




Continuity and Change in the Ethics Rules: Comparing the Navajo Nation Bar Association Rules of Professional Conduct with the ABA Model Rules of Professional Conduct


 Professor Myles V. Lynk
 Peter Kiewit Foundation Professor of Law and the Legal Profession
 Sandra Day O'Connor College of Law, Arizona State University
 Chair, Standing Committee on Ethics
 and Professional Responsibility
 American Bar Association


2015 Navajo Nation Law CLE Conference
 October 24, 2015
 Sandra Day O'Connor College of Law
 Arizona State University


Adoption of the NNBA Rules of Professional Conduct





 On May 17, 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 ethical rules (hereinafter, "Navajo Nation Rules") of the Navajo Nation Bar Association (NNBA), with certain exceptions and amendments.

Introduction



 Since 1983 the ABA's Model Rules (hereinafter, "ABA Rules") have been amended many times, most recently in 2013.

 I am not aware of amendments to the NNBA Ethical Rules that have been adopted by the Navajo Nation Supreme Court since 1993.

 It therefore is not surprising that now there are significant differences between the two sets of rules.

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 I think are important, 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:



☞ A lawyer may serve as: i) an advisor to the client on its legal rights and obligations; ii) an advocate asserting the client's position before a tribunal or as a negotiator on behalf of the client; iii) **an intermediary between different clients seeking to reconcile their differences;** and iv) an evaluator examining and reporting to the client and others on the client's legal affairs. (Emphasis added.)

Navajo Nation Rule 2.2 – Lawyer as Intermediary



☞ This role is defined in Navajo Nation Rule 2.2, which provides details on the ethical duties to all affected clients that a lawyer acting as an intermediary has to those clients, 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.

☞ This could be an important role for the members of the Navajo Nation Bar, to view themselves as agents who will not just zealously advocate their client's positions in an adversarial legal system, but also help reconcile differences between and among their Navajo clients.

Navajo Nation Rule 2.2 – Lawyer as Intermediary



- ☞ Rule 2.2 in the ABA Rules was deleted 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 Navajo Nation Rules.

ABA Rule 2.3 – Lawyer as Third Party Neutral



- ☞ Paragraph [3] of the Preamble and Rule 2.3 of the ABA Rules state that a lawyer may serve a role as a Third Party Neutral. This is different from an Intermediary because the lawyer does not represent the parties whose dispute she is trying to resolve. Rather, the lawyer is serving as an arbitrator, mediator or other similar capacity, to help decide or resolve a dispute.
- ☞ Should the Navajo Nation Rules include a provision like ABA rule 2.3?

Navajo Nation Rule 1.0 & ABA Rules “Terminology” Section



- ☞ Navajo Nation Rule 1.0 contains ten defined terms. One of these terms, “Consult,” is not defined in the ABA Rules.
- ☞ The ABA Rules contain fourteen defined terms. Of these, the terms “Confirmed in writing,” “Informed consent,” “Reasonably should know,” “Screened,” “Tribunal,” and “Writing or written” are not defined in the Navajo Nation Rules.
- ☞ The word “screened” is defined in the ABA Rules because that term is used in Rules 1.10 and 1.11 to explain how a law firm can represent a client when a lawyer in the firm is ethically barred from representing that client.

Navajo Nation Rule 1.0 & ABA Rules "Terminology" Section



- ☞ By contrast, Rules 1.10 and 1.11 in the Navajo Nation Rules do not provide for such a screening procedure. Therefore the word "screened" is not used in those rules.
- ☞ Should this be revisited? Given the small size of the Navajo Nation Bar, having a screening mechanism available would help members of the Nation who need legal assistance obtain the representation they want.
- ☞ The definition of "Consult" was deleted from the ABA Rules in 2002 when the term, "Informed consent," was added.

Rule 1.6 – Confidentiality of Information



- ☞ Broad language in the 19th and 20th paragraphs of the Preamble to the Navajo Nation Rules discuss the limited exceptions to a lawyer's duty not to disclose confidential client information, and states that the lawyer's decision not to disclose such information should not be subject to "reexamination."
- ☞ It might be helpful to clarify what not subject to "reexamination" means.

Rule 1.6 – Confidentiality of Information



- ☞ In both sets of rules, Rule 1.6(a) provides that a lawyer shall not reveal information relating to a representation without the client's informed consent, or implicitly authorized or unless disclosure is authorized by 1.6(b).
- ☞ Rule 1.6(b) in the Navajo Nation Rules contains only two grounds authorizing such disclosure: to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm, and if necessary to establish a claim or defense for the lawyer in a criminal or civil case or in a grievance proceeding.

Rule 1.6 – Confidentiality of Information



- ✎ By contrast, since 1983 the number of exceptions permitting disclosure in Rule 1.6(b) of the ABA Rules have increased to seven.
- ✎ In addition to the two in the Navajo Nation Rules, they include: to prevent harm to the financial interest or property of another; to secure legal advice about the lawyer's ethical duties; to comply with other law or court order; and the most recent; to detect and resolve conflicts of interest.
- ✎ Are any of these exceptions applicable to issues faced by members of the Navajo Nation Bar?

Rule 1.6 – Confidentiality of Information



- ✎ In addition, ABA Rule 1.6 contains a new paragraph (c) which requires a lawyer to take reasonable steps to prevent inadvertent or unauthorized disclosure of or access to information relating to the representation.
- ✎ Should this paragraph be added to Rule 1.6 of the Navajo Nation Rules?

ABA Rule 1.17 – Sale of a Law Practice/ABA Rule 1.18 – Duties to Prospective Clients



- ✎ The Navajo Nation Rules do not include these provisions, which provide for the sale of a law practice and a lawyer's ethical duties to prospective clients.
- ✎ Some states have also not included them in their ethics rules.
- ✎ Are these issues important to the members of the Navajo Nation Bar? Should they be added to the Navajo Nation Rules?

ABA Rule 5.7 --- Law-Related Services/ABA Rule 6.5 – Non-Profit and Court-Annexed Legal Services Programs



- ☞ There are two other ABA Rules that were added after 1983 and are not in the Navajo Nation Rules.
- ☞ They govern the application of the ethics rules to lawyers who are providing “law-related” services that are not legal services to clients, and to lawyers who are providing limited legal services to clients under the auspices of a nonprofit organization or court-based program.



Rule 3.6 – Trial Publicity



- ☞ In both sets of rules, Rule 3.6(a) prohibits a lawyer in an investigation or litigation from making public statements that could prejudice the proceeding.
- ☞ Rule 3.6(b) in the Navajo Nation Rules specifically identifies the kinds of prejudicial extrajudicial statements that are prohibited by 3.6(a). This is not included in the ABA Rules version of 3.6.
- ☞ On the other hand, the ABA Rule contains a paragraph (c) that permits a lawyer to make extrajudicial statements to protect a client from the prejudicial effects of adverse publicity, and a paragraph (d) that provides that a lawyer associated in a law firm or government agency with a lawyer who is subject to 3.6(a), is also subject to paragraph (a).

Rule 5.4(a)(2) – Deceased, Disabled or Disappeared Lawyers



- ☞ Rule 5.4(a)(2) in the Navajo Nation rules permits a lawyer who undertakes to complete the unfinished legal work of a deceased lawyer to pay the estate of the deceased lawyer for the services rendered by the deceased lawyer.
- ☞ In the ABA Rules, Rule 5.4(a)(2) provides that a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may pay an agreed upon price to that lawyer’s estate.
- ☞ Should the Navajo Nation Rules also address disabled (incapacitated) and “disappeared” lawyers in addition to deceased lawyers?

Rule 5.5 – Unauthorized Practice of Law



- ☞ The ABA version of 5.5 has expanded over the years to provide many exceptions that permit a lawyer who is not admitted in a jurisdiction to nonetheless practice law in that jurisdiction under certain circumstances.
- ☞ By contrast, Navajo Nation Rule 5.5 is brief and concise. I think it is properly so. It need not provide the exceptions found in the ABA Rule, given the specialized nature of the practice before the Navajo Nation's courts and agencies.

ABA Rule 7.6 – Political Contributions



- ☞ ABA Rule 7.6 prohibits a lawyer from accepting a governmental legal engagement or appointment by a judge if the lawyer or law firm made political contributions or solicited political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.
- ☞ There is no comparable provision in the Navajo Nation Rules.
- ☞ Is this an issue faced by members of the Navajo Nation Bar? Should a similar provision be added to the Navajo Nation Rules?

Conclusion and Recommendations



- ☞ I have touched on just a few of the many differences that have developed over the years between the Navajo Nation Rules of Professional Conduct and the ABA's Model Rules of Professional Conduct.
- ☞ In light of these differences, I recommend that the Navajo Nation Bar Association appoint a committee to review the existing ethics rules to determine whether to propose to the Bar that it recommend to the Navajo Nation Supreme Court amendments to the rules that were adopted in 1993.

Conclusion and Recommendations



Together with my colleague Amanda Jones on the ABA's Standing Committee on Ethics and Professional Responsibility, I would be happy to work with that committee and assist in its work.

Thank You! Questions?