11

The Statutory Influence of Tribal Lay Advocates*

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There is a lawyer shortage in Indian country.[1] Comparable to Indigenous people across the globe, Native Americans lack access to justice in strikingly disproportionate numbers compared to non-Natives.[2] This is in part because typical access to justice initiatives tend to fail rural communities, and particularly Native communities.[3] First, there are not enough Native attorneys. While Native Americans are approximately 1.6 percent of the US population, they represent only 0.3 percent of the legal profession, a disproportionality that has been observed as "stark beyond measure."[4] In addition to education-access barriers, this disproportionality is rooted in historical efforts to bar Natives from participating in the American legal system, including from serving on juries,[5] as

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1 Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 Harv. L. & Pol'y Rev. 15, 119 (2018) (noting "South Dakota's Native American population suffers from a particularly dire shortage of lawyers"). "Indian country" is both a legal term of art to describe the Tribal lands on which Tribes exercise their sovereign authority (18 U.S.C. § 1551) and a euphemism to describe Tribes, Tribal communities, and the contexts in which they live.

2 *See generally* U.N. Expert Mechanism on the Rights of Indigenous Peoples, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples*, A/HRC/24/50 (2013); Inst. for the Study of Human Rights, Colum. Univ., Indigenous Peoples' Access to Justice, Including Truth and Reconciliation (Wilton Littlechild & Elsa Stamatopoulou eds., 2014).

3 Michele Statz et al., *"They Had Access, But They Didn't Get Justice": Why Prevailing Access to Justice Initiatives Fail Rural Americans*, 28 Geo. J. on Poverty L. & Pol'y 321 (2021) (using empirical data from the "Northland," including intentional examinations of Native communities in Wisconsin and Minnesota, to unveil the failure of typical access to justice initiatives like technology, pro se self-help forms, and finding a dearth of private pro bono attorneys).

4 Nat'l Native American Bar Ass'n, The Pursuit of Inclusion: An In-Depth Exploration of the Experiences and Perspectives of Native American Attorneys in the Legal Profession 10 (2015).

5 Elk v. Wilkins, 112 U.S. 94, 102 (1884) (exempting Native Americans born on Tribal lands from birthright citizenship, and thereby excluding them from federal jury service); Equal Just.

witnesses,[6] and even from U.S. citizenship.[7] Second, non-Native attorneys are not filling the gap. There are not enough resources to attract attorney representatives, including woefully underfunded court systems[8] coupled with insufficient compensation and housing for attorneys.[9] Yet, the legal needs in Indian country are extensive. The vestiges of historical oppression against Natives manifest in devastating metrics, including the country's highest rates of poverty and unemployment.[10]

Intriguingly, however, access to justice initiatives within Indian country do not exclusively focus on expanding access to attorneys,[11] largely because Tribal legal traditions are not wholly dependent on lawyers. For example, the practice of Tribal law, an intellectual tradition dating back millennia, does not center the lawyer but instead centers community customs and expectations. Further, Native Americans' practices in Tribal court, which reflect their long-established legal traditions and

Initiative, Race and the Jury: Illegal Racial Discrimination in Jury Selection 35–36 (2021) (noting federal courts continue to disproportionately exclude Native Americans from jury service).

6 *See, for example*, People v. Hall, 4 Cal. 399 (Cal. 1854) (upholding the Act Concerning Civil Cases of April 16, 1850, which provided that "No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man").

7 Indian Citizenship Act, Pub. L. 68-175, 43 Stat. 253 (1924) (conferring birthright citizenship on all noncitizen Indians); United States v. Nice, 241 U.S. 598 (1916) (holding that U.S. citizenship is compatible with Tribal citizenship).

8 U.S. Comm'n on C.R., Broken Promises: Continuing Federal Funding Shortfall for Native Americans 8 (Dec. 2018), https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf (last accessed Feb. 4, 2025) (finding that funding for Tribal courts is inadequate); Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy and Public Defense*, 63 UCLA L. Rev. 1752, 1756 (2016) ("[T]he decision not to extend a statutory right to appointed counsel in tribal courts was driven by a recognition of tribal sovereignty, but perhaps more so by a concern about federal funding."); Comm. on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 39 on the Rights of Indigenous Women and Girls*, CEDAW/C/GC/39, at ¶ 28 (2022) (noting the international propensity for Indigenous justice systems to be underfunded and/or unsupported, and that nation-states have an obligation to ensure their support).

9 *See, for example*, Dominque Alan Fenton, *Poor on a Native American Reservation? Good Luck Getting a Lawyer*, The Marshall Project (June 13, 2016), https://www.themarshallproject.org/2016/06/13/poor-on-a-native-american-reservation-good-luck-getting-a-lawyer (last accessed Feb. 4, 2025) (describing the lack of public defense counsel at the Oglala Sioux Tribal Court); Pruitt et al., *supra* note 1, at 116–17 (noting despite disproportionately high rural poverty rates, rural areas tend to receive disproportionately less legal aid funding); Joseph Kunkel & Aspen Global Leadership Network, *Indian Country's Housing Crisis Is a Public Health Crisis*, Aspen Institute (June 26, 2020), https://www.aspeninstitute.org/blog-posts/indian-countrys-housing-crisis-is-a-public-health-crisis/ (last accessed Feb. 4, 2025) (noting while "the Department of Housing and Urban Development (HUD) has found that Indian Country faces a deficit of 68,000 housing units per year, the real need is likely triple that").

10 U.S. Comm'n on C.R., *supra* note 8, at 8.

11 Compare with the American Bar Association's (ABA) preferred strategy for increasing access to justice by focusing on increasing access to lawyers. Deborah L. Rhode & Scott Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 Geo. J. Legal Ethics 485, 489 (2017).

continue as recognized expressions of their Tribal sovereignty,[12] were established without the formal equivalent of the lawyer.[13] The hundreds of Tribal courts across Indian country operate around and with lawyers,[14] but also with experts in Tribal customary law, like elders, and with traditional processes and remedies, like peacemaking and restorative reparations. Lawyers tend to have a crippling lack of familiarity with Tribal courts and a false sense that Tribal law is an inferior practice area.[15] Thus, even assuming attorneys came flocking to the Tribal court, *and* the Tribe had sufficient funds and political will to hire them on behalf of the Tribe, a law school-trained, state-barred attorney may nevertheless still lack the necessary legal and cultural competence to meet the needs of the Tribal court.[16]

Outside of Indian country, the broader access to justice movement is increasingly calling for options apart from lawyers.[17] Given the historical evolution of Tribal courts and their creative innovations to accommodate nonlawyer practitioners, Tribal courts may offer some useful insight for broader access to justice initiatives. As just one type of response, numerous Tribal codes expressly provide for lay advocates as authorized representatives to appear before the court despite not being a member of a state bar, and/or not having attended an American Bar Association (ABA)-accredited law school. Lay advocates offer unique access to justice opportunities, including filling a gap between prohibitively expensive attorneys and pro se representation. But we should resist framing lay advocates as simply attorney replacements. Attorneys are presently mired in their own legitimacy crisis, experiencing a professional fissuring that is undermining the special monopoly traditionally claimed by attorneys as defenders of the rule of law and democracy itself.[18] There may be an appetite for a model of lay advocacy that expands beyond just a

[12] *See, for example*, United States v. Wheeler, 435 U.S. 313, 322–23 (1978) (describing Tribes as "self-governing sovereign political communities" with "the inherent power to prescribe laws for their members and to punish infractions of those laws").

[13] Wanda D. McCaslin, *Introduction: Reweaving the Fabrics of Life*, *in* Justice as Healing: Indigenous Ways 88 (Wanda D. McCaslin ed., 2005). ("For indigenous Peoples, law is far more than rules to be obeyed. Law is found within our language, customs, and practices. . . . These are not passed on through lectures or written codes.")

[14] Steven W. Perry et al., *Tribal Courts in the United States, 2014 – Statistical Tables*, Bureau of Just. Stat., Off. of Just. Programs, U.S. Dep't of Just. 11 (July 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/tcus14st_0.pdf.

[15] Gloria Valencia-Weber, *Indian Law on State Bar Exams: A Situational Report*, Fed. Law. (Mar./Apr. 2007), https://www.fedbar.org/wp-content/uploads/2007/03/focuson-valenciaweber-0307-pdf-1.pdf (last accessed Feb. 4, 2025) (arguing for the inclusion of Indian law on state bar exams, in part, to recognize and legitimate Indian law, challenge disrespect of Tribal governments, and serve the general interests of the state).

[16] CEDAW, *supra* note 8, ¶ 30 (finding internationally, non-Indigenous justice systems have a higher likelihood of subjecting Indigenous people to racism, structural and systemic racial discrimination, and procedures that are not culturally appropriate).

[17] Rhode & Cummings, *supra* note 11, at 490 ("The public wants more access to justice, not necessarily more access to lawyers."). *See also, for example*, Chapter 1 in this volume.

[18] Scott Cummings, *Lawyers in Backsliding Democracy*, 112 Calif. L. Rev. 513 at 518–19 (Apr. 2024).

second-best solution or resource of last resort, and toward a more capacious conception. Can lay advocates offer meaningful representation? Are they sufficiently competent? Are they accountable? Do they satisfy the clients – and communities – they serve?[19] Tribal court lay advocates have practiced for decades and offer some answers to these timely and critically important questions.

In particular, the Tribal experience can help to answer these burning questions because Tribes have the sovereign autonomy to design and operate their Tribal courts, including the authority to deviate from well-established federal and state constitutional norms, though with notable constraints detailed below. Tribes are integrating social services into case plans, experimenting with restorative justice, weaving in cultural concepts, language, and teachings, and building out Tribal law jurisprudence.[20] Notably, Tribal lay advocates have disrupted the notion that their efforts are a compromise on competency. For some Tribes, the fact that lay advocates are more likely to be from the community and more likely to stay within the community makes them *more competent advocates* than outside lawyers.

This chapter examines Tribal codes to determine the extent to which Tribes have codified the eligibility of lay advocates to appear in Tribal courts, and how, if at all, Tribes have contended with ethical concerns surrounding lay advocates, including their competence and accountability. It reveals how Tribal codes expressly incorporate cultural elements into the lay advocate's role. By examining Tribal codes, this chapter provides insight into Tribal views on lay advocates' ability to enhance Tribal members' access to justice and also sheds light on potential guardrails to ensure that lay advocates provide ethical and effective representation.

The chapter proceeds in two sections. Section 11.1 examines the legal structure and history of Tribal courts, including why these courts embrace lay advocates. Section 11.2 then turns to Tribal codes and canvasses what these codes say about the ethical requirements of, and qualifications for, lay advocates. This inquiry reveals that Tribes are using lay advocates to expand the pool of eligible representatives before the court. But they are also prioritizing customary law and community such that lay advocates may have the potential to enhance the level of representation within the Tribal court.

11.1 EXCEPTIONAL TRIBAL COURTS

Tribal courts are the judicial arms of sovereign Indian nations, which are distinct both from the United States and from each other. Tribal powers neither arise from

[19] Rhode & Cummings, *supra* note 11, at 490.

[20] *See generally* Matthew L. M. Fletcher, American Indian Tribal Law (2nd ed. 2020); Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 Calif. L. Rev. 101 (2024).

nor are created by the Constitution of the United States.[21] Tribal courts are instead extra-constitutional – that is, the U.S. Constitution and its attendant due process protections simply do not apply.[22] Nor does the Fourteenth Amendment of the U.S. Constitution incorporate federal due process protections to Tribes.[23] The lack of incorporation extends to prominent U.S. Supreme Court decisions, such as the right to legal counsel[24] and the right for that counsel to be effective.[25] Instead, Tribes make their own Tribal laws and determine how those laws are to be interpreted.

The Tribal court remains an oft-neglected and misunderstood juridical structure within the American legal system.[26] There is no central depository of Tribal law, nor has there been any meaningful comparative study of lay advocates within Tribal systems. In fact, the first study of the mere existence of Tribal courts was published only in 2021, and excluded all of Alaska.[27] Federal courts have frequently relied upon the perceived foreignness of Tribal courts to justify undermining Tribal sovereign authority.[28]

While Tribes are distinct, Tribes exist within the United States under the plenary authority of Congress.[29] Congress can unilaterally recognize, restrict, and/or encroach upon Tribal authority. Congress has done just that, statutorily recognizing Tribal courts[30] but also restricting that authority in numerous instances and

[21] Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding the Fifth Amendment's grand jury requirement does not apply to the Cherokee Nation).

[22] *Id.* at 383–84.

[23] *Id.* at 383–84. *See also* United States v. Doherty, 126 F.3d 769, 777 (6th Cir. 1997) ("*Talton* has come to stand for the proposition that neither the Bill of Rights nor the Fourteenth Amendment operates to constrain the governmental actions of Indian tribes.") (citations omitted) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

[24] Gideon v. Wainwright, 372 U.S. 335 (1963) (holding the Sixth Amendment guarantees counsel in criminal proceedings and extends that guarantee to states through the Due Process Clause of the Fourteenth Amendment).

[25] Strickland v. Washington, 466 U.S. 668 (1984).

[26] Elizabeth Reese, *The Other American Law*, 73 Stan. L. Rev. 555, 578 (2021) (noting the "current omission of tribal law from the mainstream is not because tribal law is inherently unworthy of our attention," but because of a history of marginalization).

[27] Perry et al., *supra* note 14. Of the 574 federally recognized Tribes, 229 are located within the state of Alaska. However, given jurisdictional and infrastructure limitations, there are likely far fewer operational Tribal courts within Alaska.

[28] *See, for example*, Nevada v. Hicks, 533 U.S. 353, 384 (2001) ("The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' . . . which would be unusually difficult for an outsider to sort out.").

[29] United States v. Kagama, 118 U.S. 375, 377 (1886) (holding Congress has a duty of protection to Tribes and a corresponding plenary power). Hon. Orville M. Olney & David H. Getches, *Indian Courts and the Future: Report of the NAICJA Long Range Planning Project*, Nat'l Am. Indian Ct. Judges Ass'n 2 (1978), https://www.ojp.gov/ncjrs/virtual-library/abstracts/indian-courts-and-future-report-naicja-national-american-indian (last accessed Feb. 4, 2025) (noting that the development and implementation of robust Tribal court systems have not stymied incursions on Tribal authority to self-govern).

[30] *See, for example*, Indian Reorganization Act of June 18, 1934, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§461–66, 470–76, 478–79); Violence Against

contexts.[31] As Tribal judicial actions came to impact white settlers, federal policy increasingly became concerned with the substance of Tribal judicial systems.[32] The Indian Civil Rights Act (ICRA) of 1968 is one of the most consequential legislative influences on Tribal courts.[33] Broadly, anti-subordination efforts have focused on the promotion of individual civil rights, including through national oversight, rights-based frameworks, and judicial solicitude.[34] Under this theory, rights-based individual freedoms are most relevant when contrasted against an oppressive government from which the people require protection. The protection of those rights – such as the right to due process, including through representation by counsel – is presumed to take place in the context of judiciaries overseeing parties facing off as adversaries. The ICRA endorses this constitutional framework by statutorily extending due process requirements comparable to the U.S. Constitution's Bill of Rights onto Tribes.[35] But in doing so, it also cements the adversarial system, overseen by a powerful centralized government, as the statutorily mandated judicial system of Tribes.

While the ICRA statutorily requires Tribal courts to ensure litigants receive "due process" and "equal protection,"[36] the ICRA does not incorporate the body of federal case law that informs the substance of those terms in American law.[37] Consequently, the reasonings of constitutional bulwarks like *Strickland*,[38] *Gideon*,[39] and *Miranda*[40] do not automatically extend to Tribal governments, and

Women Reauthorization Act of 2005, Pub. L. No. 109-62, tit. IV, 119 Stat. 2960 (2005) (requiring state and federal courts to extend full faith and credit to Tribally issued protection orders).

[31] *See, for example*, General Crimes Act, ch. 92, 3 Stat. 383 (1817) (codified as amended at 18 U.S.C. § 1152) (extending federal concurrent criminal jurisdiction onto Tribal lands); Major Crimes Act, ch. 341, 23 Stat. 385 (1885) (codified as amended at 18 U.S. § 1153) (further extending federal concurrent criminal jurisdiction onto Tribal lands), and Act of Aug. 15, 1953, Pub. L. No. 67, Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162) (extending state concurrent criminal and civil adjudicatory jurisdiction onto some Tribal lands).

[32] *See generally* van Schilfgaarde, *supra* note 20 (tracing the history of CFR Courts as the introduction of the adversarial, rights-based judicial system to Tribes, coupled with federal restrictions on how Tribes can operate those systems).

[33] Pub. L. 90-284, 82 Stat. 77 (Apr. 11, 1968) (codified as amended at 25 U.S.C. §§ 1301–05); *see also generally* The Indian Civil Rights Act at Forty (Kristen Carpenter et al. eds., 2012) (examining the impacts of the Indian Civil Rights Act forty years after its enactment).

[34] Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 Harv. L. Rev. 1787, 1797 (2019).

[35] 25 U.S.C. § 1302(a).

[36] *Id.* § 1302(a)(8).

[37] Santa Clara Pueblo v. Martinez, *supra* note 23, at 62 (holding the ICRA has no federal cause of action beyond habeas corpus, and upholding Tribal sovereign immunity).

[38] Strickland v. Washington, *supra* note 25.

[39] Gideon v. Wainwright, *supra* note 24 (holding the Sixth Amendment's guarantee of a right to assistance of counsel applies to states by way of the Fourteenth Amendment).

[40] Miranda v. Arizona, 384 U.S. 346 (1966) (holding the Fifth Amendment requires law enforcement officials to advise suspects of their right to remain silent and to obtain an attorney during interrogations while in police custody).

Tribes must determine the substance of due process and equal protection rights. Many Tribes have nevertheless elected to incorporate comparable protections, including due to pressures to adopt Western legal norms.[41] But there are also instances in which Tribes diverge.[42]

In addition to federal case law exceptionalism, the ICRA differs substantively from the US Constitution. For example, the ICRA imposes a sentencing limitation on Tribal courts, effectively demoting Tribal legal systems to misdemeanor courts.[43] In regard to attorney representation, the ICRA is most notably contrary to constitutional protections in its acknowledgment, and then workaround, of *Gideon*, providing that no Tribe may "deny to any person in a criminal proceeding" the right "*at his own expense* to have the assistance of counsel for his defense."[44] Tribes cannot prevent someone from hiring a defense attorney, but they do not have to fund it. The lack of federally mandated, Tribal government-funded criminal legal defense has been cited as a significant barrier for the future of Tribal courts.[45] Some Tribes have guaranteed the right to counsel for indigent defendants in their own Tribal law.[46] But broadly, most Tribes either cannot afford or have failed to prioritize building a robust public defender and/or legal services office. As a result, the adversarial model of two equally positioned adversaries remains largely theoretical in Tribal courts.

Congress could have required that Tribes provide state-barred attorneys to criminal defendants in Tribal court. So too could Congress have funded that public defense. Instead, the ICRA is an example of federal attempts to encourage the adoption of the Anglo-adversarial model, while also recognizing some Tribal self-

[41] Carrie E. Garrow & Sarah Deer, Tribal Criminal Law and Procedure 202 (2004) ("[T]he introduction of Anglo-American models of police, jails, and more coercive governmental power has required tribal governments to protect individuals from overbearing governments and intrusions upon their liberty").

[42] *See, for example*, Navajo Nation v. Rodriguez, 2004 WL 5658107 (Navajo Dec. 16, 2004) (interpreting the ICRA not to include a requirement for a *Miranda*-type warning from law enforcement but relying on the Navajo principle of *hazhó'ógo*, meaning loosely that patience and respect are required when dealing with another human being).

[43] 25 U.S.C. § 1302(b)-(c) (limiting Tribal imprisonment authority to one year and a fine of $5,000). In 2010, Congress raised the sentencing limitation to three years but attached conditional due process requirements. Tribal Law and Order Act of 2010, Pub. L. 111-211, 124 Stat. 2258.

[44] 25 U.S.C. § 1302(a)(6).

[45] Samuel Macomber, Note, *Disparate Defense in Tribal Courts: The Unequal Rights to Counsel as a Barrier to Expansion of Tribal Court Criminal Jurisdiction*, 106 Cornell L. Rev. 275 (2020).

[46] *See, for example*, Osage Nation Code tit. 5, § 1-111 (providing the right to counsel for criminal defendants, but only in cases of extreme financial hardship, and only where imprisonment is being sought); United Keetoowah Band of Cherokee Indians in Oklahoma Tribal Code, 2022 Courts Act, ch. 11, Rule 1106(a) (providing that the Court will pay for indigent defense, but only if there are sufficient funds); Salt River Pima-Maricopa Indian Community Code of Ordinances, ch. 5, art. iv, Rule 6.1 (providing for indigent defense, but only if the defendant is charged with an offense that carries a potential sentence of imprisonment exceeding one year).

government. In doing so, Congress reserved some, albeit small, space for Tribal innovation.

Section 11.2 explains that Tribes are seemingly using that space to do something remarkable through Tribal lay advocate programs. In so doing, they are not only addressing the access-to-justice gap but also bridging their traditional customs with the Western court model. Within a historical context of pressures to abandon traditional dispute resolution in exchange for adopting the Anglo-adversarial model, Tribes have created a space for lay advocates – and these lay advocates are serving as a liaison between the traditional and Western justice models.

11.2 TRIBAL LAY ADVOCATES IN TRIBAL CODE

Tribal lay advocates are representatives authorized to appear in the Tribal court without some or all of the credentials required of an attorney. Tribal codes reveal the instances in which Tribes have statutorily recognized, and even prioritized, the role of the lay advocate within the Tribal judiciary. There is no current scholarship as to when Tribal lay advocates began to proliferate in Tribal courts, how their roles within the Tribal judiciary have materialized in reflection of and beyond the Tribal code, how they have influenced other Tribal legal bodies, or how they impact litigants within Tribal courts. However, we can look to a snapshot of Tribal codes as a current statutory expression of Tribal court praxis – praxis that has trickled up to legislative recognition.[47]

Not all Tribal codes are publicly available. Of those that are, only a few are available on typical legal search engines.[48] While there have been attempts to centralize Tribal codes, it is nevertheless still best practice to verify codes with individual Tribes.[49] For this project, we visited publicly available Tribal websites with publicly posted Tribal codes and searched for provisions regarding attorney or legal practitioner regulation, and specific terms such as "attorney," "lawyer," "lay advocate," or "spokesperson(man)(woman)." In total, we visited 129 Tribal websites representing 24 states. Because Tribal courts tend to be underdeveloped within Public Law 280 jurisdictions, Tribes located in Public Law 280 states, including Alaska and California, tend to be underrepresented. Our research was not exhaustively comprehensive of all Tribal codes. Rather, we sought a diversity of content – that is, variations among the codes in order to showcase a panoply of potential

[47] Tribal code is but one lens to examine Tribal law approaches to lay advocates. The advantage of examining Tribal code is both its increasing availability, but also its bluntness in revealing the degrees of Tribal endorsements of lay advocates. Note the snapshots below do not represent all Tribal codes, in part because not all Tribal codes are publicly available.

[48] Reese, *supra* note 26, at 622 ("Even for experts working in tribal law, there is a lot we do not know and – because we have yet to build a reliable and consistent infrastructure – cannot find out easily.")

[49] *Id.* at 623.

approaches to lay advocates. Of the Tribal websites visited, twenty-three did not make their codes publicly available, and twenty-four codes did not include a relevant provision regarding lay advocates. Eighty-two codes did include such a provision. Numerous provisions were substantively similar to each other. Drawing on these codes, this chapter offers a rough mapping of the role of lay advocates in various Tribal courts.

11.2.1 *Right to Representation*

As noted above, the ICRA extends to a criminal defendant in Tribal court only the right of counsel "at his own expense."[50] A Tribe may expand this guarantee in Tribal law to provide defendants with a right to an attorney in certain circumstances.[51] But some Tribes have used lay advocates to provide more representation to defendants. For example, the Nooksack Indian Tribe guarantees representation for criminal defendants at the expense of the Tribe, and this guarantee applies to non-attorney-appointed advocates.[52]

11.2.2 *Qualifications for Lay Advocates*

Tribal definitions for lay advocates vary. But generally, Tribal codes define a lay advocate as someone authorized to practice before the Tribal court but who did not graduate from an ABA-accredited law school.[53] Many Tribal courts, however, require both attorneys and lay advocates to obtain a license to practice.[54] For instance, the Hoopa Valley Tribal Court of Appeals confirmed that both attorneys and non-attorneys fall under the regulation of spokespersons, another term for lay advocate, who may appear before the Hoopa Valley Tribal Court.[55]

[50] 25 U.S.C. § 1302(6).

[51] *See, for example*, Boos v. Yazzie, 6 Nav. R. 211, 214 (Nav. Sup. Ct. 1990) (recognizing a right to counsel for indigent criminal defendants in section 7 of the Navajo Nation Bill of Rights); Osage Nation Code tit. 5, § 1-111 (providing counsel for criminal defendants, but only in cases of extreme financial hardship and where imprisonment is sought); Salt River Pima-Maricopa Indian Community Code of Ordinances, ch. 5, art. iv, Rule 6.1 providing for indigent defense, but only if the defendant is charged with an offense that carries a potential sentence of imprisonment exceeding one year).

[52] Nooksack Indian Tribal Code § 10.02.010 (noting if the defendant is found guilty, they must pay a $50 fee for their representation, subject to waiver if the defendant is unable to pay or was a minor at the time of the offense).

[53] *See, for example*, White Mountain Apache Judicial Code § 2.27; Yurok Tribal Code § 2.05.010 (though section 2.10.810 of the Yurok Tribal Code also allows for spokespeople to be admitted at the discretion of the hearing judge).

[54] *See, for example*, White Mountain Apache Judicial Code § 2.26; Mohegan Tribe of Indians of Connecticut Code of Ordinances, pt. II, ch. 1, art. I., § 1-36 (requiring spokespeople to be admitted to the Mohegan Tribal Court Bar).

[55] In the Matter of Robertson, 4 NICS App. 11, 116 (Hoopa Valley Tribal Ct. App. 1996).

Some Tribal codes reference a Tribal bar, referencing the existence of a Tribal bar established outside of the code, while some specifically establish a Tribal bar and make membership in such bar its own criteria for lay advocates to appear before the Tribal court.[56] The Citizen Potawatomi Nation clarifies that lay advocates are "[e]ntitled to the same rights, privileges, obligations, and duties, and [ ] accorded all the honors to the same extent as any attorney admitted to practice before the Courts of the Tribe within [the] reservation."[57]

Crucially, Tribal codes tend to frame lay advocates as more than nonlawyers or attorney replacements. As explained further below, Tribal codes incorporate additional qualifications, such as tiered priorities for Tribal members and Native Americans who are close to the community and have familiarity with Tribal law. These added qualification criteria suggest that Tribes expect their lay advocates to possess expertise distinct from that of a lawyer.

11.2.3 *Priority for Tribal Members*

Many Tribal codes that provide for lay advocates have cabined and/or tiered their eligibility pool to give priority to Tribal members when authorizing individuals to appear before the Court as lay advocates.[58] The Blue Lake Rancheria Code provides for appearances by "counsel" who must be admitted to the bar of any state,[59] and for "spokesperson[s]," defined as "any person not admitted to a bar of any state who is a tribal member or a relative of a party and speaks for any party in a case filed in the Tribal Court."[60] The Fort McDowell Yavapai Nation extends lay advocate eligibility

[56] *See, for example*, Burns Paiute Tribal Code § 1.1.180; Confederated Tribes of the Umatilla Indian Reservation Rules of Court, Rule 11(e); Klamath Tribal Codes tit. 2, § 11.35(b)(2); Kalispel Tribe Law & Order Code, § 1-12.01; Lummi Nation Code, § 1.05.010. Note that not only has Tribal bar membership garnered implicit recognition from Congress, but organizations like the ABA now recognize Tribal bar membership as an eligible entry point into the broader American legal profession. American Bar Association Res. 11-4 (2014) (amending constitutional amendment § 3.1 to include individuals in good standing with federally recognized Tribal courts).

[57] Citizen Potawatomi Nation Tribal Code, Rule 8-1-101(C).

[58] *See, for example*, White Mountain Apache Judicial Code § 2.27(B)(1); Leech Lake Band of Ojibwe Judicial Code tit. 1, pt. v, § 3 (extending lay advocate eligibility to a member of the Band or a member of another Band affiliated with the Minnesota Chippewa Tribe); Lower Sioux Indian Community Judicial Code § 1.22; Prairie Island Indian Community Tribal Code, Courts Ordinance § 9(a); White Earth Nation Judicial Code, ch. v, § 1; Mississippi Band of Choctaw Indians Tribal Code tit. 1, § 1-4-3 (limiting lay advocate eligibility to either a member of the Tribe or of another federally recognized American Indian Tribe); Citizen Potawatomi Nation Tribal Code, Rule 8-1-101(C) (limiting lay advocate eligibility to members of a federally recognized Tribe); Miami Tribe of Oklahoma Judicial Code §§ 2.25, 2.26(D) (limiting lay advocate eligibility to Tribal members, or to members of a federally recognized Tribe who are also licensed to practice in any other Indian Tribal Court in Oklahoma on a case-by-case basis).

[59] Blue Lake Rancheria Tribal Code, Ordinance No. 07-01, § 11.1.1.010(A).

[60] *Id.* § 11.1.1.010(E).

to any Indian person.[61] The White Mountain Apache Tribe permits non-Tribal members to be licensed as an advocate, but they must either be employed by the Tribe or a public defender organization approved by the Tribe and also must be licensed and in good standing with at least one other Tribal jurisdiction.[62] Among their enumerated methods for demonstrating competency, the Ho-Chunk Nation lists admission to practice before another Tribal court, or being a Ho-Chunk Tribal member representing another Tribal member.[63]

These Tribes appear to be actively engaged in negotiating the tradeoffs between attorneys and non-attorneys, as well as Tribal members or Natives and non-Natives, in the provision of legal representation. A Tribal member attorney offers the maximum potential for competence: legal training, accreditation, and professional accountability, coupled with a likelihood for community, cultural, custom, and linguistic familiarity. A Native non-Tribal member attorney offers at least a familiarity with Tribal communities broadly and an appreciation for Tribal law and how to navigate it. A non-Native attorney may lack cultural credibility but brings their legal training. Conversely, Tribal member lay advocates may lack formal legal training, but they are more likely to bring a familiarity with Tribal law, including customary law, as well as community norms and practices. Similarly, Native non-Tribal members, non-attorneys may lack specific familiarity with this Tribal community but offer a familiarity with Tribal law generally. By requiring lay advocates to be Tribal members, Tribes validate the notion that legal representatives are most effective when equipped with intimate knowledge of the community and culture in which the litigation takes place. Proximity to the Tribe is but one competency metric. The provisions below evince a different method for measuring Tribal law competence.

11.2.4 *Tribal Law Training*

Lay advocates may definitionally be distinguished from attorneys by their lack of law school training, but many Tribal codes require that lay advocates have some legal training, experience, and/or that they demonstrate legal skills. Those requirements suggest that Tribal law advocates are not "less-than-attorneys" but rather are customary law experts.

[61] Fort McDowell Yavapai Nation Law & Order Code § 1-25.

[62] White Mountain Apache Judicial Code § 2.27(B)(2). *See also* Mohegan Tribe of Indians of Connecticut Code of Ordinances, pt. II, ch. 1, art. I., § 1-37(c) (permitting spokespersons to represent litigants only in minor civil actions, unless they are also admitted and in good standing in a foreign jurisdiction); Mashpee Wampanoag Tribe, Administrative Order #20 (extending lay advocate eligibility only to those who have been admitted as attorneys to the Bar of "any Tribe, State, or Federal Court"). However, law students are exempted from this requirement and may appear before the Tribal Court for any case. White Mountain Apache Judicial Code § 2.27(D).

[63] Ho-Chunk Nation Code, Rules for Admission to Practice, Rule II(1)-(5).

Consider Tribal codes that require a specific familiarity with the Tribe's laws and federal Indian law generally, a requirement that is woefully lacking for state-barred attorneys.[64] For example, the Cherokee Nation defines lay advocates as "[a]ny lay person demonstrating experience or education in Indian law and the laws of Cherokee Nation."[65] The Leech Lake Band of Ojibwe requires that lay advocates be familiar with "the Constitution of the Minnesota Chippewa Tribe, the by-laws of the Band, and the codes, statutes and ordinances of the Band."[66] The Bois Forte Band of Chippewa requires that lay persons attest that they will abide by the rules and principles of the Tribal court and code, and that they have an understanding of the law, but only as it pertains to their client's case.[67]

Some Tribes require that lay advocates pass a Tribal law exam.[68] Tribal law exams vary in scope and difficulty but tend to be administered by the Tribal court or the Tribal bar and test familiarity with Tribal law and court procedure. They can range from brief personal attestations to arduous multiday examinations.[69]

Other Tribes do not require that lay advocates pass a Tribal bar exam but impose other requirements to ensure that the advocate is familiar with Tribal law. The White Earth Nation, for instance, requires that lay advocates file an affidavit that they have studied and are familiar with Tribal law.[70] The Pascua Yaqui Tribe requires that each attorney and lay advocate attend a four-hour class on Pascua Yaqui law and court procedure and complete a certification class every two years.[71] Similarly, the Iowa Tribe of Oklahoma has a Tribal practice program designed to familiarize

[64] Valencia-Weber, *supra* note 15 (arguing for the inclusion of Indian law on state bar exams); Seminole Tribe of Florida Tribal Code § 3-117; Sovereign Nation of the Chitimacha Code of Justice tit. I, § 501(b); Sault Ste. Marie Tribe of Chippewa Indians Tribal Code § 87.110.

[65] Cherokee Nation Tribal Code appendix I to tit. 20, Rule 140. *See also* Fond du Lac Band of Lake Superior Chippewa Tribal Civil Code § 113; Burns Paiute Tribal Code § 1.1.81 (requiring spokesmen to swear they have read and are familiar with the Tribal law and order code).

[66] Leech Lake Band of Ojibwe Judicial Code tit. 1, pt. v, § 3.

[67] Bois Forte Band of Chippewa Tribal Code § 114(b).

[68] *See, for example*, Kickapoo Tribe in Kansas Tribal Code, Rule 106; The Laws of the Gros Ventre & Assiniboine Tribes tit. 1, § X(B); Crow Tribe of Montana Tribal Code § 3-7-702; Winnebago Tribal Code § 1-400(5); Citizen Potawatomi Nation Tribal Code, Rule 8-1-101(C); Iowa Tribe of Oklahoma Tribal Code, Rule 101(C); Keweenaw Bay Indian Community Code of Ordinances § 1.208(C)(1); Klamath Tribal Codes tit. 2, § 11.35(b)(3).

[69] *See, for example*, Navajo Nation Bar Association Bylaws, section V (detailing the format and scope of the Navajo Nation Bar Examination to include being offered twice a year, and to cover Navajo Common Law, the Navajo Nation Code, Navajo Nation Supreme Court decisions, as well as federal Indian law, contracts, criminal law, Navajo Fundamental law, Navajo civil and criminal procedure, Navajo peacemaking, Navajo property law, Navajo rules of evidence, Navajo rules of professional conduct, torts, and the Treaty of 1868). *Also see, for example*, Reno-Sparks Indian Colony Tribal Code, § 1-80-020(a) (requiring representatives to state an oath that they are "familiar with the Tribal Law and Order Code").

[70] White Earth Nation Judicial Code, ch. v, § 2.

[71] Pascua Yaqui Tribal Code tit. 3, ch. 1-4, § 20.

applicants with practice before the Tribal court.[72] In contrast, the Hoh Tribe requires that lay advocates demonstrate "knowledge of the culture and traditions of the Hoh people,"[73] potentially gesturing to the unique potential for lay advocates to use their cultural knowledge to supplement the building of customary law.[74]

To capture some of the basic legal skills that law school is credited with imparting, some lay advocate competency provisions require advocates to demonstrate certain skills. The Fort McDowell Yavapai Nation holds non-attorney advocates to the same standards of knowledge and ability as are expected of attorneys.[75] The Seminole Tribe and the Sault Ste. Marie Tribe of Chippewa Indians require that lay advocates possess good communication skills, have legal work experience, and the ability to perform legal research.[76] By contrast, the Mississippi Band of Choctaw Indians Tribal Code requires the Chief Justice to assess the competence of lay advocates prior to their admission to practice before the Choctaw courts.[77]

11.2.5 *Ethical Advocacy*

Once lay advocates are qualified, Tribal codes are primarily concerned with the substance of lay advocates' work. Like competence, the Tribal codes seek to narrow the professional responsibility gap between attorneys and advocates by extending comparable expectations to attorneys and Tribal lay advocates. In doing so, Tribes are generating a novel body of ethical rules particular to lay advocates.

11.2.5.1 Acceptance of Risk

Some Tribes require litigants to acknowledge their lay advocate is not an attorney and accept the risk.[78] Taking this tack, the Hopi Tribe and the Pascua Yaqui Tribe

[72] Iowa Tribe of Oklahoma Tribal Code tit. I, Rule 101(B). The Rules presently describe the Tribal practice program as an aspirational program they desire for the Committee on Iowa Tribe of Oklahoma Committee on Admissions and Grievances to establish.

[73] Hoh Law & Order Code § 1.8.16. *See also* Seminole Tribe of Florida Tribal Code § 3-117(H) (requiring lay advocates to have legal experience in Tribal court, and know and understand Tribal traditions and customs).

[74] *See, for example*, van Schilfgaarde, *supra* note 20, at 103, 139 (noting the work of Tribes to increasingly incorporate "custom and tradition within Tribal justice systems to help transform such systems back into truly Indigenous systems").

[75] Fort McDowell Yavapai Nation Law & Order Code § 1-25.

[76] Seminole Tribe of Florida Tribal Code § 3-117; Sault Ste. Marie Tribe of Chippewa Indians Tribal Code § 87.110.

[77] Mississippi Band of Choctaw Indians Tribal Code tit. I, § 1-4-1. The code does not specify how the Chief Justice makes this assessment, giving them total discretion.

[78] *See, for example*, Kiowa Indian Tribe of Oklahoma Code of Law tit. 1, § 1.6.5 (limiting lay advocates to civil matters, traffic violations, and misdemeanor criminal matters, but only if the defendant knowingly waives their right to an attorney); Klamath Tribal Codes tit. 2, § 11.35(c) (permitting lay advocates for any criminal matters, but only if the defendant has knowingly waived their right to counsel).

permit lay advocates for criminal cases but only when the defendant has knowingly waived their rights to counsel.[79] Some codes reflect higher expectations of lay advocates. For example, the Fort McDowell Yavapai Nation statutorily holds non-attorney advocates to the same standards of knowledge and ability as are expected of attorneys,[80] clarifying that persons who retain the services of non-attorney advocates do so at their own risk.[81] In contrast, the Cherokee Nation requires that litigants make a verified statement they understand the lay advocate is not a trained lawyer, but also permits malpractice claims against lay advocates who fail to uphold the same standards of expertise as a trained, licensed lawyer.[82] The Colorado River Indian Tribes explicitly shift the burden to the Tribal court to advise parties who are not represented by an attorney of their right to request a jury.[83] These provisions help to put the litigant on notice that lay advocates are not barred as attorneys, while preserving some protections for the litigant, including an expectation of performance by the lay advocate.

11.2.5.2 Ethical Requirements and Expectations

Some Tribal codes impose significant ethical expectations for lay advocate performance and accountability. For example, some codes define lay advocates as officers of the court[84] and/or extend the Tribal rules of professional ethics to both attorneys and lay advocates.[85] The Pascua Yaqui Tribe incorporates the ABA Model Rules of Professional Conduct to lay advocates.[86] The Fort McDowell Yavapai Nation adopts the ABA Model Rules for both attorneys and lay advocates, alongside "such standards as may be established by tribal law or court rule in performances of their duties as legal counsel,"[87] while the Keweenaw Bay Indian Community provides seven ethical rules applicable to all "practitioners" before the Court.[88]

[79] Hopi Code § 1.6.5; Pascua Yaqui Tribal Code tit. 3, ch. 1-4, § 40.
[80] Fort McDowell Yavapai Nation Law & Order Code § 1-25.
[81] *Id.*
[82] *Id.*
[83] Colorado River Indian Tribes Law & Order Code, art. II, § 203(h).
[84] *See, for example*, White Mountain Apache Judicial Code § 2.22(C).
[85] *See, for example*, *Id.* § 2.27; Sovereign Nation of the Chitimacha Code of Justice tit. I, §§ 504, 505(a); Sault Ste. Marie Tribe of Chippewa Indians Tribal Code § 87.106; Crow Tribal Code § 3-7-702; Winnebago Tribe of Nebraska Tribal Code tit. 1, art. 4, § 1-400(3); Pueblo of Zuni Tribal Code § 1-5-1; Cheyenne River Sioux Tribal Code § 1-5-6; Flandreau Santee Sioux Law & Order Code tit. 1, § 1-5-1.
[86] Pascua Yaqui Tribal Code tit. 3, ch. 1-4, § 10. *See also* Mohegan Tribe of Indians of Connecticut Code of Ordinances, pt. II, ch. 1, art. I., § 1-7 (extending the Connecticut Rules of Professional Conduct to non-attorneys). *See also* Mashpee Wampanoag Tribe, Administrative Order #7 (adopting the Massachusetts Rules of Professional Conduct); In re Adoption of Revised Rules of Professional Conduct for Attorneys, Ho-Chunk Nation Supreme Court SCR 20:1.1.5 (Feb. 22, 2016) (adopting the Wisconsin Rules of Professional Conduct).
[87] Fort McDowell Yavapai Nation Law & Order Code § 1-25(D).
[88] Keweenaw Bay Indian Community Tribal Code tit. § 2-47.

Some codes have adopted ethical rules that are particular to lay advocates. Numerous Tribal code provisions require that the lay advocate be of good moral character and/or not have criminal convictions.[89] The Citizen Potawatomi Nation requires that lay advocates pass a moral fitness assessment.[90] The Seminole Tribe requires lay advocates to only follow the portion of the ABA Model Rules relating to the attorney-client relationship, candor, and integrity,[91] and the Nooksack Indian Tribe has a distinct Advocate's Code of Conduct and imposes additional responsibilities on professional attorneys.[92] The Mohegan Tribe of Connecticut permits the Chief Judge to waive certain Rules of Professional Conduct "for the purpose of application to non-attorney spokespersons, but shall enforce them to the maximum extent possible," that is – the court will enforce the remaining applicable rules as applied to non-attorney spokespersons to the maximum extent applicable.[93] Nevertheless, under the Mohegan Tribal Code, spokespeople may be held in contempt of court for misbehavior, other willful neglect, a violation of duty in their rule,[94] and in a section specifically directed at spokespersons, for "failing to maintain the respect due the Mohegan Tribal Court or engaging in offensive conduct in the courtroom."[95]

Other Tribal codes stop short of applying broad ethical codes of conduct to lay advocacy and instead adopt specific, discrete ethical provisions that apply to lay advocates. The Seminole Tribe, for instance, will remove lay advocates if they "knowingly disrespect[] the customs and traditions of the Tribe."[96] The Bois Forte Band of Chippewa requires that lay persons attest that they will advocate for their client's position.[97] The Burns Paiute requires lay advocates to swear they will maintain the respect due the Tribal court, will not represent a suit that appears to them to be unjust, and employ such means only as are consistent with truth and honor.[98]

The Yurok Tribe's governing principles for their rules of court seemingly go one step further, reflecting not only on lay advocate expectations but also on how the law generally should be applied in consideration of lay advocate participation.

[89] *See, for example*, Mississippi Band of Choctaw Indians Tribal Code tit. 1, § 1-4-3 (requiring "good moral character"); Turtle Mountain Band of Chippewa Indians Tribal Codes tit. 2, § 2.1401; Burns Paiute Tribal Code § 1.1.81(a); Sovereign Nation of the Chitimacha Code of Justice tit. I, § 501(b) (in addition, the Code requires that lay counselors must not have been convicted of a felony in any jurisdiction and must not have been convicted of child abuse or neglect in any jurisdiction).

[90] Citizen Potawatomi Nation Tribal Code tit. 8, Rule 8-1-101(C).

[91] Seminole Tribe of Florida Tribal Code § 3-119.

[92] Nooksack Indian Tribal Code § 10.02.010.

[93] Mohegan Tribe of Indians of Connecticut Code of Ordinances, pt. II, ch. 1, art. I., § 1-8(a).

[94] *Id.* § 1-60(a)(3).

[95] *Id.* at pt. II, ch. 1, art. I., § 1-42.

[96] Seminole Tribe of Florida Tribal Code § 3-120.

[97] Ho Chunk Nation Tribal Code, Rules for Admission to Practice, Rule 1(A).

[98] Burns Paiute Tribal Code § 1.1.81(d)–(f).

The Tribe requires lay advocates to "conduct themselves in a fashion that respects the individuals involved in the Court process and is consistent with the sovereign rights and responsibilities set out in the preamble of the Yurok Constitution and inherent in Yurok cultural practices."[99] At the same time, the Tribal code recognizes that its courts should account for lay advocate participation when resolving disputes, noting the following.

> In establishing these rules, the Yurok Tribal Council and the Yurok Court are aware that many times people will come before the Court without formal representation or with spokespersons who may not be law-trained. These rules are not meant to create an environment that favors law-trained represented persons and will not be enforced in such a manner as to create such an outcome. Rather, the rules are meant to guide the parties to a fair and just resolution by providing a framework for the resolution of issues.[100]

The Yurok Tribe has centered its values on guiding "parties to a fair and just resolution." While the Tribe does not relieve lay advocates of accountability, these governing principles explicitly signal a more flexible statutory interpretation rubric to be employed in light of lay advocate participation.

11.2.5.3 Effective Advocacy

Some Tribes have adopted ineffective assistance of counsel standards. In U.S. constitutional law the standard for effective assistance of counsel in criminal trials is established in *Strickland v. Washington*, which provides that counsel is ineffective where "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[101] Because the ICRA does not provide a right to counsel, and because Tribes are not compelled to follow *Strickland*, Tribes are not required to guarantee effective assistance of counsel unless they do so through Tribal law.[102] The Hopi Tribe has done just that, adopting the *Strickland* standard as applied to attorneys (but not lay advocates).[103]

In 2005, the Hualapai Court of Appeals followed suit in *Bender v. Hualapai Tribe*, including the requirement that the attorney's actions be reasonable under the circumstances in light of prevailing professional norms.[104] Notably, *Bender* extends the *Strickland* test to non-attorney lay advocates. In compliance with the Hualapai

[99] *Id.* § 2.20.050.
[100] Yurok Tribal Code § 2.10.010.
[101] 466 U.S. at 692–93.
[102] Kimmelman v. Morrison, 477 U.S. 365, 377 (1985) (explaining that "the right to counsel is the right to effective assistance of counsel").
[103] Navasie v. Hopi Tribe, No. 98AC000015 (Nov. 16, 1999), 1999.NAHT.0000010.
[104] Bender v. Hualapai Tribe, 2005-AP-001, 5 (Hualapai Court of Appeals, 2005).

Constitution,[105] the Tribe provided the appellant with an advocate at trial, not a licensed attorney. The Hualapai Court noted that the professional norms used to determine the standard of professional conduct must take into account the difference between licensed attorneys and non-attorney advocates,[106] and that the standard must take into account the different contexts of Tribal and non-Native legal systems.[107] However, the court held that even a lay advocate should have been expected to request a continuance to adequately prepare, to protest the absence of a preliminary hearing, or both.[108] The lay advocate was consequently found to have provided ineffective assistance.[109]

11.3 CONCLUSION

The Tribal code offers just one small window into the role of the lay advocate within Tribal courts. But the code reveals promising insights. Tribal courts, particularly within the criminal realm, are severely limited in the authority they can exercise, while also pressured to assert that surviving authority in a specifically Anglo-adversarial way. Yet, despite operating Anglo-adversarial-type courts, and despite suffering a lack of lawyers, the Tribal code makes clear that the lay advocate is serving more than just a gap-filler for lawyers.

Lay advocate eligibility criteria often prioritize Tribal members and familiarity with Tribal law. The lay advocate is not just offering some legal training; they are offering a wholly new form of competence to the Tribal court – enhancing the Tribal court's legitimacy and the building of Tribal law. Ethical protocols, meanwhile, are being applied to the lay advocate in ways that suggest lay advocates can operate within their own realm of accountability, transparency, and community norms.

Outside of Tribal courts, lay advocate critics have raised concerns over the quality and performance of nonlawyers, including those who are licensed and regulated.[110] The fact that some Tribes specifically exclude lay advocates from practice suggests they may harbor similar concerns.[111] But for at least some Tribes, Tribal lay advocates are "welcome in the courtroom."[112] The codification of lay advocacy reveals a

[105] Hualapai Constitution, art. VI, § 13(c) (providing that a criminal defendant is entitled to "the assistance of an advocate for his defense admitted to practice before the Tribal Courts").
[106] Bender v. Hualapai Tribe, 2005-AP-001, *supra* note 104, at 6.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Statz et al., *supra* note 3, at 356 (citing Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public: Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2593–94 (2014).
[111] *See, for example*, Osage Nation Code tit. 5, § 1-111(c) ("Lay counselors not admitted to any state bar association … are prohibited from appearing before the Courts to represent any party".).
[112] Statz et al., *supra* note 3, at 359.

concerted effort to provide enhanced access to advocacy that is likely more familiar with the Tribal court process. And given their ties to Tribal communities, cultures, and traditions, Tribal lay advocates may assist in enhancing dignity within the Anglo-adversarial process.[113] Access to justice requires access not just to legal information but additional human resources. To the extent the attorney serves as a bridge between "access" and "justice,"[114] the lay advocate too can be a bridge – for the advancement of Tribal law, for the preservation of Tribal custom, and for the substantive access of Tribal communities to Tribal justice.

[113] *Id.* at 373 (noting procedural due process, at its most basic, is notice and an opportunity to be heard, which requires a connection to human dignity).
[114] *Id.* at 374.