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Advisory Opinion AO 25-01

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Question: How do the obligations of Tribal officials to their Tribe align or conflict with their duty of loyalty when participating on State or Federal advisory boards or commissions?

Factual Background:

Tribal Officials (as defined in the EBCI's Code of Ethics) are often appointed by the tribal government to serve on State or Federal advisory boards, committees or commissions. Issues may arise when the Tribal Official takes an oath of office for that State or Federal body which requires the Official to bear allegiance to the State or Federal government while serving. This oath (and the Official's service, even if no oath is administered) immediately raises an issue of potential conflict between the Official's duty of loyalty to the EBCI and to the State or Federal agency.

The ethical issue is often referred to as a "dual loyalty conflict" and comes up not only in Tribal government/State-Federal government relations but also in local government/State-Federal government relations. For example, county commissioners in North Carolina regularly sit as members of regional or state committees or commissions and the issue of their "primary" loyalty is often raised.

Applicable Legal Provisions:

A. Constitutional and Treaty Foundations

The United States maintains a unique government-to-government relationship with federally recognized tribal nations as established in the U.S. Constitution, treaties,

statutes, and court decisions. This relationship recognizes tribal sovereignty while acknowledging tribes as "domestic dependent nations" within the federal framework.

Tribal governments predate the United States government, and their sovereignty does not derive from federal authority but is inherent and recognized by it. The federal government has special obligations to protect tribal lands, resources, and rights to self-government.

B. Oaths of Office Generally

Federal and state officials are required by Article VI of the U.S. Constitution to take an oath to support the Constitution. For federal civil service employees, 5 U.S.C. § 3331 establishes the specific oath language requiring them to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "bear true faith and allegiance to the same."

The purpose of these oaths is to establish that public servants owe their primary loyalty to the Constitution rather than to any individual supervisor, agency head, or political appointee. The oath binds the official to uphold constitutional principles and faithfully execute their duties.

The Ethics Code of the EBCI recites that:

. . . .

- (d) Tribal officials shall treat service to the EBCI as a sacred public trust with fiduciary responsibility, which requires upholding and acting in accordance with laws and engaging in the proper governance of the EBCI in a manner, which is placed above personal and private gain.

-- Sec. 117-45.3. Code of Ethics.

The term "fiduciary responsibility" means that tribal officials are to place their primary loyalty to the EBCI above their own "personal or private gain" but, in my view, it also means that the tribal official's loyalty to the EBCI is above their duty of loyalty to the State or Federal program where they are serving.

Analysis and Conclusion:

1. Nature of the Potential Conflict

When a tribal official accepts an appointment to a state or federal position requiring an oath of loyalty, two potentially competing obligations arise:

- a. The obligation to their tribal nation, including upholding tribal sovereignty, advancing tribal interests, and preserving tribal self-governance
- b. The obligation to the state or federal government, including supporting the U.S. Constitution and faithfully executing their appointed duties.

These obligations may align in many circumstances but can diverge when tribal and federal/state interests conflict, particularly regarding:

- Natural resource management
- Jurisdictional disputes
- Tax matters
- Law enforcement authority
- Cultural resource protection
- Political advocacy in legislative and executive-branch contexts

2. Legal Precedents on Government-to-Government Relationships

Federal Government directives have established principles for federal interactions with tribal governments that recognize their sovereignty. The 1994 Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments and Executive Order 13175 (2000) require federal agencies to:

1. Operate within a government-to-government relationship with federally recognized tribes
2. Consult with tribal governments before taking actions affecting them
3. Assess impacts of federal plans on tribal trust resources
4. Respect tribal self-governance and sovereignty

These directives establish that federal agencies have a responsibility to respect tribal sovereignty while fulfilling their own mandates. I have not identified similar directives in North Carolina state government publications, but I assume that the general principles would apply.

Ethical Opinion

1. Permissibility of Dual Loyalty

A tribal official may ethically accept appointment to a state or federal position requiring an oath of loyalty under the following conditions:

- a. Transparency: The tribal official must be transparent with both governments about their dual roles, responsibilities, and potential conflicts.
- b. Recusal Protocol: The tribal official should establish a clear protocol for recusal from

decisions where direct conflicts between tribal and federal/state interests arise.

c. **Primary Loyalty Framework:** The tribal official should clarify with appointing authorities that their primary governmental loyalty remains with their tribal nation while committing to faithful execution of their liaison duties.

d. **Tribal Authorization:** The tribal government should formally approve the dual appointment, with clear parameters for the official's authority to represent tribal interests.

e. **Constitutional Compatibility:** The tribal official must recognize that supporting the U.S. Constitution, as required by oath, can be compatible with tribal loyalty when understood in the context of the Constitution's recognition of tribal sovereignty and the federal trust responsibility.

2. Ethical Best Practices

Tribal officials serving in dual capacities should:

- a. Regularly report to tribal leadership about their activities in the appointed position
- b. Seek tribal government guidance when unclear about potential conflicts
- c. Maintain written documentation of potential conflicts and resolution approaches
- d. Advocate for incorporation of tribal perspectives in federal/state policy development
- e. Understand that the oath to the Constitution includes upholding the constitutional principles that recognize tribal sovereignty

3. Specific Conflict Areas and Resolution Approaches

a. **Policy Advocacy:** When advocating for tribal positions that differ from current federal/state positions, the tribal official should frame advocacy in terms of improving government-to-government relationships and providing valuable diverse perspectives.

b. **Resource Allocation:** When decisions involve allocation of resources that may affect tribal interests, the official should ensure tribal consultation occurs and document both positions.

c. **Legal Disputes:** When legal conflicts arise between the tribal government and the state/federal government, the official should formally recuse themselves from representing either government in the specific matter.

Note: This advisory opinion was based on specific circumstances, the Standards of Ethical Conduct (Cherokee Code Sec. 117-45), and other relevant code provisions and policies in effect on the date the legal analysis was prepared and subsequently released.