

## INDIGENIZING PROFESSIONAL RESPONSIBILITY

# The Role of Ethics in Tribal Courts

By Lauren van Schilfgaarde

**T**he regulation of attorney practice, including the ability to discipline, is considered an inherent power of the judiciary.<sup>1</sup> Tribal Courts, like federal and state courts, inherently possess this power. But while nearly all 50 states have adopted identical ethical obligations for their advocates,<sup>2</sup> these rules, and the societal values underlying them, may not be a perfect fit for all Tribal jurisdictions.

The Tribal Court, as an institution, is a bit of a contradiction. The modern Tribal Court loosely traces its roots to the Code of Federal Regulation Courts (CFR Courts) operated by the Bureau of Indian Affairs in the late nineteenth century. Scholars Vine Deloria Jr. and Clifford M. Lytle note that “it is difficult to determine whether

they were really courts in the traditional jurisprudential sense of either the Indian or the Anglo-American culture or whether they were not simply instruments of cultural oppression.”<sup>3</sup> The Anglo-adversarial system was reinforced with the Indian Reorganization Act (IRA) of 1934.<sup>4</sup> But the IRA at least included a push for Tribes to self-determine aspects of their judiciaries. The resultant systems are undoubtedly Anglo in form, but Tribal in expression.

The tendency to equate “legitimate” and “fair” with Anglo-flavored systems has resulted in a centuries-long campaign to transform Tribal systems into Anglo ones. This was most recently evidenced in 2010 amendments to the Indian Civil Rights Act requiring that the defense attorney and

judge be licensed to practice to law.<sup>5</sup> Today, many Tribal Courts feel strikingly similar to federal and state courts, but they remain Tribal. Through Tribal Courts, Tribes have established beacons of sovereignty and service. They are mechanisms through which Tribes build distinct Tribal law, build traditional resurgences, and prize custom and tradition as binding authority.

Tribal Courts are thus a careful balance. The ethical rules regulating the practice of advocates in Tribal Courts must necessarily strike a careful balance.

### The Role of Ethical Rules

As in other courts, Tribal Court ethical rules serve a variety of useful purposes. The ability to “check” unethical advocates can

actually serve to attract advocates to the Tribal Court. A judiciary with clear rules that are evenly and consistently enforced project a stable judiciary. For many Tribal Courts, especially those in rural areas, attracting competent and eager advocates is a perpetual task. Knowing that an advocate's integrity will be valued and protected is a selling point.

Once practitioners are before the Tribal bar, the ethical rules can then serve as a framework for ensuring the advocate practices Tribal law. While Tribal Courts may look similar to state courts, state precedent is only ever persuasive. For the advocate unaccustomed to the Tribal forum, the ethical rules can both guide and check their advocacy.

Most critically, ethical rules lend credence not just to the practitioners themselves, but to the greater community. Tribal communities deserve a forum that is accountable to, as well as reflective of, their customs and norms. Tribal Courts must balance adoption of Anglo systems while staying true to traditional values and forms of dispute resolution. As Tribal Courts continue to expand their presence and capacity, ethical rules provide a framework for internal legitimacy.

Finally, ethical rules can curb against external critiques.<sup>6</sup> U.S. Supreme Court reasoning for diminishing Tribal authority stems not from any specific findings of Tribal ineptness, but that "by virtue of their incorporation into the American republic, 'their rights to complete sovereignty, as independent nations, [are] necessarily diminished.'"<sup>7</sup> This modern incorporation of colonization is a severe threat to all Tribal Courts, and it is unclear in what ways the next perception of diminishment will manifest. But in the meantime, Tribes and their judiciaries persist. Ethical rules can serve as a pillar for external legitimacy.

So how exactly have Tribes interpreted the rules of professional responsibility? For the most part, Tribes that have established rules have predominantly adopted the ABA Model Rules of Professional Conduct much like their state counterparts. There are pockets, however, suggesting that Tribes, in the pursuit of balancing both

external and internal pressures on Tribal Courts, are beginning to inject a uniquely Tribal lens to their interpretation of the rules, and ultimately their whole approach. This article seeks to review a small handful of those approaches.

### The Duty of Competence

Rule 1.1 of the ABA Model Rules of Professional Conduct provides that competent representation requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This must include Tribal law. With unnerving frequency, Tribal advocates neglect to acknowledge the Tribal constitution, the Tribal code, the Tribal case law, and the Tribal common law. The Tribal advocate is ethically required to familiarize him- or herself with these laws. The Supreme Court of the Navajo Nation recently noted, "[w]hen an applicant acts without regard to the customs and laws of this jurisdiction, and it raises significant questions as to his or her fitness to practice law."<sup>8</sup> Yet, many Tribal Courts are compelled to remind their advocates of this duty.

More so, Tribal law exists within a web of complex federal policies and unique histories that inform the everyday practice of law. Former U.S. Attorney for Colorado Troy Eid observed that "[f]ar from being an academic exercise, the quest for greater historical and cultural awareness by attorneys representing or dealing with tribes and tribal enterprises goes to the heart of every lawyer's basic obligation to provide competent representation to his or her client under Rule 1.1 of the Model Rules of Professional Conduct."<sup>9</sup> For Tribal Courts, the duty of competence is immense and encompasses an obligation to acknowledge the space, history, culture, and law of the tribunal.

### Zealous Advocacy and the Public Trust

Zealous advocacy is a quintessential American value, centering the individual within the adversarial process. The duty envisions the role of the advocate as exclusive to the client, in which the advocate is compelled to fight on behalf of his or her individual client through all (permissible) means. This ethical responsibility

encounters some natural barriers for the group lawyer, who represents a client who is not an individual.<sup>10</sup> But this is even more so for the Tribal advocate.

In *In re Saenz*, the Navajo Nation Supreme Court admonished an attorney who had advised the Navajo Nation Legislative Council that its authority was far larger than the court saw permissible, particularly when it threatened the authority of the court to establish a Government Reform Commission.<sup>11</sup> The court saw this attorney's conduct in breach of a Tribal statute, section 206, which bars Tribal employees from interfering with the functions of the court. The court additionally saw the conduct as a breach of its Tribal bar, prizing the practitioner's duty to the court over the duty to zealously advocate on behalf of the client. The court stated, "[m]embers of the [Navajo Nation Bar Association] are officers of the court and have a special responsibility to ensure the integrity of the Navajo legal system."<sup>12</sup> The court continued,

While the private practitioner zealously advocates for his client, the government lawyer advocates for the public trust and is constrained by the public trust from wholesale support of any governmental client's pursuit of desired policies. The advocacy model of lawyering,



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in which lawyers might craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the obligations to the public trust.

The Navajo Nation Supreme Court identifies a dueling obligation that contravenes pure zealous advocacy. The court imposes on the government lawyer an added duty to the public trust, which serves as a constraint. It is plausible that this public trust duty is truly exclusive to the Navajo Nation government lawyer. As a group lawyer and unlike other advocates, the Navajo Nation, government lawyers must balance advocacy so as not to harm other branches of the government. But the court's call to consider the public seems larger and more systemic. Even for non-Tribal employee attorneys, arguments assaulting the judiciary are not welcome.

The National Native American Bar Association (NNABA) identified a similar obligation to the public. In a 2015 ethics opinion regarding disenrollment, NNABA identified the Tribal advocate's unique duty owed to the greater Native community, noting that the duty to zealously advocate can intersect with the duty owed to the Tribe and all Tribes. "Tribal advocates carry a duty to 'seek justice.' . . . The responsibility of a Tribal advocate differs from that of the usual advocate; his or her duty is to further justice in the greater Native American community, not merely to win his or her case."<sup>13</sup> NNABA went further than the Navajo Nation Supreme Court did, extending the public trust duty to all Tribal advocates and defining the public trust as including both the specific community of the tribunal as well as all Tribal communities. Like the Navajo Nation Supreme Court, NNABA couched this duty as in direct conflict with the zealous advocate's desire to win his or her case. But given the immense and constant threats looming against Tribal sovereignty, and the fact that these threats manifest as assaults against Tribes collectively, NNABA thereby extended a duty to consider all Tribes when making potentially harmful arguments.

### **Zealous Advocacy and Healing**

Upon reconsideration, the same Navajo Nation Supreme Court reversed the attorney's permanent disbarment, noting that it "serves no healing purpose." Instead, the court viewed its own role in the matter such that while "[i]nharmonious words have been exchanged and actions performed . . . this Court will do what it can in an effort to turn such things into positive dew or corn pollen."<sup>14</sup> Both the attorney and the court were bound to consider the impact on the well-being of the judiciary and the community. Healing, harmony, and balance draw upon a restorative model of justice that can conflict with the adversarial, zealous advocate model. The Navajo Nation Supreme Court appears to be drawing upon both.

Tribal Courts have warmly embraced the restorative justice approach, building both new restorative justice dockets as well as maintaining traditional systems. Christine Zuni Cruz highlights this main beacon, among many, of Tribal Courts:

The holistic approach to the problems that bring indigenous peoples before the court is a part of most indigenous legal traditions. Justice involves helping the parties to resolve underlying problems and healing the breaches caused by conflict. . . . There is a need for lawyers in indigenous communities to collaborate with other helping professions, including those who help people in a very broad sense of the word, through faith, health, spirituality, forgiveness, and especially through sobriety.<sup>15</sup>

It is unclear, however, how ethical rules can incorporate this shift. The ABA Model Rules of Professional Conduct "allow" advocates to consider other factors beyond the law when advising their client, such as moral, economic, social, and political factors.<sup>16</sup> The Mashantucket Pequot, in their rules, copied this same language. This language is in contrast to most of the rules, which sets floor boundaries: minimum standards by which all advocates should

abide. Rule 2.1, on the other hand, flirts with being aspirational. In a judiciary that incorporates healing and balance within its adversarial framework, aspirational qualities might be the better fit as opposed to sanctioning advocates for failing to heal their clients.


### **Conflicts of Interest**

Rules against conflict of interest are generally aimed toward limiting representation if it would be directly adverse to another, if it would be materially limited by the responsibilities to another, or if the advocate is personally related to the litigants, opposing counsel, or the judge.<sup>17</sup> If any of those ingredients exist, then one must either step down or obtain informed consent. As Chief Judge Abby Abinanti of the Yurok Nation notes, this core principle of the adversarial system is effectively "justice by strangers."<sup>18</sup>

Like the other model rules, ethical rules that have been drafted by Tribal Courts have incorporated the prohibitions against conflicts of interest. The Confederated Salish and Kootenai Tribes interpreted this obligation as a "professional obligation of fairness" when they held that the judge should have disclosed that the litigant's attorney was also his personal attorney in his own child custody dispute.<sup>19</sup>

The Colville Tribes did not have a specific rule prohibiting an attorney from serving as counsel for a case in which he had previously served as judge. However, they imported Washington State's rule because the attorney was also a member of the state bar.<sup>20</sup>

The Kaw Nation took a similar approach, importing Oklahoma's rules for regulating attorneys in the Kaw Nation Tribal Court.<sup>21</sup> But they noted a logistical reality for many Tribes: The number of attorneys can be limited. Rather than adopt a zero-tolerance policy against related persons, the court found the attorney to have acted properly when he recused himself immediately upon discovering the conflict. The court explicitly noted it wanted to avoid attorneys being overly cautious in their willingness to represent litigants in Tribal Court.



Tribal communities deserve a forum that is accountable to, as well as reflective of, their customs and norms.

A Tribal Court in a rural jurisdiction with a small docket will necessarily look different than a large urban court. The desire for a dispassionate advocate is outweighed by the prospect of no advocate. But Chief Judge Abinanti speaks to something else. She reflects that prior to contact, Native people did not necessarily prioritize prohibitions against conflicts of interest. In a small village, such a person was impossible to locate. But more than logistics, the value in a traditional leader providing dispute resolution was in his intimate knowledge of the litigants and their conflict. All parties, including the judge and the community, were impacted. Restoration to the balance of the community depended on the complex and intimate relationships between all the members. Therefore, the calculus for a just outcome required “interest.”

The Kaw Nation touched on this, noting that “[a]djudication in Tribal Courts involves greater flexibility than non-Indian state and federal courts to accommodate tribal traditions and

equity.”<sup>22</sup> The Muscogee (Creek) Nation explicitly noted this when determining whether it was proper for a case to proceed when the assistant attorney general and the chief judge were cousins:

Under traditional Mvskoke law, controversies were resolved by clan Vcuvkvilke (elders). Their integrity was considered beyond reproach. They were obligated by the responsibilities of their position to decide cases fairly, and honestly, regardless of clan or family affiliation. Since this Nation’s establishment of a constitutional form of government in 1867, Muscogee law is *ruled* upon by appointed judges, but the obligations under traditional Muscogee law remain in effect.<sup>23</sup>

This is potentially an area worthy of consideration for Tribes, especially when the model rules take a strict approach to conflicts of interest.

### Enforcement

Finally, the enforcement of ethical rules has proven to be challenging for many jurisdictions. Rather than treat ethical violations as substantive obligations, such as a distinct cause of action, they are generally confined to disciplinary actions within a bar association.<sup>24</sup> The consequence of violating an ethical rule, therefore, might be limited to a censure, suspension, or even disbarment, but, generally, these consequences do not extend to nondisciplinary remedies, such as fines.

However, for jurisdictions that have adopted the ABA Model Rules of Professional Conduct, ethical obligations at least enjoy open borders across jurisdictions. Rule 8.5(a) provides that a barred attorney’s ethical obligations follow him or her regardless of the forum in which the attorney appears. Notably, the model rule provides that the ethical rules of the tribunal or jurisdiction in which the conduct occurred shall be the choice of law.<sup>25</sup> This means that a state-licensed attorney can

be sanctioned by his or her state bar for violating a Tribal rule while appearing in Tribal Court. Conversely, if a Tribe's rules are silent, the state rules still apply.

Tribes therefore have greater cover to enforce their ethical rules against unscrupulous attorneys, without concern that their rules inadvertently neglect a particular area of conduct. Attorneys expose both their Tribal bar membership and any state bar membership when appearing in Tribal Court. Tribes have taken advantage of this reciprocal disciplinary option.<sup>26</sup>

Importantly, though, unlike most state judiciaries, Tribal Courts frequently allow non-attorney advocates to appear in Tribal Court. Lay advocates provide substantive representation, especially in rural jurisdictions where there are just not enough attorneys. Lay advocates may also provide a more traditional lens that is more reflective of the Tribe's customs and traditions. Either way, many Tribal Courts provide for their admission into the Tribal bar.<sup>27</sup> This means Tribal ethical rules must also cover lay advocates.

## Conclusion

Ethical rules are a necessary tool to hold advocates accountable. They are also a ripe opportunity to inject Tribal values into the judiciary, shape advocate perspectives about their role in the judiciary, and ultimately inform the construction of Tribal law. While Tribal Courts were historically compelled to take an adversarial shape, and while they defend against broad stroke attacks on their legitimacy, ethical rules can help reinforce their structures while indigenizing their roots. ■

## Endnotes

1. Donald E. Campbell, *The Paragraph 20 Paradox: An Evaluation of the Enforcement of Ethical Rules as Substantive Law*, 8 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 252, 259 (2018).

2. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2018); *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Mar. 28, 2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules); CAL. RULES OF PROF'L CONDUCT (STATE BAR OF CAL. 2019) (On Nov. 1, 2018, 69 new California Rules of Professional Conduct replaced 46 previous Rules of Professional Conduct in an effort to bring the California Rules in closer alignment with ABA Model Rules).

3. VINE DELORIA JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 115 (Univ. of Tex. Press 1983).

4. Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984.

5. Indian Civil Rights Act, 25 U.S.C. § 1302(c)(2)–(3).

6. The last 40 years of Indian law have been marked by a disturbing trend in the U.S. Supreme Court to “interpret” contractions in inherent Tribal jurisdiction, despite notable expansions of Tribal judicial capacity, including courts that effectively mirror Anglo norms, structures, and practices. See *United States v. Montana*, 450 U.S. 544 (1981), and its progeny.

7. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 544 U.S. 316, 328 (2008) (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (quoting *Johnson v. McIntosh*, 8 Wheat. 543, 21 U.S. 574 (1823))).

8. *Matter of Gentile*, 2019 WL 3337220 (Navajo July 3, 2019).

9. Troy A. Eid, *Ethics Issues in Doing Business with Native American and Alaska Native Tribes and Tribal Enterprises*, 2014 ROCKY MTN. MIN. L. INST. 16, 16-2 (2014).

10. See Kristen Carpenter & Eli Wald, *Lawyer for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085 (2013) (noting that the “Standard Conception” of law practice, which includes the principle of zealous advocacy, results in a theory of law practice that is often an ill fit with the practice of group lawyers).

11. *In re Saenz*, 9 Am. Tribal Law 329 (Navajo Oct. 18, 2010).

12. *Id.*

13. Nat'l Native Am. Bar Ass'n, *Formal Ethics Op. No. 1, Duties of Tribal Court Advocates to Ensure Due Process Afforded to All Individuals Targeted for Disenrollment* (adopted June 26, 2015).

14. *In re Saenz*, 9 Am. Tribal Law 329.

15. Christine Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyer for Indigenous Peoples*, 82 N.D. L. REV. 863, 895 (2006) (citations omitted).

16. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

17. *Id.* r. 1.7, 1.8.

18. TRIBAL JUSTICE (Makepeace Productions, 2017).

19. *Monteau v. Monteau*, 5 Am. Tribal Law 26 (Confederated Salish & Kootenai Tribes Ct. App. Apr. 26, 2004).

20. *Gallaher v. Colville Confederated Tribes*, 15 Am. Tribal Law 159 (Colville Tribal Ct. App. Nov. 9, 2018).

21. *Cole v. Kaw Hous. Auth.*, 4 Okla. Trib. 281 (Kaw Nation D. Ct. July 10, 1995).

22. *Id.*

23. *In re Practice of Law*, 9 Okla. Trib. 31 (Muscogee (Creek) Nation Feb. 14, 2005).

24. See, e.g., Campbell, *supra* note 1.

25. MODEL RULES OF PROF'L CONDUCT r. 8.5b (AM. BAR ASS'N 2018).

26. See *In re Dixon*, 2 Mash. Rep. 402 (1998) (holding an attorney who was disciplined in the Connecticut State Bar to be reciprocally disciplined in the Mashantucket Pequot Tribal Bar).

27. See, e.g., Mashantucket Pequot Rules of Legal Counsel Conduct, Intro. (“These rules govern the practice by attorneys, lay advocates and advocates before the courts. . . . Any attorney, lay advocate, or advocate admitted to, or engaging in the practice of law before the courts . . . shall be subject to the court's supervision and disciplinary jurisdiction . . .”); *Day v. Chief Judge of Tribal Ct.*, 5 Am. Tribal Law 219 (Hopi Tribe App. Ct. Apr. 12, 2004) (“Lay advocates are members of the bar, as are attorneys.”).