate in legal proceedings because of a conflict of interest or other extraordinary circumstances; and
- c) it is in the public interest to have independent counsel.

B. Investigations to determine need for independent counsel.

Prior to appointing independent counsel, the Secretary may investigate any conflicts to determine if such appointment is warranted. The Secretary is free to determine that such appointment is not warranted, but must then direct appropriate steps be taken to mitigate the effects of all disclosed conflicts.

C. Special requirements for independent counsel when representing tribal interests.

If the Secretary determines that the appointment of independent counsel is warranted, and independent counsel is appointed to represent tribal interests:

- a) tribal interests must be given a meaningful role in selecting this representation by
  - i. allowing for reasonable time to consult with private sector firms chosen by the Secretary, including a choice from a selection of at least three (3) firms highly ranked by Martindale-Hubbell, SuperLawyers, Best Lawyers or a comparable ranking system; and
  - ii. allowing the selection of one of those firms; or
  - iii. allowing waiver of the appointment of independent counsel.
- b) This section does not apply when a tribe elects to pursue independent counsel under section II (B)(a) of these protocols.

D. Exemptions.

Nothing in this section shall interfere with the right of tribes to seek their own representation when bringing suit against any entity, governmental or not.

Independent counsel: qualifications.

A. General requirements.

Independent counsel must be competent. The standard for competency shall be the same as the standard contained in the ABA Model Rules of Professional Conduct, Rule 1.1, which requires that a lawyer possess the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Preference should be given to attorneys who have experience litigating the particular matter at hand.