

Updating the Navajo Nation Bar Association Rules of Professional Conduct In Light of Changes to the ABA Model Rules of Professional Conduct



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Adoption of the NNBA Rules of Professional Conduct



☞ In my presentation last year I noted that in 1993 the Navajo Nation Supreme Court, by Order A-CV-41-92, adopted the original Model Rules of Professional Conduct of the American Bar Association, dated August 1983, as the ethics rules (hereinafter, "Navajo Nation Rules") of the Navajo Nation Bar Association (hereinafter, "NNBA"), with certain exceptions and amendments.

Introduction



☞ I also noted that since 1983 the ABA's Model Rules (hereinafter, "ABA Rules") have been amended many times.

☞ By contrast, while Navajo Nation Rule 8.4 amends ABA Model Rule 8.4 and Navajo Nation Rule 8.6 is new, I am not aware of any other amendments to the Navajo Nation Rules that have been adopted by the Navajo Nation Supreme Court since 1993.

☞ Therefore, it is not surprising that there now are significant differences between the two sets of rules.

Introduction



☞ Therefore, beginning in early 2015, my colleague from the ABA Ethics Committee, Amanda Jones, Professional Responsibility Counsel at the law firm of DLA Piper International, LLP, and I, have been working with Navajo Nation attorneys Patterson Joe and the late Vernon Roanhorse, to incorporate into the NNBA Ethics Rules the current version of the ABA Model Rules.

Introduction



☞ Therefore, in this presentation I want to go over with you our draft proposal for the Preamble and Scope, Rules 1.0 to 1.8, and questions that have arisen concerning Rule 6.1 and 6.5.

☞ This process is ongoing. We are not yet done. But I thought it would be helpful to share with you where we are now.

Introduction



☞ Note also that we have not yet begun to edit the Comments to the Rules. These need to be updated since in the Comments to the Navajo Nation Rules comparisons are drawn to the old Disciplinary Rules (DRs) and Ethical Considerations (ECs) of the ABA's former Model Code of Professional Responsibility, which is no longer in effect.

☞ We expect this will take us into the Spring of 2017 to complete.

Introduction



- ☞ You have received in your materials a side-by-side print-out of the Navajo Nation Rules and the ABA Rules, prepared by the law firm of DLA Piper LLP under the supervision of that firm's Associate Ethics Counsel, Amanda Jones.
- ☞ Please follow along with me as I compare different provisions of the two sets of rules.
- ☞ I will address some of the differences between these two sets of rules and then conclude with a recommendation for the Navajo Nation Bar Association in light of these differences.

Preamble to the Navajo Nation Rules -- Four Roles a lawyer may be asked to perform as a Representative of Clients:



- ☞ We have edited the title to conform to the ABA Rules and to the ethics rules in most states, by removing the word, "Terminology," and replacing it with the word, "Scope." Paragraphs [1] through [13] are the Preamble, and [14] through [22] are the Scope.
- ☞ Language is added to paragraph [1] noting that a lawyer is a member of the legal profession.

Preamble



- ☞ In the draft you have you will note in paragraph [2] that the sentence about a lawyer serving as an intermediary between clients has been deleted. This has been moved to new Paragraph [3]. NNBA Ethics Rule 2.2 addresses the role of an attorney as **an intermediary between different clients seeking to reconcile their differences**. There is no comparable provision in the ABA Rules, but it seems absolutely appropriate for the NNBA and will be retained.

Preamble



- ✎ Paragraph [3] is new. It addresses other functions an attorney may serve such as a third-party neutral or an intermediary between clients.
- ✎ It also states that some Rules apply to lawyers who are not active in practice or when active lawyers are acting in a non-professional capacity.
- ✎ Language is added to paragraphs [6] and [9] to bring them up to date with current practice and policy.

Scope



- ✎ In the Scope section, note that paragraph [18] refers to "Navajo fundamental law," an important and necessary addition to a rule for the NNBA.
- ✎ Other edits to Scope, in paragraphs [14], [15], [17], [20], [21] and [22], are editorial in nature and reflect current terminology. For example, the outdated reference in Comment [22] to Research Notes and the Model Code that was adopted in 1969 has been deleted.

Rule 1.0 Terminology



- ✎ The Terminology section has been moved to its own rule, Rule 1.0, as in the ABA Rules and most state ethics rules.
- ✎ New defined terms include "Confirmed in writing," "Informed Consent," "Screened," "Tribunal," and "Writing."
- ✎ Revised and updated defined terms include "Firm," "Fraud," and "Partner."

Rule 1.2 Scope of Representation



- ✎ No change is made to Rule 1.1, Competence.
- ✎ Rule 1.2(a) and (c) are updated to conform to the current version the ABA Rules.
- ✎ Note that in 1.2(c), the older term, “the client consents after consultation,” has been replaced with the modern term of art: “the client gives informed consent.”

Rule 1.4 Communication



- ✎ No change was made to Rule 1.3 Diligence.
- ✎ In Rule 1.4, new paragraphs (1) and (2) are added.
- ✎ They address promptly informing the client when the client’s informed consent is required, and consulting with the client about the means by which the client’s objectives are to be accomplished. {Also required by Rule 1.2(a).}

Rule 1.5 Fees



- ✎ Rule 1.5 is amended to be clearer and more definite.
- ✎ Paragraph (a) now includes a more definite statement about an attorney’s obligation to not make an agreement for or charge or collect an unreasonable fee or an unreasonable amount for expenses.
- ✎ Paragraph (b) now notes that the lawyer must also communicate to the client the scope of the representation and the amount of expenses, and it notes the less stringent communication required when a lawyer is billing a regularly represented client.
- ✎ Paragraph (e)(2) now notes that when a fee is divided between lawyers from different firms, the client must consent to the arrangement in writing.

Rule 1.6 Confidentiality



- ✎ Rule 1.6 is substantially amended to conform to the substantial amendments that have been made to this provision over the past thirty-three years since it was first adopted.
- ✎ The term “informed consent” is used in 1.6(a) in place of, “consents after consultation.”
- ✎ New exceptions to the confidentiality required by 1.6(a) are added in 1.6(b)(2) [prevent injury to financial interests or property of another], (3) [prevent, mitigate or rectify injury or financial interests or property of another for which the lawyer’s services are being used by the client] , (4) [to secure legal advice on an ethics issue], (6) [to comply with other law or order], and (7) [to detect and resolve conflicts of interest].

Rule 1.6 Confidentiality



- ✎ A new 1.6(c) has been added. It requires lawyers to take reasonable steps to prevent the inadvertent or unauthorized disclosure of confidential information relating to the representation. {This provision relates to a lawyer’s new obligation to keep abreast of new technology.}

Rule 1.7 Conflicts of Interest



- ✎ This rule has essentially been rewritten, not just amended, given the substantial changes to this provision since the Model Rules were adopted in 1983.
- ✎ Rule 1.7(a) and (a)(1) are revised, and a new (a)(2) is added, to more clearly delineate conflicts of interest that can arise with a current client.
- ✎ Rule 1.7(b) is revised and new subparagraphs (b)(2) and (3) are to delineate the circumstances when a lawyer may and may not represent a client if there is a conflict of interest .
- ✎ Rule 1.7(c) is a revised version of the former (b)(2).

Rule 1.8 Conflicts of Interest Current Clients



- ✎ This rule has been substantially updated.
- ✎ In 1.8(a)(2) the lawyer is required to advise the client in writing of the desirability of seeking separate legal counsel, and (a)(3) now refers to “informed consent” and identifies what the client is consenting to.
- ✎ 1.8(b) and (c) are made more explicit, as “related persons” are now defined in (c).
- ✎ Paragraphs (g), (h) and (i) are amended, and new paragraphs (j) [sexual relations with a client], (k) [representing a party adverse to the lawyer’s child, spouse, parent or sibling] and (l) [when imputed conflicts apply] have been added to the rule.

Navajo Nation Rule 2.2 – Lawyer as Intermediary



- ✎ The role of “intermediary” is defined in Navajo Nation Rule 2.2. That rule details the ethical duties to all affected clients that a lawyer acting as an intermediary has to all the clients for whom the lawyer is serving as intermediary, and advises that a lawyer should withdraw from the this role when requested to do so by any of the clients being served in this role.

Navajo Nation Rule 2.2 – Lawyer as Intermediary



- ✎ Although a comparable Rule 2.2 was deleted from the ABA Model Rules in 2002, in part because its application and relationship to Rule 1.7 was not well understood, this does not mean it should be deleted from the NNBA Rules. We will recommend that it remain.

Two Issues -- Rule 6.1 and Rule 6.5



- ✎ ABA Rule 6.1 is the pro bono rule that asks lawyers to provide pro bono legal services to qualified recipients. Earlier this year we were advised that the NNBA is revising its pro bono rules. We are awaiting the results of that revision.
- ✎ ABA Rule 6.5 provides protection for lawyers engaged in non-profit and court-annexed limited legal services programs. There currently is not such provision in the NNBA Rules. We recommend it be added, since DNA Peoples Legal Services does operate a "self-help" clinic and a divorce clinic AND New Mexico Legal Aid operates a domestic violence hotline for which NNBA members might provide assistance.

Conclusion



- ✎ Amanda Jones and I will continue to work with Mr. Patterson Joe to complete this draft by April or May 2017. Our goal is to then present it to the NNBA for its consideration.
- ✎ Once approved by the Bar, it will need to be presented to the Navajo Nation Supreme Court for adoption.

Thank You! Questions?



IN MEMORIAM
Mr. Vernon Roanhorse
1956-2016
