“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.”


Ethics:

Tribal Bar Associations

Lauren van Schilfgaarde, San Manuel Band of Mission Indians Tribal Legal Development Clinic Director, UCLA School Of Law

“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 and eyes of outsiders

“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 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)

- For conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits 
- 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

- 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.
- Lay advocates are members of the bar, as are attorneys.
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.”


Acting like a sovereign

Most Tribes, if they want anything, adopt the ABA Model Rules of Professional Responsibility.

In five thirteenth states, including California (mostly) as of Nov. 1, 2018

Areas of distinct tribal consideration?

Zealous Advocacy
Conflict of Interest

Duty to the Court

  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

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.


But also note

- Opinion and Order on Reconsideration
  “The Court finds that his permanent disbarment serves no healing purpose when one arm of the government views 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.’


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.”

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 in related

  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.

But see


“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.”

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 Vculvkvlke (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.”