

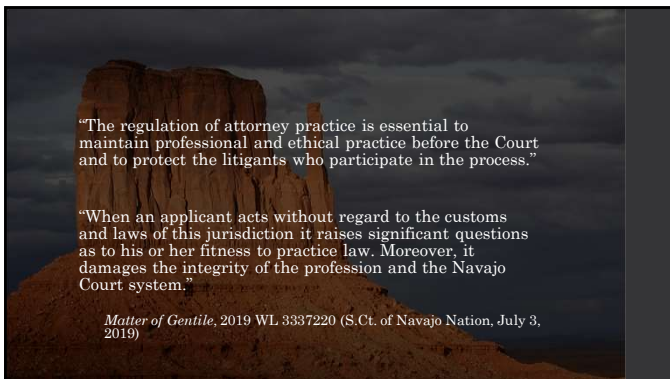
# Ethics: Tribal Bar Associations

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“Indian tribes have remarkable regulatory authority over nonmembers that do business within tribal boundaries. But relatively few tribal governments regulate attorney activities within reservation borders.

More tribes should.”

Matthew L.M. Fletcher, *Bullshit and the Tribal Client*, 2015 Mi. St. L. Rev. 1435, 1471 (2016).



“The regulation of attorney practice is essential to maintain professional and ethical practice before the Court and to protect the litigants who participate in the process.”

“When an applicant acts without regard to the customs and laws of this jurisdiction it raises significant questions as to his or her fitness to practice law. Moreover, it damages the integrity of the profession and the Navajo Court system.”

*Matter of Gentile*, 2019 WL 3337220 (S.Ct. of Navajo Nation, July 3, 2019)

## We seek to

- Attract attorneys appearing in tribal court
- Ensure a basic understanding of tribal laws and rules
- Ensure counselors are held accountable for their actions
- Ensure tribal courts are perceived as legitimate
  - In eyes of community
  - In eyes of outsiders

## The State Bars

An attorney's ethical obligations follow them, regardless of tribunal.

Rule 8.5(a): "A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs."

## Choice of Law – CA Rule 8.5(b)

- 1) For conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits ...; and
- 2) For any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred (including the jurisdiction that experiences the predominant effect of the lawyer's conduct).



## Reciprocal Disciplinary Proceeding

*In re Dixon*, 2 Mash.Rep. 402 (1998)  
Attorney disciplined by CT State Bar.

**Mashantucket Pequot Rules of Legal Counsel Conduct** specifically provide for reciprocal discipline, in this case, suspension from practice for 9 months.

"Ethical conduct conforming to the applicable rules of professional conduct within each and every jurisdiction an attorney is admitted to practice is the expected norm, not the exception."

## Need to include *all* counselors

These rules govern the practice of law 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 ..."

•Mashantucket Pequot Rules of Legal Counsel Conduct, Intro.

"Lay advocates are members of the bar, as are attorneys."

•*Day v. Chief Judge of Tribal Court*, 5 Am. Tribal Law 219 (App.Ct. of the Hopi Tribe, April 12, 2004).

## Federal Pressures

- “Tribal courts are often ‘subordinate to the political branches of tribal government,’ and their legal methods may depend on ‘unspoken practices and norms.’”
  - *Duro v. Reina*, 495 U.S. 676, 693 (1990)
- “The resulting law applicable in tribal courts is a complex ‘mix of tribal codes and federal, state, and traditional law,’ ... which would be unusually difficult for an outsider to sort out.”
  - *Nevada v. Hicks*, 533 U.S. 353, 384 (2001)
- Tribal court defendants may find there are “no rules of procedure,” and that the rules are “being made up as [the case goes] along.”
  - Brief Amici Curii and the National Association of Criminal Defense Lawyers and Experienced Tribal Court Criminal Litigators in Support of Respondent, in *United States v. Michael Bryant, Jr.*, at 18 (2016).

## Acting like a sovereign

- Most Tribes, if they note anything, adopt the ABA Model Rules of Professional Responsibility.
  - In line with *all* states, including California (mostly) as of Nov. 1, 2018
- Areas of distinct tribal consideration?
  - Zealous Advocacy
  - Conflict of Interest

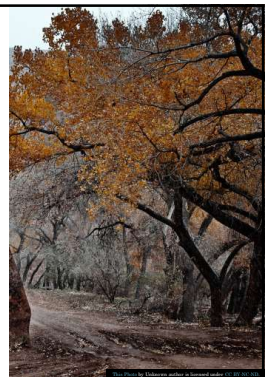
## ICRA re TLOA and VAWA

25 U.S.C. § 1302(e) ... the Indian tribe shall—

- 2) ... provide an indigent defendant the assistance of a defense attorney **licensed to practice law by any jurisdiction** in the United States that
  - applies professional licensing standards and
  - effectively ensures the competence and professional responsibility of its licensed attorneys;

## Duty to the Court

- *In re Stenz*, 9 Am. Tribal Law 329 (Nav.Sup.Ct. October 18, 2010)  
Counsel to the NN Legislative Council advised that the Supreme Court lacked authority to establish a “Government Reform Commission.”  
“Members 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.”
- § 206.  
“No [government official] shall obstruct, interfere with or control the functions of any Court of the Navajo Nation.”



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."

National Native American Bar Association Formal Ethics Opinion No. 1, Duties of Tribal Court Advocates to Ensure Due Process Afforded to All Individuals Targeted for Disenrollment, Adopted June 26, 2015



### *But also note*

· Opinion and Order on Reconsideration

"The Court feels that his permanent disbarment serves no healing purpose when one arm of the government view this disbarment as akin to banishment for political reasons ..."

"Inharmonious words have been exchanged and actions performed, but this Court will do what it can in an effort to turn such things into positive dew or corn pollen."

*In re Saenz*, 9 Am. Tribal Law 329 (Nav.Sup.Ct. October 18, 2010)



### *Zealous Advocacy vs. Public Trust*

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

*In re Saenz*, 9 Am. Tribal Law 329 (Nav.Sup.Ct. October 18, 2010)



With the growth of restorative justice approaches and tandem traditional systems, should the rules consider approaches rooted outside the adversarial framework?

## Other Advice

State Bar of California, Rule 2.1  
 "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."

Comment:  
 "The rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social, and political factors that may be relevant to the client's situation."

"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."

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



## Other Advice

Mashantucket Pequot, Rule 8  
 In representing a client, legal counsel shall exercise independent professional judgment and render candid advice. In rendering advice, legal counsel may refer not only to law but to other considerations such as

- Moral
- Economic
- Social, and
- Political factors

that may be relevant to the client's situation.

## Conflict of Interest

- General need to obtain informed consent
  - Mashantucket Pequot, Rule 7
    - No representation if "directly adverse to another"
    - No representation if "materially limited by responsibilities" to another
    - No representation if opposing counsel is related
  - *Monteau v. Monteau*, 5 Am. Tribal Law 26 (C.App. Confederated Salish and Kootenai Tribes, April 26, 2004)  
 Judge should have disclosed that litigant's attorney was also his personal attorney in his own child custody dispute.
- Counsel has "*professional obligation of fairness*" to opposing party and counsel to disclose.

Colville –  
Can use state bar rules


- *Gallaher v. Colville Confederated Tribes*, 15 Am. Tribal Law 159 (Colville Tribal Court of Appeals, Nov. 9, 2018).

Prior to serving as public defender, including filing a writ of *Habeas Corpus*, defendant served as an associate judge for Tribal Court, including presiding over initial filings in Appellant's case.

- Tribe has NO rule prohibition judge from serving as counsel in same case.
- But, State of Washington does have such a rule, and are attached here because Defendant is member of State Bar.

Dieta: "The Kaw Nation has adopted an adversarial system to settle its disputes. The interests of preserving the integrity of the tribal court forum are less exacting and strict if a conflict involves a lawyer practicing before the Court rather than a judge sitting on the Court. Adjudication in tribal courts involves greater flexibility than non-Indian state and federal courts to accommodate tribal traditions and equity."

*Cole v. Kaw Housing Authority*, 4 Okla. Trib. 281 (D.Ct. of Kaw Nation, July 10, 1995)



*But see*

- *Cole v. Kaw Housing Authority*, 4 Okla. Trib. 281 (D.Ct. of Kaw Nation, July 10, 1995)
- "Since counsel is member of the Oklahoma Bar Association, this Court may freely apply Oklahoma's rules for regulating lawyers in the Kaw Nation Tribal Court."
- Court finds Judge acted properly when they recused them self immediately upon discovering the conflict. The Court reflects on the difficulty to find lawyers in the area.

**Conflict of Interest - Kinship**

*In re Practice of Law*, 9 Okla. Trib. 31 (S.Ct. of Muscogee (Creek) Nation, February 14, 2005).  
Assistant Attorney General is cousin with Chief Judge.

"Under traditional Mvskoke law, controversies were resolved by clan Vcuvkvike (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."

