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A Coherent Ethic of Lawyering in Post-McGirt Oklahoma

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A COHERENT ETHIC OF LAWYERING IN POST-*MCGIRT* OKLAHOMA

I. INTRODUCTION

In 2000, a McIntosh County, Oklahoma jury sentenced Muscogee (Creek) Nation citizen Patrick Murphy to death for the brutal murder of fellow Creek citizen George Jacobs.[1] This single event would set the stage for Murphy's two decade long appeal of his death sentence, beginning with the standard Oklahoma state appeals process and ending all the way in the United States Supreme Court with a single page *per curiam* opinion in July of 2020.[2] It is likely that Mr. Murphy's case would not have been resolved on such a high stage, and with such enormous significance for the Muscogee (Creek) Nation, if federal public defender Lisa McCalmont had not been assigned Murphy's case during his federal habeas proceedings. Murphy's case was ultimately resolved in accordance with the Supreme Court's decision in *McGirt v. Oklahoma* that the State of Oklahoma lacked jurisdiction to prosecute Seminole Nation citizen Jimcy McGirt under the Major Crimes Act because McGirt's crime, like Murphy's crime, took place on the treaty-guaranteed

1. Michael Smith, *Man guilty in dismemberment murder*, TULSA WORLD (Apr. 14, 2000) (last updated Feb. 27, 2019), https://tulsaworld.com/archive/man-guilty-in-dismemberment-murder/article_6c80adfc-e236-5f21-9dfd-a4a928c29a64.html.

2. *See* Sharp v. Murphy, 140 S. Ct. 2412 (2019).

Creek Reservation in modern day eastern Oklahoma.[3]

Even before she was assigned Murphy's case, Lisa McCalmont dedicated her legal career to fighting the death penalty and had a reputation for attention to detail and zealous advocacy on behalf of her clients.[4] Moreover, Lisa had a background in geology and was familiar with land-title law, which led her to a crucial discovery just north of Vernon, Oklahoma at the scene of Murphy's crime.[5] Lisa and her team realized the Oklahoma Bureau of Investigation incorrectly reported the exact location of the crime, and the actual location of Jacobs' death was atop a subsurface estate which was still Creek allotment land.[6] This discovery gave Murphy's legal team the first "breakthrough" they needed to push an 18 U.S.C. § 1151(a) Indian country jurisdictional argument in Murphy's appeal.[7] But the team didn't stop with the allotment-based argument. They went one step further, and ultimately raised the additional argument in Murphy's second application for state post-conviction relief that the entire treaty-guaranteed Muscogee (Creek) Nation reservation was never disestablished, and therefore the murder occurred in "Indian country" for the purposes of the Major Crimes Act.[8] The state of Oklahoma had no authority to prosecute their client.

Lisa McCalmont's deep dive into the land status of the scene of Patrick Murphy's crime was an early glimpse at the extent to which attorneys for Patrick Murphy, Jimcy McGirt, the Creek Nation, and amicis would argue on behalf of their Indigenous clients in the Creek Nation reservation litigation over the coming years. Indeed, McCalmont's work goes far beyond a bare standard of mere "competent representation"[9] and instead demonstrates an attorney's use of all available knowledge and skill to work toward her client's cause. Post-*McGirt*, it is becoming an ever-increasing reality that lawyers practicing in Oklahoma must, like Lisa, become keenly aware of the land on which their case occurs and whether or not the case implicates sovereign Nations and their citizens. This heightened standard of awareness necessitates a coherent ethic of lawyering for Native Nations and peoples.

The American Bar Association Model Rules of Professional Conduct fail to fully inform the ethical considerations presented by many Indian law and Indian law-adjacent cases. There is simply no rubric for complex matters of culturally competent representation and individual invocations of Native treaty rights for the zealous advocate to follow. The ABA has still offered no official guidance regarding representation of individual Native citizens and Native Nations—attorneys must often rely on the general rules and simply do their best when they are faced with issues outside the reach of the rules. Unfortunately for those representing Indigenous clients in Oklahoma and the U.S. legal system at large, this

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3. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

4. Rebecca Nagle, *This Land: The Case*, CROOKED (June 3, 2019), https://crooked.com/podcast-series/this-land/.

5. Albert Bender, *Waiting on the Supreme Court to return eastern Oklahoma to Indigenous nations*, INDIANZ (Oct. 9, 2019), https://www.indianz.com/News/2019/10/09/waiting-on-the-supreme-court-to-return-e.asp; *see also* Nagle, *supra* note 4.

6. *See* Nagle, *supra* note 4.

7. *Id*.

8. *See* Murphy v. Royal, 875 F.3d 896, 907 (10th Cir. 2017), *aff'd sub nom.*, Sharp v. Murphy, 140 S. Ct. 2412, 207 L. Ed. 2d 1043 (2020); Murphy v. State, 2005 OK CR 25, ¶ 59, 124 P.3d 1198, 1209.

9. MODEL RULES OF PROF'L CONDUCT r. 1.1 (2019).

could be a daily occurrence. Practical solutions and initiatives are needed, alongside a movement away from the standard approach to lawyering for minority populations, to achieve a coherent ethic of lawyering for Native Nations and their peoples in post-*McGirt* Oklahoma and beyond.

This Comment provides an overview of some of the legal ethics issues surrounding lawyering for Indigenous communities and how the *McGirt* case and opinion, as well as Indigenous traditions and viewpoints, might influence an ethic of lawyering in eastern Oklahoma and across Indian Country. Part II examines the impact of Justice Gorsuch's prior exposure to federal Indian law cases on the *McGirt* case and details common erroneous judicial views of federal Indian law. Part III examines Rules 1.1 and 1.3 of the Model Rules of Professional Conduct and considers whether those who represent Native Nations and people are bound to culturally competent and diligent representation. Part IV of the Comment looks at the distinct challenge of identifying the sovereign client in treaty right assertions and how Rule 1.13 Organization as Client fails to fully inform this identification. Part V offers practical solutions including Tribal court guidance, new provisions to the ABA Model Rules, and other means by which the legal community can adapt in concrete ways to better serve Native communities in an ethical manner. Part VI discusses how the dissent to the Standard Approach to cause lawyering can inform these issues, but a more comprehensive, Indigenous-minded approach is still needed to guide those who advocate on behalf of Native clients in the U.S. legal system.

II. FEDERAL INDIAN LAW AT THE HIGH COURT

That a conservative nominee to the Supreme Court stood with four other justices and followed the rule of law, instead of bowing to political arguments, is striking: a decision of integrity. It provides hope that the rule of law upon which this country is based can be applied equally.[10]

The positive outcome in *McGirt* can be attributed to the coordination of Creek Nation attorneys and other Native Nations, organizations, and allies over the course of the litigation, from the district court level to the Supreme Court. Native Nations did not always have a coordinated tribal advocacy strategy before the Court, which in part led to detrimental outcomes for tribal sovereignty in opinions such as *Atkinson Trading Co. v. Shirley* and *Nevada v. Hicks*.[11] As a direct response to those two opinions, in 2001 the Native American Rights Fund ("NARF") and the National Congress of American Indians ("NCAI") launched the Tribal Supreme Court Project ("Project"), "based on the principle that a coordinated and structured approach to tribal advocacy is necessary to preserve tribal sovereignty."[12] The Project facilitates a working group of hundreds of attorneys and academics who specialize in federal Indian law and Indian law-adjacent fields as well as an Advisory Board, which offers perspective on the political and distinctly-tribal needs of

10. Joy Harjo, *After a Trail of Tears, Justice for 'Indian Country'*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/opinion/mcgirt-oklahoma-muscogee-creek-nation.html.

11. 532 U.S. 645 (2001); 533 U.S. 353 (2001); *see also* Judith V. Royster, *Decontextualizing Federal Indian Law: The Supreme Court's 1997–98 Term*, 34 TULSA L. J. 329 (2013) (discussing the Court's 1997–1998 term as particularly problematic for Indian country).

12. *Tribal Supreme Court Project*, NARF, https://sct.narf.org/index.html (last visited Dec. 2, 2020).

Native Nations and individuals to ensure that Tribal sovereignty and Tribal jurisdiction are protected at the Supreme Court.[13] As soon as the Supreme Court issued writs of certiorari in *Murphy*, and later *McGirt*, representatives from the Tribal Supreme Court Project reached out to counsel for the Creek Nation to plan an amicus strategy and isolate the briefing into key issue areas.[14]

Unfortunately, even though the Tribal Supreme Court Project has "substantially improved"[15] Native Nations' presentation before the Supreme Court, the nine justices have still not always ruled in favor of Tribal sovereignty and jurisdiction. In many cases, the Court "has run roughshod over tribal sovereignty" with essentially no "objection from the larger legal establishment."[16] Fortunately for the Creek Nation, the deciding vote in *McGirt* belonged to Justice Neil Gorsuch, a western jurist who previously sat on the Tenth Circuit with a distinct understanding of federal Indian law and Native treaty interpretation. Justice Gorsuch's role as the author of the *McGirt* opinion is exemplary of the difference prior exposure to federal Indian law and interactions with Native Nations can make in the outcome of a case—from the way it is litigated to the opinion itself. Before the U.S. Senate began confirmation hearings for Justice Gorsuch to serve as the new Associate Justice of the Supreme Court, Richard Guest, a staff attorney at NARF, authored a memorandum to Tribal leaders and attorneys offering an Indian law perspective on Justice Gorsuch's background.[17] The memorandum explained that while there is "no question" Justice Gorsuch's "judicial philosophy is conservative," and no guarantees could be made about whether or not he would take pro-Tribe positions, his background and role in prior Indian law cases evinced "significant experience with federal Indian law" and respect for "the fundamental principles of tribal sovereignty and the federal trust responsibility."[18]

Justice Gorsuch's background is by no means indicative of the level of exposure to federal Indian law of the vast majority of those on the federal bench. As part of Echo Hawk Consulting's 2016–2018 groundbreaking $3.3 million public research initiative entitled Reclaiming Native Truth ("RNT"), which gathered data and expert insights on what the public and key stakeholders think about Native communities and issues, Pipestem Law conducted confidential interviews with federal judges on Native communities and their perception of Indian law cases.[19] According to the research report, a portion of the judges interviewed "perceived it as a factual reality that Native Americans commit more crimes per capita than non-Natives" and described reservations broadly as poverty-stricken areas,

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13. *Id*.

14. Delilah Friedler, *How Native Tribes Started Winning at the Supreme Court*, MOTHER JONES (Aug. 5, 2020), https://www.motherjones.com/crime-justice/2020/08/how-native-tribes-started-winning-at-the-supreme-court/.

15. *Id.* (comment by Cherokee attorney and NARF Tribal Supreme Court Project coordinator Joel West Williams).

16. Matthew L.M. Fletcher, *The Supreme Court and the Rule of Law: Case Studies in Indian Law*, 55 FED. LAW. 26, 27 (2008), https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1190&context=facpubs.

17. Richard Guest, *Memorandum Re: The Nomination of Neil Gorsuch to the Supreme Court of the United States—An Indian Law Perspective*, (Mar. 16, 2017), https://sct.narf.org/articles/indian_law_jurispurdence/gorsuch-indian-law.pdf.

18. *Id*. at 4, 9–10.

19. *Reclaiming Native Truth Research Findings: Compilation of All Research* at 66, ECHO HAWK CONSULTING (June 2018), https://www.firstnations.org/wp-content/uploads/2018/12/FullFindingsReport-screen.pdf.

though they had visited only one or two reservations.[20] None of the federal judges interviewed had taken a course on federal Indian law and, of the Non-Native law clerks interviewed, some shared that they did not want to work on the Indian law cases assigned to their judge because they were perceived as "nonsensical" and "irrational" in a theoretical sense.[21]

Justice Gorsuch's majority opinion in *McGirt* offers a glimpse as to how his background and prior exposure to Indian law indeed influences his valuation of treaty rights. The opinion illuminates that fundamental principles of Indian law, which include the mandate that treaty obligations owed from the United States to Native Nations are to be treated with care.[22] Going forward, the *McGirt* opinion effectively puts practitioners on notice that not only are treaty rights "to be construed in favor, not against, tribal rights," but also "Native American claims of statutory right" are not to be treated "as less valuable than others."[23] If this is the standard which attorneys must meet when they encounter Native treaty-rights issues and other statutory mandates in Indian Country, then practitioners must be educated in the field of federal Indian law, not as a matter of learning a niche practice area, but to avoid incompetent practice. For the rights of Native Nations and individuals to be preserved in the courts going forward (particularly in post-*McGirt* eastern Oklahoma), Native advocates must continue coordinated litigation strategies, and culturally competent representation must become the new norm.

III. COMPETENT AND DILIGENT REPRESENTATION OF AUTOCHTHONOUS POPULATIONS

We are autochthonous, a term used in describing people who live by being chthonic, that is by living in or in close harmony to the earth. Our legal tradition can be described as an autochthonous legal tradition. The chthonic legal tradition rejects formality in the expression of law and is characterized by the oral tradition.[24]

In order to better understand how attorneys in Oklahoma and beyond might adopt a practice which is sensitive to the needs of Native Nations and peoples, we must look first to the existing framework for ethical conduct in the legal field. The foundational rule of the ABA Model Rules of Professional Conduct is Rule 1.1, which requires that a lawyer "shall provide competent representation."[25] The rule further qualifies that competence goes to " . . . the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[26] Additionally, Rule 1.3 provides, "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[27] There is no clear guidance in the model rules as to how far the duty of diligence is to extend—it is only clear that

20. *Id*. at 67.

21. *Id*. at 23.

22. *See, e.g.*, *McGirt*, 140 S. Ct. at 2476 ("But the most authoritative evidence of the Creek's relationship to the land lies not in these scattered references; it lies in the treaties and statutes that promised the land to the Tribe in the first place.").

23. *Id*. at 2470.

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

25. MODEL RULES OF PROF'L CONDUCT r. 1.1 (2019).

26. *Id*.

27. MODEL RULES OF PROF'L CONDUCT r. 1.3 (2019).

these rules regarding competence and diligence are binding.

When examining the meaning of competent and diligent Native representation, it is important to note the basic fact that the majority of students will graduate from law school without taking a single Indian law class.[28] For attorneys who haphazardly take up a case on behalf of a Tribe or Tribal citizen, there may be serious barriers to zealous representation because Indian law includes both Federal Indian law and Tribal laws enacted by the 574 federally recognized tribes.[29] Navigating this extensive field is a daunting task, and those not equipped to handle it "may quickly find themselves running afoul of the ethical duty of competence."[30]

A. Ethical Representation When Indigenous Activism Is on Trial

The reality that very few attorneys come out of law school equipped to argue issues of Indian law only scratches the surface of what competent representation could truly mean for those advocating on behalf of Indigenous communities. To illustrate this, it is helpful to look at an example of how a bare-minimum competence requirement fails to inform what competence "necessary for the representation" might mean when prosecuting or defending Indigenous peoples. Take for instance a case in which Indigenous activism itself was on trial—the 1974 Wounded Knee trials of American Indian Movement ("AIM") leaders Dennis Banks and Russell Means.[31] In 1973, Banks and Means led a takeover of the Wounded Knee site on the Pine Ridge Reservation in South Dakota in protest of the U.S. government's treatment of Native Americans on the reservation. The village was the site of an 1890 massacre where U.S. soldiers shot and killed over 250 defenseless Lakota men, women, and children before throwing their bodies in a mass grave. The occupiers held federal agents at bay for seventy-one days; two Native Americans died and several agents were injured amid the frequent gunfire.[32]

Following the incident, nearly two hundred Natives were subsequently indicted by federal grand juries on charges of arson, theft, assault, and interfering with federal officers. The showcase trial of Banks and Means in South Dakota became emblematic of the confrontation between AIM and the U.S. government when the defense portrayed Banks and Means as political prisoners, while the prosecution characterized them as petty criminals who used violent and illegal behavior to enflame their community against the government.[33] Unsurprisingly, throughout the trial the prosecution employed unsavory tactics, so much so that the judge ultimately dismissed all charges and offered a one-hour

28. Elizabeth Ann Kronk Warner, *Ethics and Indian Country*, 63 FED. LAW. 4 (Apr. 2016).

29. BUREAU OF INDIAN AFFAIRS, *Frequently Asked Questions*, https://www.bia.gov/frequently-asked-questions#:~:text=At%20present%2C%20there%20are%20574,Alaska%20Native%20tribes%20and%20villages (last visited Dec. 4, 2020) (noting there are "at present" 574 federally recognized tribes).

30. Warner, *supra* note 28, at 4.

31. *See generally* Ronald J. Bacigal, *Judicial reflections upon the 1973 uprising at Wounded Knee*, 2 J. CONTEMP. LEGAL ISSUES 1, 3–4 (1989).

32. DAVID TREUER, THE HEARTBEAT OF WOUNDED KNEE: NATIVE AMERICA FROM 1890 TO THE PRESENT 432 (2019); Emily Chertoff, *Occupy Wounded Knee: A 71-Day Siege and a Forgotten Civil Rights Movement*, THE ATLANTIC (Oct. 23, 2012), https://www.theatlantic.com/national/archive/2012/10/occupy-wounded-knee-a-71-day-siege-and-a-forgotten-civil-rights-movement/263998/.

33. Bacigal, *supra* note 31, at 5.

lecture on the government's "sordid and misleading conduct."[34] The defense attorneys, who were all non-Natives except for Means and Banks (who appointed themselves as co-counsel), also had great difficulty in representing the Indigenous activists. They were bound by even more complex issues of ethical representation than the prosecution because of the defendants' demands that their sacred ways and treaty rights be front and center at the criminal trial.[35]

Means and Banks performed many acts of reverence to their Lakota culture in the federal courtroom that were misunderstood and discouraged by their defense team. Often times these acts were, at face value, highly non-strategic for a defendant in an American court, within a legal system not built for them: they used a medicine pipe to pledge their veracity instead of a Bible[36] and refused to stand for the judge on the grounds that it would acknowledge the sovereignty of the United States.[37] In one instance which was particularly infuriating to their non-Native defense team, Means and Banks used Muscogee medicine man Phillip Deere's technique of saying each potential juror's name before dropping a pinch of tobacco in a glass of water to determine who they found acceptable for jury selection.[38] To the American-trained legal mind, these actions are alien and disadvantageous, but for Banks and Means, they were upholding their sacred ways.

Not all Indian law or Indian law-adjacent cases will have such clear issues of courtroom cultural practice. Yet, the Wounded Knee trials are illustrative of how Indigenous customs and traditions are not always given space in the American legal system. Furthermore, the American-trained legal mind is not always equipped to handle these types of cases. The Model Rules do provide some further guidance on competence which could aid tricky situations of courtroom cultural practice. Sticking firmly to the basic language of Rule 1.1, preparing for a defendant who will be invoking cultural and religious practice requires no *legal* knowledge or preparation. With that in mind, does study and preparation for courtroom cultural practice fall entirely outside the competence requirement? Perhaps comment 2 on the rule can inform; the comment specifies that an attorney can provide adequate representation in a "wholly novel field" through "necessary study" or "the association of a lawyer of established competence in the field."[39] It is possible that this "necessary study" could include avenues such as cultural-sensitivity training and historical research into autochthonous legal systems, but the rules do not further qualify the recommendation.

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34. *Id.* at 6.

35. *See* RUSSELL MEANS, WHERE WHITE MEN FEAR TO TREAD 290–99 (1995).

36. *See* Bacigal, *supra* note 31, at 9; *see also* Black Elk's explanation of the religious significance of the pipe, "In filling a pipe . . . the pipe contains, or really is, the universe. But since the pipe is the universe, it is also man, and the one who fills a pipe should identify himself with it, thus not only establishing the center of the universe but also his own; he so 'expands' that the six directions of space are actually brought within himself. It is by this 'expansion' that man ceases to be a part, a fragment, and becomes whole or holy; he shatters the illusion of separateness." THE SACRED PIPE: BLACK ELK'S ACCOUNT OF THE SEVEN RITE OF OGLALA SIOUX 21 (J.E. Brow, ed. 1981).

37. Bacigal, *supra* note 31, at 9.

38. MEANS, *supra* note 35, at 301.

39. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt.2 (2019).

B. The Search for a Lawyer of Established Competence in the Field

While comment 2 to Rule 1.1 seems to indicate a more productive direction for advocates seeking to tailor the representation to culturally-sensitive needs, there is still a significant barrier (particularly for Indigenous representation) in that a person of "established competence" seeking to aid the attorney must also be an attorney. When thinking about a situation such as the role of the Muscogee medicine man at the Wounded Knee trial, where the defendants surely felt he was a man of "established competence" to assist with voir dire, the Model Rules would not consider him to be a proper consultant for the "wholly novel field" because he was not an attorney.[40]

Professor Phil Frickey observes the persistent reality of the profound lack of understanding or respect for Indigenous cultural practice in the courtroom,

> [H]ow can any transformation of the field occur when judges, cabined by the blinders of precedent, will dismiss such indigenous aspects as irrelevant, and when (largely non-Indian) scholars . . . will have difficulty identifying the Indian side of the story, much less integrating it into conceptual arguments for reform of the field?[41]

The weight of striving for culturally competent and diligent representation must ultimately fall on the individual attorney. One way of going about transforming the field through the individual attorney is to rely on Indigenous lawyers and scholars, who often already have the cultural worldview in place that enables them to bridge Anglo-American law and Tribal history and custom. To be sure, it is important to recognize that the simple fact that an attorney is Native does not inherently better position them to represent Tribes. Native attorneys are simply more likely, as a matter of exposure, to be attune to the fact that the "legalistic training and indoctrination of lawyers" in our current system "indeed discourages if not excludes the acquisition of such knowledge."[42] Yet, urging that attorneys rely upon Indigenous attorneys for cultural consulting is particularly problematic for Native Americans because there is a profound lack of inclusion for Natives in the legal field. A 2014 National Native American Bar Association ("NNABA") study found Native Americans comprise approximately 0.2 percent—or number about 2,640—of the more than 1.2 million attorneys in the United States.[43]

Pipeline initiatives, then, are more important than ever.[44] But even many progressive research institutions do not always assist Native individuals in obtaining Native American studies degrees, nor do they always succeed in creating space for Native scholars. In a 2019 article for the Yale Herald entitled "Why Do None of My Professors Look Like Me?," Gabriella Blatt, an Indigenous Native Studies student at Yale University, lamented

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40. *Id*.

41. Philip P. Frickey, *Adjudication and Its Discontents, Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1777–84 (1997).

42. Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085, 3124 (2013).

43. *See* Mary Smith, *Native American Attorneys, NNABA Groundbreaking Study Reveals Devastating Lack of Inclusion in the Legal Profession at Large*, 62 FED. LAW. 73, 73 (Apr. 2015).

44. *See* Mary Smith, *The Pursuit of Inclusion: An In-Depth Exploration of the Experiences and Perspectives of Native American Attorneys in the Legal Profession*, 2013–2015 NAT'L NATIVE AM. BAR ASS'N 1, 6 (2015) (available at http://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA_report_pp6.pdf).

"[t]o be the only Native American in the room has been a common theme in my life. To feel like I must represent all Native Americans. To feel like if I make one mistake, this is reflective of my entire tribe. This is a debilitating feeling."[45] Unfortunately, Native attorneys and scholars must often take on the added exhaustion of being the only authority for a given case or project on Tribal custom and history, which can significantly impede cultural competence for the case as a whole.

This problem is persistent. In June of 2020, a joint study by The Center for Women in Law and the NALP (National Association for Law Placement) Foundation titled, "Women of Color—A Study of Law Student Experiences" made headlines for omitting Native American/American Indian/Alaska Native women from its analysis because of "their currently low representation levels" in the legal profession, instead focusing only on "Asian/Pacific Islander, Black/African-American and Hispanic women/Latinas."[46] In response, Tribal Judge and legal scholar Professor Angelique W. EagleWoman noted " . . . this study will be read by law firms, legal organizations, law school administrators and the inference to be drawn is that we are statistically insignificant and our perspectives matter so little that they can be aggregated into silence."[47] For Native attorneys, particularly Native women, the fight to be heard or asked to consult on an Indian law or Indian law-adjacent case, as "a lawyer of established competence in the field,"[48] is unfortunately sometimes a fight to even be statistically significant.

Though many incredible pipeline initiatives exist for Indigenous people seeking to go into the legal field,[49] the Model Rules still only suggest that at minimum, those without the cultural or historical knowledge needed to effectively advocate in Indian law cases can simply search for a "person of established competence in the field."[50] Native attorneys and scholars of Indian law should not feel obligated to serve as liaisons in every Indian law and Indian law-adjacent case to prevent lead counsel from having to pay careful attention themselves to their client's cultural needs and statutory rights as a citizen of a sovereign nation. In post-*McGirt* Oklahoma, this could become quite a large issue as those in the Oklahoma legal community may seek to lean heavily on Native attorneys and Federal Indian law specialists as a way to avoid independent research. While collaboration can be beneficial to all involved, the legal profession should still adopt an ethic of lawyering which does not lead to exhaustion for Native attorneys, but one that encourages a community-wide interest in Native culture and Tribal rights.

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45. Gabriella Blatt, *Why Do None of My Professors Look Like Me?*, YALE HERALD (Apr. 23, 2019, 12:08 PM), https://yaleherald.com/why-do-none-of-my-professors-look-like-me-4c0dab2fd849 (describing the lack of Native studies programs and Indigenous individuals on Yale's tenure track faculty and highlighting the inclusive and inspirational work of Indigenous scholar Prof. Ned Blackhawk).

46. *Women of Color—A Study of Law Student Experiences* at 17, NALP FOUND. (2020), https://www.nalpfoundation.org/uploads/products/WomenofColor-AStudyofLawSchoolExperiencesReport.pdf.

47. Angelique W. EagleWoman, Wambdi A. Was'teWinyan, *Native women law students excluded from so-called "Women of Color in Law Schools" study*, INDIAN COUNTRY TODAY (June 26, 2020), https://indiancountrytoday.com/opinion/native-women-law-students-excluded-from-so-called-women-of-color-in-law-schools-study-ICrOQBx3UEux6kqr2kGxbw.

48. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt.2 (2019).

49. *See, e.g.*, *Pathway to Law Initiative: Native American Law School Admissions Workshop*, ASU, https://law.asu.edu/pathway-to-law (last visited Apr. 19, 2021); *AILC seeks an experienced Administrative Manager*, AILC, https://www.ailc-inc.org/plsi/about/ (last visited Apr. 19, 2021).

50. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt.2 (2019).

IV. THE ORGANIZATIONAL HIERARCHY AND GROUP CONSTITUENTS: DIFFICULTIES IN IDENTIFYING THE SOVEREIGN CLIENT

The Creek Nation has joined Mr. McGirt as amicus curiae. Not because the Tribe is interested in shielding Mr. McGirt from responsibility for his crimes. Instead, the Creek Nation participates because Mr. McGirt's personal interests wind up implicating the Tribe's.[51]

The ABA Model Rule regarding lawyering on behalf of groups is 1.13 Organization as Client, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[52] The rule goes on to address specific structures of representing an organization, such as determining the "best interest" of the organization and observing the hierarchy of "authority" in communications with officers.[53] Rule 1.13 seeks to identify the group (here the Tribe) in terms of locating either the individual that speaks for the group or the individual up the "hierarchy" who can articulate the best interest of the group. But in Indian Country, who speaks for the best interest of the whole? This question is very difficult to answer for many Native Nations, and often, the answer is that there is no scenario in which one person can speak for the interest of the whole.[54]

Tribal attorneys could represent the Tribe as a government entity or as individual Native citizens. They could also represent individual citizens against the Tribe. Confusingly, for years, Native Nations "could only hire lawyers through contracts approved by the United States—even in cases against the United States—creating conflicts of interest" which could only be detrimental to the Indigenous client.[55] In these cases, the Rules' simplistic recommendation to go up the "hierarchy" regarding the question of "whom does the attorney represent" does not provide clear guidance to those representing Native individuals and Nations.

The concept of Native individuals speaking on behalf of the "whole" in asserting legal claims is not always discouraged by other Native entities and, often, has the potential to further Tribal jurisdictional authority. This is plain in *Murphy* and *McGirt*. Lisa McCalmont's decision to argue on behalf of Patrick Murphy that the entire reservation of the Creek Nation was never disestablished effectively triggered the scenario by which the Creek Nation and other Eastern Oklahoma tribes made their case before the Supreme Court in *McGirt*. The argument that the Creek reservation was never disestablished, pursued first by a public defender in *Murphy* and later by an individual tribal citizen via a *pro se* petition

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51. *McGirt*, 140 S. Ct. at 2460.

52. MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (2019).

53. *Id.* at (b)–(c).

54. At any given time, the tribal client could be construed to be one or more of the following: (1) the Indian tribe, qua tribe; (2) the Tribal Council as a whole; (3) the Chairman of the Tribal Council; (4) other members of the Tribal Council; (5) a Tribal Enterprise or other political subdivision; (6) tribal members; (7) a political faction of the governing body; or (8) traditional elders or clan mothers. *See* Rob Roy Smith, *The Council's Counsel: The Ethics of Representing Tribal Councils,* IDAHO STATE BAR ASS'N 4 (July 2006), http://docs.wixstatic.com/ugd/aad22c_d281061149a3420cb55e2bfb7d4b4d03.pdf?index=true).

55. Carpenter & Wald, *supra* note 42, at 3094.

for writ of certiorari in *McGirt*,[56] gained widespread coverage for its broad-sweeping implications on the future of Indian Country in Oklahoma[57]—they were "speaking for the whole." Yet, the decision ultimately had very individualized benefits for Murphy and McGirt (retrials in federal court without the possibility of capital sentences).[58] The sovereign Nations which were implicated by the two cases did not see a conflict between their interest in restoring Tribal jurisdiction and the individuals' interests in retrials, and in fact, wholeheartedly supported the argument against judicial disestablishment in *Murphy* and *McGirt* filings.[59] Here, it seems, is a case where individuals "speaking for the whole," at least for a time, aligned with the interest of the sovereigns implicated.

Just as a new framework is needed for cultural competency, a new framework is needed in the rules of professional conduct which will aid in defining and protecting Tribal group constituents. The current rules regarding group constituents do not aid the attorney faced with these issues in Indigenous representation but instead only serve to start a conversation around who the client even is.[60] Short of reworking the American legal system to tailor federal courts specifically to these needs, there is not likely to be a solution which will fully fix the group constituent issue in Indian law. However, there are manageable steps which can be taken to provide some relief to those who operate in this difficult ethical space. To address the issue of attorneys for the Tribe charged with representing individual members of the Tribe, the Little Traverse Bay Band of Odawa Indians recently passed legislation creating an "Office of Citizens Legal Assistance" in the Legal Department of the Tribe.[61] The Office may assist individual members with a variety of matters but cannot appear in Tribal court or assist in matters where the Tribe is adverse.[62] This new program (and others like it) is indicative of a conscientious move on the part of Native Nations toward better identification of the client. Ultimately, accounting for nuance in representing Native Nations and their people with respect to the various interests at stake requires practical solutions.

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56. *See* Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

57. *See, e.g.*, Garrett Epps, *Who Owns Oklahoma?*, THE ATLANTIC (Nov. 20, 2018), https://www.theatlantic.com/ideas/archive/2018/11/murphy-case-supreme-court-rules-muscogee-land/576238/ (one of the first national articles covering the case in detail).

58. *See* Curtis Killman, *Feds File Charges Against Two Men Whose State Convictions Were Overturned on Jurisdictional Grounds*, TULSA WORLD (Aug. 1, 2020), https://tulsaworld.com/news/local/crime-and-courts/feds-file-charges-against-two-men-whose-state-convictions-were-overturned-on-jurisdictional-grounds/article_94e41a9d-3a2f-5ee2-8fc0-dba3c3dad3a0.html; Curtis Killman, *Federal Jury Finds McGirt Guilty in Retrial*, CHEROKEE PHOENIX (Nov. 9, 2020, 2:00 PM), https://www.cherokeephoenix.org/Article/index/185512.

59. *See, e.g.*, Brief of *Amici Curiae* Historians, Legal Scholars, and Cherokee Nation in Support of Respondent at 1, *Sharp*, 140 S. Ct. 2412 (No. 17-1107); Brief of *Amici Curiae* David Boren et al. in Support of Respondent at 1, *Sharp*, 140 S. Ct. 2412 (No. 17-1107); Brief of *Amici Curiae* Tom Cole et al. in Support of Petitioner at 1, *McGirt*, 140 S. Ct. 2452 (No. 18-9526); Brief of *Amici Curiae* Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner at 1, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

60. Carpenter & Wald, *supra* note 42, at 3095.

61. *See* Waganakisng Odawak Stat. No. 2012-006 (2012), available at http://www.ltb bodawa-nsn.gov/odawaregister/legislative/Statutes/2012/WOS%202012-006%20Office%20 of%20Citizens%20Legal%20Assistance.pdf.

62. *Id*.

V. PRACTICAL SOLUTIONS TO LEGAL ETHICS PROBLEMS IN OKLAHOMA INDIAN COUNTRY

Process is critical because for native peoples community lawyering is about self-determination, both for the community and the individual, about recognizing traditional norms and practices, and about valuing relationships.[63]

The ABA Model Rules do not currently issue a clear path to considering community and culture as it relates to Native Nations and people in guidance for competent and diligent practice. Therefore, new guidance is ultimately needed to inform attorneys who practice in this area. But since each Native Nation and case is unique, it would be overly simplistic to assume that a singular ethic of competent representation could suffice because handling a single matter for one Tribal client does not make an attorney competent to represent other matters for other Tribes.

While many states have adopted the ABA Model Rules, many Native Nations have created their own rules of conduct. In 1990, the State Bar of Arizona issued an opinion prioritizing the Navajo Nation ethical rules over the State ethical rules for a situation in which the two rules were at odds regarding conflicts of interest and the attorney had a potential Navajo client.[64] In line with this opinion, one possible solution to the lack of guidance for cultural competence in the model rules is that state bar associations could direct attorneys faced with these issues to the rules of professional conduct for their client's Tribe and prioritize the Tribe's rules where the two conflict. Tribes, then, should expand their rules of conduct regarding competence and diligence to account for their own specific cultural needs in representation. Because the ABA rules regarding competence and diligence are mandatory, Tribes could make culturally competent representation mandatory for those representing their government and its citizens.

Further, a new comment or provision to the ABA Model Rules is necessary to move toward cohesion across Tribal, state, and federal courts. Native American bar associations and those who draft Tribal court ethics codes can be of use in working to establish a common baseline of rules regarding identification and representation of sovereign clients. A forum is needed for these interested parties to create a flexible and workable rule which aids Indigenous representation as a whole with the identification issue but does not thwart the individual needs of the 574 Tribes. A potential comment or additional provision to Rule 1.13 could state:

> While this rule is intended to cover corporate clients, those representing Native Nations and individual citizens shall bear in mind the distinct challenges of identifying the sovereign client. At the outset of the representation, they shall strive to identify the cultural and political needs of the sovereign Nation as well as the individual citizen. The organizational hierarchy identified must be informed by and remain consistent with the cultural and governmental structure of the Native Nation implicated.

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63. Christine Zuni Cruz, *[On the] Road Back in: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229, 235 (1999).

64. State Bar Ariz. Rules of Prof'l Conduct Comm., Ethics Op. No. 90-19 (1990); *see also* Smith, *supra* note 54, at 6.

This addition not only allows for greater Native control in instances where "speaking for the whole" has a potential to work a disservice to the rights of others but also permits flexibility for when "speaking for the whole" is encouraged by the sovereign Nations affected, as is the case in *Murphy* and *McGirt*. This is by no means a comprehensive fix but moves in the direction of establishing an ethic for the Native organizational hierarchy in the rules.

In addition to Tribal court guidance and adjustments to the ABA Model Rules, another practical solution which encourages a positive ethic of lawyering in post-*McGirt* Oklahoma would be implementation of some level of required Indian law education for law students. Federal Indian law is a subject taught at all three major Oklahoma law schools,[65] and students at all three universities have the opportunity to complete an Indian law-centered curriculum while in law school.[66] The *McGirt* decision opens up an enormous opportunity for these institutions to partner with Native Nations on clinics, courses, and research, particularly with Tribal courts. The "Five Tribes"—Muscogee (Creek) Nation, Cherokee Nation, Choctaw Nation, Chickasaw Nation, and Seminole Nation—each have robust courts which will likely see an influx of cases over time since they "retain exclusive jurisdiction over lower level crimes" and have the "highe[st] stake in ending violence within Indian Country."[67] Oklahoma law schools should increase partnerships with Native Nations and their courts to enable law students to have the opportunity of observing the government-to-government relationships up close. For some students, it may lead to a career-long interest in Tribal court practice. Encouraging direct interaction between students and Tribal leaders and individuals would supplement classroom exposure to the laws which affect Indigenous people and provide a different kind of education about Tribal culture and custom. Undoubtedly, Indian law in Oklahoma will not be going away any time soon as Oklahoma is presently the epicenter of the discussion around Tribal jurisdiction.

Another related solution would be for the Oklahoma Board of Bar Examiners ("OBBE") to mandate an Indian law question on the Oklahoma Bar Exam. Federal Indian law is currently not tested on the essay portion of the Oklahoma Bar Exam and special issues around lawyering for Native Nations are not tested on the Multistate Professional Responsibility Examination.[68] In 2021, Oklahoma will adopt the Uniform Bar Exam which also does not cover Indian law.[69] In 2004, the state Board of Bar Examiners

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65. The University of Oklahoma College of Law, the University of Tulsa College of Law, and Oklahoma City University School of Law all offer certificates in Native American Law. *See Native American Law Center*, UNIV. OF TULSA, https://law.utulsa.edu/native-american-law-center-nalc/ (last visited Feb. 16, 2021); *American Indian and Indigenous Peoples Law*, UNIV. OF OKLAHOMA, https://www.law.ou.edu/academics/areas-concentration/american-indian-and-indigenous-peoples-law (last visited Feb. 16, 2021); *Certificates*, OKLAHOMA CITY UNIV., https://law.okcu.edu/academics/curriculum/certificates/ (last visited Feb. 16, 2021).

66. *See* sources cited *supra* note 65.

67. Stacy Leeds, *What the Landmark Supreme Court Decision Means for Policing Indigenous Oklahoma*, SLATE (July 10, 2020), https://slate.com/news-and-politics/2020/07/supreme-court-mcgirt-oklahoma-tribal-courts.html.

68. *Frequently Asked Questions*, OKBBE, http://www.okbbe.com/FAQ/default.aspx (last visited Feb. 16, 2021).

69. *Understanding the Uniform Bar Examination*, NCBE (2017), https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209.

discussed the idea of adding an Indian law question, but ultimately tabled it.[70] The proposal was supported by the Bar Association's Indian Law section.[71] Adding an Indian law question, even a basic jurisdictional question, would force those seeking to practice in Oklahoma to have at least *some* exposure to federal Indian law prior to being allowed to practice in a state where Indigenous people make up nearly 10% of its population.[72]

Post-*McGirt*, the OBBE should once again consider adding an Indian law portion to the exam due to the plethora of questions which have already arisen from *McGirt* surrounding Tribal civil jurisdiction, Tribal gaming, natural resources management and the possibility of new federally-funded programs on reservation land in eastern Oklahoma.[73] To be prepared to litigate these issues—whether in favor of a Tribe or against—practitioners should have some baseline knowledge of federal Indian law to avoid bad practice. Because federal Indian law is typically not a required class in law school, another solution is needed to mandate exposure to these issues. Oklahoma's adoption of the UBE may complicate any further movement on an Indian law bar exam question, but nevertheless, the issue should be un-tabled and examined again. Legal ethics problems in Oklahoma Indian country and beyond demand practical solutions such as Tribal court ethics guidance, new provisions in the ABA Model Rules, and even Indian law on the state bar exam. These practical solutions must be backed by a community effort toward understanding the causes of adverse legal decisions for Indigenous people as well as the basic differences between the cultural and political status of Native Nations and other populations.

VI. CAUSE LAWYERING FOR NATIVE NATIONS: BEYOND THE STANDARD APPROACH

The how of the telling shapes the what. How we see the people, their lives, their actions, and the meanings that obtain from those lives and actions shapes the present and the possible future.[74]

Issues in representation of Native Nations and people could be solved by a universally adopted code of ethics regarding general principles of lawyering for Native Americans in state, Tribal, and federal courts. Because this type of code is yet to exist, both the issues surrounding culturally competent representation and the issues around Tribal group constituents can be informed by how legal ethics scholars have reacted to the Standard Approach to cause lawyering, an approach which ultimately fails to fully meet the needs of Indigenous representation. The Standard Approach to cause lawyering posits that minority groups think and speak with unified voice.[75] This approach obscures the

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70. *Oklahoma Could be Next to Add Indian Law to Bar Exam*, INDIANZ (Jan. 10, 2005), https://www.indianz.com/News/2005/01/10/oklahoma_could.asp.

71. *Id*.

72. *QuickFacts Oklahoma*, U.S. CENSUS BUREAU (last updated July 1, 2019), https://www.census.gov/quickfacts/OK.

73. *See generally* Elizabeth Kronk Warner & Heather Tanana, *Indian Country Post*-McGirt*: Implications for Traditional Energy Development and Beyond*, UTAH L. REV. (forthcoming 2021).

74. TREUR, *supra* note 32, at 453.

75. Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY 1, 118 (Austin Sarat & Stuart Scheingold eds., 1998) (describing cause lawyers generally as those who focus on "the broader stakes of litigation rather than on the justiciable conflict" as to a population with a unified aim).

need to develop a theory of legal practice and rules of conduct that fit the needs of lawyering for political entities who have incredibly complex and individualized needs.

In *Representing the Race*, Kenneth Mack presents a collective biography of segregation-era African American civil rights lawyers which challenges the Standard Approach to cause lawyering and its failure to capture complex issues of personal and professional identity.[76] He details an established dissent among those who work in the African American civil rights sphere that lawyering for minorities is not lawyering for a unified voice. A central theme of Mack's work is that "law constructs race, or more accurately that lawyers construct race."[77] This theme runs through the history of federal Indian law with astonishing force, mostly due to a tangential fact which Mack discusses, that until minorities were permitted to represent their communities in the courtroom, the general presumption was that their entire race lacked the intellectual and emotional capacity to be full citizens,[78] much less, advocates. Yet, the Standard Approach fails to inform Native representation in very different ways than how Mack describes it fails to inform lawyering on behalf of African American communities and individuals.

Standing Rock Sioux law professor, philosopher, and theologian Vine Deloria Jr.'s groundbreaking 1969 text *Custer Died for Your Sins: An Indian Manifesto* has for half a century informed the work of Indigenous intelligentsia in forming an approach to Native advocacy which diverges from standard theories of civil rights representation.[79] Deloria's work and its progeny show movement toward two baseline aspirations of cause lawyering for Indigenous peoples: (1) distinguishing advocating for Native American rights from advocating for the rights of other minority groups, and (2) giving effect to the individualized needs of the 574 federally recognized Tribes.[80] As to the first proposal, there is an essential difference between the battle for Native rights and the struggles of other groups that have pressed for their rights: Native rights of land ownership and cultural separateness are defined through treaties.[81] Thus, for the purposes of cause lawyering, Native people cannot be characterized with other groups as having collective "minority needs" because the Native plight is also distinctly *political*.

Second, further fragmentation is necessary to account for the distinct needs of hundreds of federally recognized Tribes. Rejecting a pan-Native approach to lawyering on behalf of a specific Nation has the potential to produce sharper legal advocacy which moves toward representation that is correctly positioned to serve the right organizational hierarchy and is, overall, more culturally competent. This second step, declining a pan-Native ethical framework, is exemplary in a narrow sense of a contextualized approach to legal ethics. Ethics scholars Leslie C. Levin and Lynn Mather describe the necessity of a

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76. KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 4 (2012).

77. *Id*. at 7.

78. One has to look no further than America's founding documents to find intentional dehumanization of Native Americans, "the inhabitants of our frontiers, the merciless Indian Savages." THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

79. *See* Daniel R. Wildcat, *Preface*, *in* DESTROYING DOGMA: VINE DELORIA JR. AND HIS INFLUENCE ON AMERICAN SOCIETY viii, viii–ix (Steve Pavlik & Daniel R. Wildcat eds., 2006) (referring to *Custer* as "classic" and referring to Deloria as "one of the most important intellects and social justice activists of the last century").

80. *See generally id.*

81. Vine Deloria, Jr., *The Distinctive Status of Indian Rights*, *in* THE PLAINS INDIANS OF THE TWENTIETH CENTURY 237, 241 (Peter Iverson ed., 1985).

contextualized approach to modern legal ethics at large, "[t]he economic, social, and organizational features of practice contexts deserve at least as much attention as the formal bar rules in light of the powerful impact of context on lawyers' decisions in practice."[82] As previously discussed with Tribal group constituents, a unique challenge of applying this contextualized ethical framework in Native representation is that lawyers must still bear in mind what deleterious effects their work could have on other Indigenous populations ("speaking for the whole") while they strive to enact a more particularized representation for their Native client.

Lastly, Deloria's work articulates an overarching imperative for legal scholars in striving for culturally competent representation of Native nations and people, "[n]ot only are we dealing with a fictional history promulgated by the winners, we are dealing with a belief long fostered by the legal profession that federal Indian law is comparable to other fields of law . . . . This attitude must fall before anything significant can be accomplished."[83]

Instead of encouraging dependence on resources such as Indian law treatises and judicial opinions (which in some cases can be skewed by careless, ill-informed factual records)[84] to inform a lawyer's historical and cultural research related to their client, legal scholars and advocates should take up the difficult task of forming rules for practitioners that encourage case preparation based on a proper body of Indigenous history, politics, morality, and economics, as opposed to the "doctrinally determined history"[85] found in federal Indian law and a large portion of Indian law scholarship. This lofty aspiration is necessary to move beyond the "unified voice" theory and toward lawyering on behalf of autochthonous communities in a way which is considerate of the unique political status of Native American individuals and communities.

VII. CONCLUSION

The Standard Approach to cause lawyering and the Model Rules of Professional Conduct are useful tools for framing the issues presented by lawyering on behalf of minority individuals and entities, but they fail to aid the Indigenous advocate in working through the complexities of representing an autochthonous population. The *McGirt* decision and its resulting impact on the legal profession in Oklahoma is emblematic of a need for greater attention to cultural intricacies and the organizational hierarchies of Tribes in modern representation of Native Nations and peoples. Until advocates are encouraged to look beyond the "doctrinally determined history" formed by the courts of the oppressor, they will be unable to competently represent Indigenous populations in a manner truly consistent with sovereignty. More broadly, representation in the post-*McGirt* era suggests that the legal field at large will benefit from greater education around cultural ideologies,

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82. LESLIE C. LEVIN & LYNN MATHER, LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 369 (2012).

83. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 223 (1989).

84. *Id.*

85. *Id*.

the identities of groups and their lawyers, and the lived experiences of Native peoples.

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