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Contemporary Tribal Lawyering & Legal Ethics

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I. Introduction

Since long before European conquerors arrived, Native American tribes employed their own "internal dispute resolution" and external diplomatic systems conducted by the leaders and elders of the tribes to resolve conflicts and disputes.[1] Externally, when signing treaties with the British Crowns or the early frontier States, the lawyers representing Anglo-American interests were tribes' first encounters with Euro-centric lawyering. With no standardization of professional conduct in the treaty-signing process, tribes were often rubbed blind with deception, duress, and conduct that took no account of indigenous worldview, culture, tradition, and customs. Nor were tribes ever afforded opportunities to formulate their judicial system to articulate their perspective on the foundational principles of federal Indian law in the 19th century.

Rising from the ashes of the broken promise and forced assimilation, contemporary tribal lawyering (a concept that emphasizes lawyering for unique group interests that values tribal culture, tradition, and customs) operates in two realms. On the one hand, effective legal representation can only stand with the rule of law. On the other hand, the Euro-American legal devices have destroyed, disrupted, and displaced tribes and indigenous people both de facto and de jure. Therefore, attorneys for the tribes walk between the liminal world of the traditional tribal systems and Anglo-American legal conventions. The scope of challenges for contemporary tribal lawyering, this article argues, includes but is not limited to amending the problematic, racist legal foundations in federal Indian law, reconciling the mismatch between standardized ethical

[1] Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 Fordham L. Rev. 3085, 3091 (2013).

codes and tribal tradition, managing complex group interests in tribal courts and telling the stories of lawyering experience from Native and non-Native attorneys and law students.

II. Overview of Model Rules of Professional Conduct and Model Code of Judicial Conduct

The American Bar Association ("ABA") codified professional conduct for attorneys and judges in the Model Rules of Professional Conduct ("MRPC") and the Model Code of Judicial Conduct ("MCJC"). The Codes are advisory rules of ethical conduct for attorneys and judges to safeguard the "independence, integrity, and impartiality"[2] in and out of the courtrooms.

Uniquely, tribal clients (tribes and tribal members) have two types of interests—communal and individual. When representing and hearing cases related to tribes in federal and tribal courts, lawyers and judges are often confronted with layered challenges such as facing federal/state courts' racist undertone from the antiquated doctrinal tenets, navigating culture and tradition in tribal courts that has yet been codified into the model rules, and experiencing exclusion and underrepresentation as Native attorneys and law students.

This section first addresses that despite MCJC's premise on impartiality and fairness, when hearing cases related to a tribe or individual tribal clients, some judges in federal/state courts continue to endorse and cite precedents that are profoundly hostile against the Indigenous people in principle. The prejudice from the federal and state levels also extends to distrust of the abilities of tribal courts as appropriate forums to try tribal matters. Further, when it comes to representing tribes with communal, sovereign interests, MRPC has yet to amend to a narrowly tailored version that adapts to the unique and complex nature of tribal lawyering.

[2] MODEL CODE OF JUD. CONDUCT (AM. BAR ASS'N 2020).

Overall, this section introduces the MRPC and MCJC with a nod to their achievement in standardizing the ethical development of legal professions. However, when representing tribes and judging tribal issues, applying these codified, universal standards does not always harmonize with the objectives of tribal clients. In short, this paper argues that ABA standardized codification on ethical lawyering does not necessarily fit the unique nature of tribal lawyering.

A. Model Code of Judicial Conduct

The House of Delegates of the ABA introduced the MCJC first in the 1990s. Under four Canons of judicial conduct, MCJC provides guidelines for judges to adhere to proposed judicial ethics principles. The first Canon states, "[a] judge shall upload and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[3] This part of the MCJC introduces the lay of the land, where judges must always uphold fair and impartial judiciary conduct in court. The second Canon requires "[a] judge shall perform the duties of judicial office impartially, competently, and diligently." Under this Canon, judges are prohibited to (through words or conducts) "manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin." [4]

However, for over a century, judges in federal/state courts, including those who authored some landmark holdings of the federal Indian law, have positioned their opinions with the overwhelmingly hostile, biased, prejudicial language targeted tribes. For more than decades, even after the Civil Rights Movement, some courts continued to leave the racist, Indian-phobic nineteenth-century beliefs unchecked. Despite the language employed, some of these precedents

[3] *Id*.
[4] *Id*. at R 2.3 (B).

have holdings that upheld the core structure of the federal Indian law and are often cited by courts as favorable precedents to the tribes. As a result, federal Indian law produced an overwhelming number of cases at the whim of John Marshall's theorized Doctrine of Discovery[5] and at the mercy of a white men's court.

It wasn't until the late 1960s and early 1970s that the three branches of the federal government started to step out of the antiquated, racist shadows. During the Self-Determination Era, the Executive branch (President Richard Nixon's special message on Indian Affairs in 1970)[6] and the Legislative branch (enacting the Indian Self-Determination Act in 1988)[7] adopted self-determination as the policy for tribes in the United States. However, despite the progress under self-determination, the 1978 Supreme Court holding in *Oliphant v. Suquamish Tribe*[8] cruelly dismissed the Indian rights development post-self-determination.

In *Oliphant*, the Court relied on "deceptive reasoning"[9] where Justice Rehnquist concluded that the Suquamish Tribe lacks criminal jurisdiction over non-Indian offenders by cherry-picking, misrepresenting anti-Indian facts[10] from the Termination Era decades ago, and employing selective reasoning from the unrelated treaty. These precedents negatively affect

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[5] *See generally Johnson v. McIntosh*, 21 U.S. 543, 563 (1823) (holding that the Doctrine of Discovery granted exclusive title to land to the discoverer and as "fierce savages," the Native tribes were, in turn, getting the "benefit" of civilization); *see Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831) (stating that the tribe's sovereign power is diminished as a domestic dependent nation); *see also Worchester v. Georgia*, 31 U.S. 515, 559-61 (1832) (acknowledging that the states no longer have jurisdiction over the Cherokee nation given it is a "distinct community occupying its own territory.").

[6] Charles Wilkinson, *Blood Struggle the Rise of Modern Indian Nations* 196 (2005).

[7] *Id*. at 189.

[8] 435 U.S. 191.

[9] Adam Crepelle, Lies, *Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. Rev. L. & Soc. Change 529, 559 (2021).

[10] 435 U.S. 191, 197(upheld that "the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint." However, the tribes in the States at this point have embraced the process of self-determination—with laws and codes employed by the tribal courts.).

tribal inherent sovereignty. Then, in 2001, Justice Scalia authored *Nevada v. Hicks*,[11] where he heavily premised on "*Oliphant*'s principle of implied divestiture of tribal powers lost to the overriding sovereignty of the United States"[12] to conclude that tribal courts do not have jurisdiction to adjudicate tribal member for off-reservation tortuous conduct.

Continuous endorsement of citing precedents based on antiquated, factually erred, and explicitly hostile holdings against the self-determination agenda of tribes poses an ethical challenge for federal/ state judges. *Oliphant*-type holdings are different from other precedents in federal Indian law that ruled favorably for the tribes or individual tribal members with reliance on precedents that are explicitly racist towards the tribes.[13] Instead, the *Oliphant*-type reasonings are fundamentally opposed to the self-determination agenda by actively dismantling the tribe's rights self-determination from within. They eventually dissembled and chipped away the foundation of the tribal sovereignty one *Oliphant* citation at a time.

Through their endorsement of these holdings that are deeply rooted in racial aggression towards tribes, federal/state judges too often fail to fulfill the ethical obligation under the MCJC's "impartial," "competent," and "diligent" measurement. Through their tenacious belief that the tribal communities are culturally inferior and less competent in adjudicating and regulating their internal affairs, federal/state judges disregard self-determination progress made in the tribal judicial systems.

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[11] 533 U.S. 353.
[12] Robert A. Williams Jr., *Like A Loaded Weapon The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* 139 (2005).
[13] *See Worcester,* 31 U.S. 515, 545 (for example, even in the most favorable holdings to the tribes in the Marshall trilogy, Marshall characterizes tribes as "barbarous nations, whose incursions were feared, and to repel whose incursions the power to make war was given, were surely not considered as the subjects of Penn, or occupying his lands during his pleasure.").

Once, tribal judges were the creation of assimilationist agenda, existed at the sufferance of the Bureau of Indian Affairs ("BIA") and the Courts of Indian Offenses ("CFR Courts").[14] Now, tribes have left the shadow of the early colonial oppression and have begun to develop their judicial systems. However, given the substantive and procedural differences between tribal and federal courts, tribal judges often adhere to judicial conduct that prioritizes the culture and tradition of their tribe. For example, Chief Justice (Emeritus) Robert Yazzie wrote that the Navajo judges, by tradition, are "the hozhoji' Naat'aah, or peace chiefs" and mediators of dispute who advocate for "talking things out."[15] Community leaders are also chosen for "their wisdom, spirituality, exemplary conduct, speaking ability, and skill in planning for community survival and prosperity."[16]

Finally, the final section of this article will explore culture-tradition-focused alternative models to MCJC for tribal judges to consider. Whether tribes absorb the ABA's MCJC into their codes of ethical conduct should be theirs to self-determine. Nonetheless, the principles of impartiality, due process, and competency in judicial conduct should be encouraged as a general guideline for tribal courts to consider and incorporate as the basic principle of judicial conduct with universal applicability.[17]

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[14] Chief Justice (Emeritus) Robert Yazzie, *History of the Courts of the Navajo Nation* (Feb. 11, 2023), https://courts.navajo-nsn.gov/history.htm (explaining that the CFR courts were created by a code that Intended to destroy customs and diminish traditions—including practices of polygamy, medicine, and weddings—and tribal judges were appointed by the BIA agents/superintendents "who could have only one wife and wear Anglo-style clothes.").
[15] *Id*.
[16] *Id*.
[17] *See generally* Marla N. Greenstein, *Judicial Ethics and Tribal Courts*, ABA (Nov. 1, 2016), https://www.americanbar.org/groups/judicial/publications/judges_journal/2016/fall/judicial_ethics_and_tribal_courts/.

B. *Model Rules of Professional Conduct*

In 1977, the ABA established the Commission on Evaluation of Professional Standards (the "Kutak Commission") as the national committee to oversee ethical issues and draft professional conduct standards.[18] The committee masterminded the MRPC, which serves as the legal profession's foundational guidelines of ethics rules.

The MRPC is a highly individualistic model. The broadest requirement in MRPC states that attorneys who represent individual client, upon forming an attorney-client relationship, shall/should[19] be competent, zealously represent the client's interest, and owe an obligation to withdraw the legal representation when necessary. MRPC's definition of an advocate for a private client is one who "zealously asserts the client's position under the rules of the adversary system."[20] However, legal representation of tribes requires attorneys to form a unique legal obligation owned to an exceptional group interest whose duty is to "further justice in the greater Native American community, not merely to win his or her case."[21]

Specifically, one of the most complex challenges for tribal lawyering is adequately representing tribes as a group. MRPC states that a "dominant theory of law practice…a role-

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[18] *See generally* ABA, *Kutak Commission Draft*, https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/kutakcommissiondrafts/ (last visited Apr. 5, 2023).

[19] *See generally* MODEL RULES PROF'L CONDUCT (Some of the rules use terms "shall" or "shall not"; other rules use words such as "may," which allow attorneys to exercise discretion when consulting clients).

[20] *See* Carpenter, supra note 1, at 3145(discussing "[z]ealous advocacy reflects the individualistic impulse of the basic model…is simply not a broad enough category to encompass the range of needs for all clients, especially group clients."); *see also* Daniel Harrington & Stephanie K. Benecchi, *Is it Time to Remove 'Zeal' From the ABA Model Rules of Professional Conduct?* JDSUPRA (Aug. 26, 2021), https://www.jdsupra.com/legalnews/is-it-time-to-remove-zeal-from-the-aba-4010162/ (discussing zealous representation under the model code can "reasonably be interpreted as calling for all-out, no holds-barred, single-minded pursuit for the client's goals—which is not what the Model Rules themselves require.").

[21] *See* NAT'L NATIVE AM. B. ASS'N, *Formal Ethics Opinion No.1 Duties of Tribal Court Advocates to Ensure Due Process Afforded to All Individuals* (Jun. 26, 2015) at 2.

morality theory based on twin principles of zealous advocacy and lawyers' nonaccountability for the goals they help clients bring about."[22] Granted, the advantage of MRPC is to have a dominant framework that standardizes ethical conduct with universal applicability and the boundary-setting ability for all. However, the MRPC's guideline for individualized advocacy based on zeal can be "culturally and politically antithetical"[23] to collective tribal values of harmony and balance in the dispute-resolving process, such as the peacemaking process—upsetting specific matters such as "hozhooju naat'aanii" in the Navajo Peacemaking Court.[24]

Tribal groups are not faceless corporate entities prioritizing profit-gaining and financial productivity. Communal interests are fundamental to tribes. Knowledge or awareness of tribal history, culture, and tradition is not required to measure attorney competency under Rule 1.1.[25] Therefore, when it comes to representing tribal interests, the one-size-fits-all model under Rule 1.13[26] ("Organization as Client") limits only to corporate entities that have no requirement to master the cultural, historical, and traditional components of the entities. The MRPC favors the corporate model because its limited scope only functions in the single-laned chain of command, following the "directors, officers, employees' members, shareholders, or other constituent"[27] structure.

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[22] Carpenter, at 3089.
[23] *See* Carpenter, at 3092; *see also* Lauren van Schilfgaarde, *Indigenizing Professional Responsibility The Role of Ethics in Tribal Courts* 7-8 (2020) (discussing "[h]ealing, harmony, and balance draw upon a restorative model of justice that can conflict with the adversarial, zealous advocate model.").
[24] *See generally* James Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony* (1996).
[25] MODEL RULES PROF'L CONDUCT R.1.1 (2012) (stating "competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.").
[26] *Id*. R. 1.13 (b) (stating "[u]nless the lawyer reasonably believes that it is not necessary for the best interest of the organization to do so, the lawyer shall refer the matter to higher authority that can act on behalf of the organization as determined by applicable law.")
[27] *Id*. at R. 1.13 (f).

Furthermore, there are other ethical obligations under the provisions of MRPC that do not necessarily adapt to the practical reality when working with tribes or tribal members. For example, Rule 1.7 states that "a layer shall not represent a client if the representation involves a concurrent conflict of interest."[28] One of the difficulties for attorneys representing tribes is pinpointing the parties in conflicts. MRPC focuses on "concurrent conflict of interest"[29] when the conflicts exist either while "the representation of one client will be directly adverse to another client"[30] or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or third person, or by a personal interest of the lawyer."[31]

Here, there are many challenging conflicts when representing tribal interests. They manifest internally (between different branches of tribal government) or externally (tribes suing other tribes or tribes suing other governmental, private entities at the state or federal level).[32] For example, in the previous discussion on MCJC, the prior section illustrated that federal Indian laws were developed from numerous antiquated, factually erred, and explicitly racially hostile holdings. When citing these holdings that may put one's client in a favorable position, foreseeable conflicts might arise by setting harmful precedents for other tribes. In other words, the hardship in identifying conflicting interests for attorneys now and in the future is often the result of "a body of law that rests on problematic, if not illegitimate, doctrinal tenets."[33]

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[28] *Id*. at R. 1.7 (a).
[29] *Id*.
[30] *Id*. at R 1.7 (a)(1).
[31] *Id*. at R 1.7 (a)(2).
[32] Hon. Elizabeth Ann Kronk Warner, *Ethics and Indian Country*, The Federal Lawyer, Apr. 2016, at 5.
[33] *See* Carpenter, at 3137 (citing S. James Anaya, *The Ethical Dilemma of Doing Federal Indian Law*, Paper Delivered to the Federal Bar Association's Annual Indian Law Conference (Apr. 4-5, 2002) (on file with the authors) "[H]ow do we advise our Indian or tribal clients when we see Federal Indian Law, which was once understood to be a friendly body of doctrine, being emasculated by the federal courts to the detriment of tribal interests.").

Finally, the MCPR's requirement on conflicts of interest and attorney competency, for example, are only tips of the iceberg that highly value the client's autonomy and the lawyer's accountability through individualized representation. Yet, a flexible area should be discussed in the model code for a field that demands and prioritizes other values, such as the client's traditional, cultural, and customary identity as a group. While a lawyer's role is "grounded in a logic of service, not identification,"[34] the theory of professional conduct should also "acknowledge the range and diversity of clients, lawyers, and relationships they form, and encourage the development of professional ideologies that reflect the commitments and values of lawyers for groups."[35]

III. Ethical Challenges in Tribal Lawyering

As discussed, strictly applying MRPC to tribal lawyering is problematic because the "one size" cannot "fit for all." However, standardizing ethical conduct for this unique practice area is challenging for two reasons. "First, the individualistic impulse of the basic model of law practice and its emerging alternatives is so ingrained that it forecloses the possibility of challenging and imagining genuine group-based alternatives."[36] With this issue in mind, this section further discusses the concern in standardizing ethical conduct for judges and lawyers with illuminating examples from tribal courts, surveys, and stories from Native and non-Native attorneys and law students.

First, by reviewing the overarching challenges in the tribal-federal court system, the exhaustion doctrine, this section begins road mapping with a procedural guideline that judges

[34] *See* Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U.COLO. L. REV. 1, 6 (2003); *see also* Carpenter, at 3157.
[35] Carpenter, at 3162.
[36] *Id*. at 3087.

and lawyers must follow when handling/representing relevant cases/clients. Second, by taking a closer look into the tribal court system, this section explores ethical lawyering behaviors in tribal courts and the growing efforts in de-standardizing ethical conducts through guidelines and resolutions adopted by NAABA (National Native American Bar Association). Third, through a microscopic lens, this section concludes with stories of practicing tribal lawyers—both Native and non-Native—to thread up the critical narratives of tribal lawyering that are predominantly unseen and untold in the legal world.

A. Exhaustion Doctrine

Understanding the procedural and structural relationships between the courts is fundamental to issuing judicial opinions and representing tribal clients. As political groups,[37] federally recognized tribes can rightfully exercise tribal self-determination in tribal courts, apply tribal laws, and hear internal matters before such cases appeal to the state/federal level. Therefore, the "competence" requirement under MRPC Rule 1.1 "implicitly"[38] calls for lawyers to honor tribal self-determination and to familiarize themselves with customs, tradition, and tribal judicial, legislative, and executive (if applicable) processes.

Before a case goes to federal courts, tribal courts, from lower to appellate level, must be allowed to review the cause of action.[39] This principle, known as the *National Farmers/Iowa Mutual* exhaustion doctrine, stated, "unless a federal court determines that the Tribal Court

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[37] *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (held "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.").

[38] Carpenter, at 3123 (discussing that the Rule 1.1 defines competence to encompassing "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." However, "(n)owhere does the rule or comments suggest the possible relevance of other aspects of competence, such as knowledge of tribal history, culture, and political organization." Hence, here, the term "implicit" indicates that Rule 1.1 could be interpreted to encompass cultural competence when applied to tribal lawyering.).

[39] *Nat'l Framer Union Ins. Co. v. Crow Tribes of Indian*, 471 U.S. 845, 857 (1999).

lacked jurisdiction, however, proper deference to the tribal court system precludes relitigating" of the merits.[40] Federal courts also acknowledge that tribal courts should be allowed to adjudicate matters over reservation affairs that encompass civil issues and criminal matters that do not invoke "murder or other grave crimes"[41] under the Major Crimes Act.

Nonetheless, the tribal judicial systems were unfairly compared to the state courts and undermined as less "sophisticated" [42] and "inappropriate" forums to try, especially, criminal matters. To this day, the only case that the Supreme Court has heard with complete exhaustion of tribal remedies is the *Plain Commerce Bank v. Long Family Land and Cattle Co*.[43]

B. Tribal Courts

Despite structurally mirroring federal and state courts, tribal courts are still "tribal" because they are forums for tribes to "build distinct tribal law, build traditional resurgences, and prize custom and tradition as binding authority."[44] For example, tribal elders may be expert witnesses in tribal courts to testify about certain customs or traditions. For Navajos, the Navajo common law and peacemaking courts also emphasize the importance of bringing tradition and the Diné language into tribal judicial proceedings.

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[40] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1999).
[41] *U.S. v. Kagama*, 118 U.S. 375, 383 (1886) (held that the U.S. alone has exclusive jurisdiction to encore criminal jurisdiction under the 1885 Major Crimes Act).
[42] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211-12 (1978) (held "[w]e recognizes that some Indian tribal court system has become increasingly sophisticated and resemble in many respects their state counterparts.").
[43] 554 U.S. 316 (2008).
[44] Laren van Schilfagaarde, *Indigenizing Professional Responsibility The Role of Ethics in Tribal Courts*, ABA 6 (May 13, 2020), https://www.americanbar.org/groups/judicial/publications/judges_journal/2020/spring/indigenizing-professional-responsibility-role-ethics-tribal-courts/.

Some tribal courts have developed their own ethical guidelines for professional conduct.[45] These rules function not only as an internal framework to safeguard customs and traditions, but tribal courts' ethical rules also serve as external tools to hold tribal judges accountable.[46] Through this internal mechanism, attorneys representing clients in the tribal courts can position themselves with a better understanding of tribal law and the decision-making process.

Given the heavy communal interests at stake, tribal lawyering in tribal courts requires attorneys to position themselves in roles that resemble a government lawyer more closely. Here, contrary to an attorney advocating out of zeal for their client, the duty of a government lawyer is more analogous to the interest of tribal lawyering—advocating for a group with the constraint of the public trust.

To illustrate, one of the most debated ethical controversies in balancing group interests and public trust is tribal disenrollment—when tribes disqualify or disenroll previously registered tribal members or citizens. While international,[47] federal,[48] and tribal[49] laws recognize Indigenous people's right to identity, culture, and citizenship, these rights can be taken away

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[45] *See generally* NAVAJO NATION CODE OF JUD. CONDUCT (1992) (for example, The Navajo Nation developed its Code of Judicial Conduct in 1991where it incorporated Four Sacred Mountains, clan systems, peacemaking, and other communal, traditional values in professional conduct for Navajo judges.). [46] Schilfagaarde, *supra* note 44, at 7 (discussing that criticisms from the federal courts, the U.S. Supreme Court in particular, has challenged Tribal court judicial capacity with reasoning drawn from cases such as *Oliphant*, that tribes' right to complete sovereignty are necessarily diminished given their domestic dependent status).

[47] U.N. Declaration on the Rts. of the Indigenous People art. 5,6 (declaring "[i]digenous people have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State." And "Every Indigenous individual has the right to a nationality.").

[48] 25 U.S.C.§§ 1302 (stating "[n]o Indian tribe in exercising powers of self-government shall…deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law.").

[49] CONST. OF SPOKANE INDIAN TRIBE art. III, §3 (for example, this tribal constitution prohibits Spokane Tribal Law to "operate to strip citizenship from any person who has previously been recognized to possess citizenship" except when a citizen transfer enrollment to other tribes.).

through disenrollment. The Supreme Court has held in *Santa Clara Pueblo v. Martinez*[50] that the tribal courts should be the preferred and appropriate forum to decide tribal citizenship criteria, to include and exclude a member when it concerns crucial personal and property interests for both Indians and non-Indians within the bounds of a reservation. However, when exercising the power of exclusion discretionarily to disenroll mass members who have been subject to the tribal jurisdiction and enjoyed tribal benefit for decades, these unchecked behaviors are subject to ethical and moral[51] reviews.

Here, the National Native American Bar Association, in response to the moral and ethical challenges regarding Mass Disenrollment, enacted Resolution #2015-06[52] and drafted a legal ethics guideline[53] to provide contexts for the adopted Resolution. Unlike MRPC, the purpose of this guideline is "not purport to establish any universal Model Rules for Indian country or displace existing tribal ethics provision."[54] Instead, the initiative of NNABA is to carve out an alternative ethical model—a functional and somewhat narrowly tailored guideline that works for tribal advocates across the United States.

The guideline highlights the difference in individual tribal member representation and represents the tribe's group interest. For example, when consulting an individual targeted for disenrollment, a tribal advocate's duty is at least two-tiered. First, a lawyer should ensure that procedurally, the basis of the disenrollment afforded parties with due process of law and is

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[50] 436 U.S. 49, 72 (1997).
[51] NAT'L NATIVE AM. B. ASS'N, *supra* note 21, at 4 (discussing while tribal advocate holds no role as a moral advisor, "moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.").
[52] NAT'L NATIVE AM. B. ASS'N, *Resolution #2015-06 Supporting Equal Protection and Due Process For Any Divestment of the American Indigenous Right of Tribal Citizenship*.
[53] NAT'L NATIVE AM. B. ASS'N, *supra* note 21, at 1.
[54] *Id*. at 2.

not based on tribal political[55] or economic[56] incentives. Second, a lawyer should review the full scope[57] of a case regarding the disenrolled individual based on valid law and facts to avoid frivolous lawsuits.

When representing group interest, an advocate for a tribe should prioritize a sovereign nation's communal interest and self-determination. In a disenrollment case, attorneys typically face multiple counts of injuries caused by removing Indigenous people from their community—injuries ranging from collective harm and personal damages to compromising the integrity of tribal, federal, or international law.[58] NNABA guidelines urge attorneys unsure about their decision-making regarding these intricate matters to refer to individual tribes' internal "dispute-resolution" forums,[59] such as the Navajo peacemaking court, the council of elders, dispute resolution ceremonies, or healing ceremonies. After all, effective legal representation in the tribal court should not swallow the objectives of tribal self-determination.

C. Tribal Lawyering and Inclusivity

Before the Self Determination era, most Indian law practitioners were non-Indians. During the 1970s, lawyering groups for nation buildings began to bloom following the creation of OEO legal service programs, NARF (the Native American Rights Fund), the Indian Law Resource Center, private firms, in-houses, and Pre-Law Summer Institutes for Native students.[60]

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[55] *Id*. at 5 (explaining that political motives including motives of disenrollment based on a tribal leader's belief that family disenrolled "mostly voted against him in the last election.").
[56] *Id*. (illustrating that a tribe disenrolled a family based on the belief that "reducing the number of tribal members will increase the amount of tribal per capita payments available" to another family.)
[57] *Id*. at 4 (for example, the cultural identity of a former member, inter-generational trauma of the family, and all applicable laws—federal, tribal, and international- should be considered when a lawyer establishes case theory regarding the basis of disenrollment.).
[58] *Id*. at 6.
[59] *Id*.
[60] Wilkinson, *supra* note 6, 242.

Tribes, too, started structurally formulating their internal tribal lawyering resources. For example, in 1967, the DNA People's Legal Services ("Diné be'iiná Náhiiłna be Agha'diit'ahii" or "lawyers who work for the revitalization of the Navajo people")[61] were established under the mission to provide legal assistance for the Indian Country, servicing Navajo, Hopi, and Jicarilla Apache. A key aspect of their hiring policy requires applicants to obtain state and tribal court bar licenses, with preference given to qualified Navajo and other Native applicants first.[62]

Here, the preference hiring mechanism in tribal lawyering is not based on racial preference. The Supreme Court investigated this issue in *Morton v. Mancari*.[63] In *Morton*, non-Indian employees of the BIA filed a class action to challenge the "Indian Preference Statues" in the 1934 Indian Recognition Act, claiming violation of the 1972 Equal Employment Opportunity Act."[64] The Court rejected the appellees' arguments and held that the preference is not based on race.[65] In footnote 24, the Court further clarifies that "[t]he preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. Therefore, the preferred mechanism is a political determination regarding the progress of self-determination rather than the endorsement of racial discrimination.[66]

Even if the preferential hiring mechanism does not discriminate against non-Native attorneys, should non-Native attorneys take a backseat anyway because Native American attorneys are "inherently better positioned to represent tribes"?[67] Federal Indian law scholars,

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[61] About DNA, About DNA – DNA-People's Legal Services (dnalegalservices.org) (last visited Apr. 5, 2023).
[62] *Id*.
[63] 41 U.S. 535, 554 (2001).
[64] *Id*. at 539.
[65] *Id*. at 553.
[66] *Id*.; *see also United States v. Antelope*, 430 U.S. 641, 646 (1977) (the Court also held that the classification based on ancestry is not permissible if the ancestral group does not have a political structure to determine who its member are.).
[67] Carpenter, 3124.

lawyers and judges have firmly rejected such notions.[68] Under Rule 1.1 of MRPC, a lawyer can achieve the duty of competence owed to a client and "provide adequate representation in a wholly novel field through necessary study."[69] Tribal lawyering is a process of learning, not being. "Cultural training" or "cultural literacy"[70] can be learned by anyone with respect and understanding that these values are integral to preserving tribal tradition, promoting social/kinship structure, safeguarding political integrity, and constructing legal systems.

More specifically, in the words of the late Navajo Chief Justice Claudeen Arthur, adequate legal representation depends on whether an attorney shares a similar "worldview"[71] with the client when representing tribal clients. The Indigenous worldwide drives Indigenous people's beliefs and identity. As non-Native lawyers, tribal lawyering is an inevitable learning process.
One can understand, respect, and empower worldviews by actively learning, listening, and training themselves to enrich one's indigenous cultural competency and cultural literacy.[72] For example, by taking the Navajo Nation Bar Exam or becoming acquainted with the Navajo Nation Bar Association, a non-Native attorney or student can adequately learn and apply the Navajo world views and legal structure (traditional, customary, natural, and common law) under the Diné bi beenahaz'áanii[73] (or the Diné Fundamental Law).

Native law students and attorneys (including those identifying as American Indian, Alaska Native, or Native Hawaiian) were/are severely underrepresented in the legal field.

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[68] *Id*.
[69] Model Rules Prof'l Conduct R. 1.1 cmt. 2 (2012).
[70] Carpenter, 3127 (discussing "Pueblo lawyer and law professor Christine Zuni Cruz has put it, those who seek to work with tribal people must seek 'cultural literacy,' including the ability to 'critically analyze the social and political structures that inform…realities.").
[71] *Id*. at 3124.
[72] *Id*. at 3129.
[73] Diné Bi Beenahaz'áanii (1 N.N.C. §§ 201-206).

Inclusivity is a crucial ethical component under Rule 8.4 of the MRPC.[74] But the rule does not reflect the perspectives and stories of workplace harassment or discrimination that attorneys, especially women, experienced in real life. In 2015, the NNABA conducted an in-depth study that tells the stories of tribal lawyering.[75] For the first time, from survey results to interviews with Native attorneys, this report comprehensively reviews the ethical concerns and stories related to identity, tribal affiliations, law school enrollment, workplace experience, racial discrimination, gender-based harassment/mistreatment, age-related discrimination, and tribal politics-based exploitation.

Morton[76] established that being an Indian is a political identity based on the membership determination of any federally recognized tribe. This criterion, however, does not encompass practitioners who identify as Native American but not as an enrolled member of a recognized tribe by the United States, ones who are not enrolled in a federally recognized tribe for other personal reasons, or those not enrolled but identify as Native American based on heritage connection but does not know nor cannot prove blood quantum.[77] The NNABA report factors in the "complicity of simply being Indian"[78] and invites all participants to engage in the inclusive discussion.

In the report, the layered and often negative workplace experiences of Native attorneys cry for rewiring, reforming, and remodeling means of tribal lawyering. For example, attorneys who do not directly practice with tribes (non-tribal sectors)—including those who work in private firms, federal or state government, non-profit or public sector, and solo practice—the

[74] Model Rules Prof'l Conduct R. 8.4 (g).
[75] *See* NAT'L NATIVE AM. B. ASS'N, *The Pursuit of Inclusion: An In-Depth Exploration of the Experiences and Perspectives of Native American Attorneys in the Legal Profession*, (Feb. 11, 2015) at 2.
[76] 41 U.S. 535, 542.
[77] NAT'L NATIVE AM. B. ASS'N, *supra* note 75, at 16-17.
[78] *Id*. at 15-17.

experience of feeling stuck,[79] alienated[80], and dissatisfied[81] with their job reveals an appalling reality. Moreover, the statistics show that discrimination in the workplace is layered with one's gender, race, ethnicity, and tribal affiliation. When these factors are augmented, Native attorneys' frustration and oppression when repetitively encountering "exclusion, disrespect, and marginalization in the workplace"[82] amplifies to the extent that numbers cannot quantifiably portray.

In the NNABA's report, 37.79% of women to 3.35% of men reported that they had experienced gender-based harassment in their workplace.[83] Even for Native attorneys who work in the tribal sectors, despite the overall higher job satisfaction rate[84] than the non-tribal workers, women attorneys considerably experience more gender-based discrimination.[85] Besides being oppressed by male-favoring tribal politics, women attorneys also encounter gender, age, and racial discrimination, harassment, and verbal abuse from clients, judges, and other male

[79] *Id*. at 30 (one attorney responded to the survey reported that "I honestly feel that my resume being stacked with almost solely Indian Law/Lobbying work has prevented me from obtaining positions not having to do with Indian law…I am literally stuck now. No advancement opportunities, no job opportunities, no business loan opportunities due to my debt.")
[80] *Id*. at 32 (Lawrence R. Baca, the former senior tribal attorney in the civil rights division at DOJ, wrote that "[t]here is a greater likelihood for Native American Attorneys that they will be the first. The first Indian hired into your law firm or agency; the first or the only Indian teaching at your law school.")
[81] *Id*. at 34 (an attorney reported that "[w]orking as an attorney in Federal Indian law in a major market, the projects are driven by the desires of the clients with the most money—often the goals and priorities of these clients are not aligned with and or are damaging to tribal clients who need help the most…Too often, the glamorous issues that got the most legal traction were not representative of the more "grassroots" tribal population…leading me to conclude that employment as an attorney in Indian law was not the best way to be an advocate.")
[82] *Id*. at 35 (statistics reflect that "40.65% of the attorneys in the study reported experiencing demeaning comments or other types of harassment based on their race, ethnicity, and/or tribal affiliation"; and "25% of attorneys overall in the study reported experiencing demeaning comments or other types of harassment based on their gender.")
[83] *Id*. at 36.
[84] *Id*. at 34 (the report reflects that tribal sector attorneys have the most satisfied experience than ones who work for the federal/state governments or law firms).
[85] *Id*. at 26 (women attorneys have reported that "[t]ribal leaders often favor males and so that limits the ability of women to succeed as leaders in the community and the workplace.").

stakeholders in the legal world. For example, one attorney shared in the NNABA reports on an outrageous incident in her early professional career:

> "When I was a young attorney, I appeared in a courtroom in northern MN. I represented a non-Indian male. He appeared in court in blue jeans and a t-shirt and was rather disheveled. I have on a navy-blue suit. The white male judge thought I was the defendant, and my client was the attorney. He continued to refer to the defendant as a counselor until the court reporter had to lean over and tell him that the white man was not the attorney. It was the Indian woman."[86]

While guidelines are advisory and static, human experiences in the professional world are not. The story of tribal lawyering goes beyond codification. For Native and non-Native students and attorneys who practice Indian law, their experiences are critical narratives that help the ethical guidelines to adapt.

IV. Proposed Resolution

This article focuses on the issue of the misalignment between ABA's codes for professional conduct and the nature of tribal lawyering. To reconcile the differences while having a functional mechanism to hold practitioners accountable, there should be more alternative models that work for different tribes. Besides laying out guidelines, conversations, and actions on fostering a more inclusive, positive environment for Native and non-Native tribal attorneys and law students needs urgent attention.

A. Alternatives Models

Government lawyering, the alternative ethical guideline to tribal lawyering, encompasses the five public-interest-oriented considerations[87] for government lawyers: public interest, all three branches of the government, the branch of government where lawyers work for, any agency or department that lawyers work with, and officers who are responsible for making decisions for

[86] *Id*. at 37.
[87] Carpenter, at 3095.

the government agency. However, because tribal culture, customs, and history are not incorporated, this model is referential as a starting point.

Other alternatives to MRPC that incorporate more tribal-focused models are gradually emerging. For example, the NNABA guidelines on disenrollment issues set forth ethical guidance in matters that implicate the fundamental rights of Indigenous people.[88] Broadly, NNABA has incorporated some ethical principles for tribal lawyering in its mission statement.[89] The elements of communal interests, communal responsibility, identity, diversity, sovereignty, culture, customs, and history are the main themes that are and will govern the professional conduct of practitioners who represent tribes. Similarly, the ABA also established a Tribal Courts Council (TCC) committee to "improve the fairness and functioning of Native American tribal courts and to correct misperceptions about tribal courts and governments."[90]

Moreover, the National Tribal Judicial Center at the National Judicial College proposed a "Sample Tribal Code of Judicial Conduct."[91] Tribes with limited capacity to codify their judicial conduct can refer to this code as an alternative to the MCJC. The benefit of using this alternative model goes beyond incorporating cultural, communal, and traditional values, as stated in Canon 4.[92] The Code also restores some measures of the tribal court's authority over criminal matters post

[88] NAT'L NATIVE AM. B. ASS'N, *supra* note 21, at 6.
[89] NAT'L NATIVE AM. B. ASS'N The Mission of NNABA, https://www.nativeamericanbar.org/the-mission-of-nnaba/ (last visited Apr. 6, 2023).
[90] AM. B. ASS'N Tribal Courts Council, https://www.americanbar.org/groups/judicial/committees/tribalcourts/?login (last visited Apr. 6, 2023).
[91] SAMPLE TRIBAL CODE OF JUDICIAL CONDUCT: A TEMPLATE (2007), *available at*: https://www.judges.org/wp-content/uploads/2020/03/ntjc_samplecode.pdf.
[92] *Id*. at 10 (Canon 4 states that "a judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.").

Oliphant.[93] It, too, helps the tribes to retain more external business and economic development interests.[94]

B. Other Suggestions

The MRPC considers lawyers as public citizens who "should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession."[95] In addition, lawyers "cultivate the knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education."[96] Therefore, educational resources—through either law school programs, states or uniformed bar exams, and continuing legal education (CLE) credits—are platforms that can help increase awareness and training on tribal legal ethics for attorneys and law students.

In the NNABA's diversity report, the number of Native American law students enrolled nationally in the 80s was 392.[97] The number climbed to 1,273 in 2010.[98] The information advised[99] that to rejuvenate the pool of Native practitioners, implementing pipeline strategies is an effective means to introduce and expose more Native students to the legal field. While in law school, student organizations such as local NALSA (Native American Law Student Association)

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[93] Carpenter, at 3158.
[94] *Id*. (discussing that "[p]rivate business are very afraid of the notion of a tribal court. Tribes have recognized that impression and have been trying to say, 'This is a legitimate system…. The adoption of the model codes in wide usage, which people understand inside and outside the tribal context, would be helpful in that regard.").
[95] AM. B. ASS'N Model Rules of Professional Conduct: Preamble & Scope, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ (last visited Apr. 6, 2023) (citing to ¶6 of the Model Rules).
[96] *Id*.
[97] NAT'L NATIVE AM. B. ASS'N, *supra* note 75, at 20.
[98] *Id*.
[99] *Id*. at 47.

and its national organization NNALSA (National Native American Law Student Association)[100] are also resources to support the future Federal Indian Law practitioners through a student-led writing competitions, moot court competitions, resume book, and career and internship boards to help students network and grow professionally.

Further, adding federal Indian law as a tested subject to Uniformed Bar Exam (UBE) or fact patterns unique to ethical lawyering in the Indian Country to the Multistate Professional Responsibility Exam (MPRE) can be helpful. However, different states are split in adopting Indian law into UBE. Even without testing the subject matter on the Bar, some states have adopted alternative models to support the need to educate students and newly admitted attorneys. For example, before New Mexico became a UBE state, it was the first state that adopts Indian law as a testable subject in 2002.[101] Upon joining UBE, New Mexico eliminated federal Indian law as a bar exam subject. Yet, it innovatively devised an independent course for federal Indian law as Bar admission, required outside the UBE.[102] The state of Washington, without directly absorbing federal Indian law as a testable component for writing or multiple-choice sections, created a "unique add-on, open-book, multiple-choice test that includes Indian law."[103]

Finally, for federal Indian law practitioners, CLE credits that incorporate discussion on oral history, tradition, culture, and customs from different tribes help address the significant

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[100] BYLAWS OF THE NATIONAL NATIVE AMERICAN LAW STUDENTS ASSOCIATION, INC (Jan. 16, 2023), *available at*: https://static1.squarespace.com/static/5b498b0536099be3d3fbcd81/t/642c91e4e087376fd94f8445/1680642585371/BYLAWS+-+Jan2023.pdf.

[101] Paul Spruhan, *Indian Law on State Bar Exams In the Age of the Uniform Bar Examination*, THE FEDERAL LAWYER 14 (Mar. 15), https://www.fedbar.org/wp-content/uploads/2015/03/indian-mar15-pdf-1.pdf.

[102] *Id*. at 15 (discussing that the reason for New Mexico to write the subject out is that "if New Mexico adopts the UBE, the board of bar examiners will propose the same requirement for all those who pass the exam so that all attorneys admitted to the bar exam will have to take a free-standing Indian law course as a separate requirement for admission.").

[103] *Id*.

cultural component in navigating tribal courts, balancing complex interests when representing tribes, and ethical practices that value these critical components in tribal lawyering. For example, events such as the Federal Bar Association's 2023 Indian Law Conference incorporates CLE in its agenda and discussion to advance this initiative.[104]

V. Conclusion

Finally, by reviewing the operative issues of standardizing ethical guidelines when advocating for tribes, this article argues that alternative models of the MCJC and MRPC could meet the harmonization objective of tribal lawyering. By spotlighting ethical challenges that Native and non-Native attorneys and law students face, this article calls for more inclusive narratives to be heard and seen.

Tribal lawyering is the product of identity, decolonization, and innovation. Its layered nature invites and excites conversation on theoretical and practical ethical challenges for both judges and attorneys. This article concludes that the complexity is at least fivefold.

First, tribal lawyering concerns both judges and attorneys. Codified ethical conduct influences the conduct of both. Second, tribal lawyering is a process of decolonization and healing. The ethical guidelines should be reflective in harmonizing the two worlds, honoring the Sacred Trust (or "wouncage"),[105] and prioritizing tribal self-determination and national building.

Third, most importantly, tribal lawyering is about balancing the unique group interests when representing the communal interests of a tribe and navigating the intricacy of the culture, tradition, and customs of different tribal groups. Lastly, tribal lawyering is also about

[104] FED. B. ASS'N 2023 Indian Law Conference, https://www.fedbar.org/event/indianlaw23/ (last visited Mar. 6, 2023).
[105] Carpenter, 3125 (discussing the Sacred Trust is "an expression of the communal reverence shown by the people of a tribe or community for the originating force that makes the wind, that brings the clouds, that carries the rain, that falls to the grass, that feeds the buffalo to nourish the man.").

storytelling. But unfortunately, the narratives of non-Native and Native advocates are still mostly excluded and often unseen, especially from Indigenous women law students, lawyers, and law professors.[106]

[106] Angelique W. Eagle Woman & Wambdi A. Was'teWinyan, *Native Women Law Students Excluded from So-called "Women of Color in Law Schools" Study*", ICT (Jun. 26, 2020), https://ictnews.org/opinion/native-women-law-students-excluded-from-so-called-women-of-color-in-law-schools-study.