Navajo Nation Law CLE

Section 6

Randolph “Dolph” Barnhouse

Ethics—State Practice / Navajo Practice: Is There A Difference?

NAVAJO NATION LAW CLE CONFERENCE
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ETHICS

STATE PRACTICE/NAVAJO PRACTICE:

IS THERE A DIFFERENCE?

"The governmental and justice system in the Navajo Nation require attorneys and advocates who practice in this court *comprehensively* follow the letter and spirit of our laws and rules of practice and procedure. Especially in this period of reform, attorneys and advocates should accept the responsibility of heightened duty to the public trust. We expect and will accept no less."

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Ethics – State Practice / Navajo Practice: Is There A Difference?

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COURSE OUTLINE

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   A. In General
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   C. On the Navajo Nation

II. Navajo Nation Ethics
   A. NNBA Rules of Professional Conduct
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Ethics

Economics and Culture Both Put Their Stamp on Ethics Rules in Tribal Courts

Posted Mar 1, 2011 3:43 AM CST
By Ed Finkel

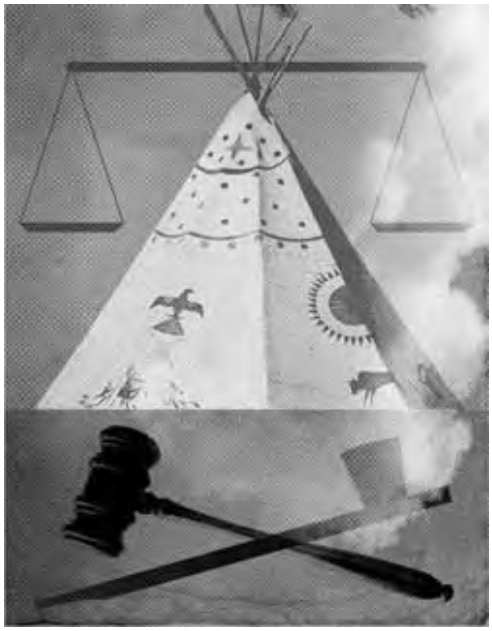

Illustration by Stuart Bradford

One of the notable trends in the legal ethics field over the past several years has been a gradual movement toward more uniformity in the substance and application of professional conduct rules.

There is little, if any, expectation that the states will fall into complete lockstep on how they apply ethics principles for lawyers and judges, or how they structure their disciplinary systems. But the ABA's Model Rules of Professional Conduct and Model Code of Judicial Conduct have served as starting points for efforts to bring more uniformity to the field. The Model Rules, for instance, have been adopted in some form by every state except California.

But in Indian country — the lands occupied by more than 600 tribes recognized by the U.S. government as sovereign entities — that trend hasn't caught on. And experts say it is unlikely that there will be much uniformity any time soon in the way that tribal courts address ethics and discipline issues for lawyers and judges.

"Tribes are all over the place on this," says B.J. Jones, director of the Tribal Judicial Institute in the Northern Plains Indian Law Center at the University of North Dakota in Grand Forks. "A lot of them do use the ABA Model Rules," says Jones, who serves as chief judge for the Sisseton-Wahpeton Oyate and chief justice for the Turtle Mountain Band of Chippewa Indians, and is admitted to practice in a number of tribal courts. But, he says, "It's hard to gauge what the most prevailing form of discipline is."

The somewhat random pattern of ethics rules for lawyers and judges in Indian country reflects the nature of general rules and procedures in tribal courts, says W. Gregory Guedel, who chairs the Native American Concerns Committee in the ABA Section of Individual Rights and Responsibilities, and other practitioners in the field.

"The thing that makes it both interesting, complex and a little maddening at times is that every tribe's system is different," says Guedel, chairs the Native American Legal Services Group at Foster Pepper in Seattle. "Some tribes have extremely well-developed legal codes and court procedures that are as intricate and broad as any non-tribal system. Other jurisdictions have just adopted the federal code or whatever is available because they won't have the resources."

Tribal jurisdictions vary greatly, says Paul Stenzel, an attorney in Shorewood, Wis., outside Milwaukee, who represents a number of tribes. "Some are handling a complete range of topics and cases that you would see in a

state court, almost, with the exception of major felonies," he says. "Smaller ones are doing very narrow dockets, maybe only hunting and fishing violations, maybe only adoptions or family law. And there's everything in between."

IMPETUS FOR CHANGE

Increasingly, there are good reasons for tribal courts to firm up conduct codes for lawyers and judges, and to identify ethics issues on which a more uniform approach might be beneficial.

Some of that impetus should come from passage of the Tribal Law and Order Act of 2010 (PDF), which President Barack Obama signed into law on July 29. The act gives tribal courts and police more authority to deal with crimes committed in Indian country, and promises more federal money to help bolster tribal justice systems.

"The act gave a lot of people the thought that, 'Let's not stop there. Let's continue and see what else we need to do,' " says Guedel. "There's a lot of discussion in general about it."

Economic considerations are another reason for tribal courts to take a harder look at their ethics rules for lawyers and judges. As some tribes have gained wealth — often in the form of casino revenue — their financial operations have become more complex and their commercial dealings with outside entities have grown.

"Private businesses are very afraid of the notion of a tribal court," Guedel says. "Tribes have recognized that impression and have been trying to say, 'This is a legitimate system. This is not just a kangaroo court.' The adoption of the model codes in wide usage, which people understand inside and outside the tribal context, would be helpful in that regard. You would have a level playing field. A business that's considering doing business with a particular tribe would say, 'At least we've got an understandable way to resolve our differences.' "

And there have been steps in that direction.

Last year, George A. Kuhlman, lead senior counsel and ethics counsel in the ABA Center for Professional Responsibility, met informally with court representatives from tribes in Wisconsin to discuss the process of developing ethics rules for lawyers and judges. But Kuhlman emphasizes that the center's primary role is to provide information and assistance to jurisdictions looking at their own rules, rather than to actively push for adoption of provisions in the ABA's model conduct codes for lawyers and judges. Kuhlman says his message is, "If the ABA's rules would be useful for you, ask me if I can explain anything."

In 2007, the National Tribal Judicial Center at the National Judicial College in Reno, Nev., produced a Sample Tribal Code of Judicial Conduct (PDF). The sample code incorporated provisions of the 1990 version of the ABA Model Code of Judicial Conduct along with judicial conduct rules developed previously by a number of tribes. (The ABA House of Delegates adopted a revised version of the model code in February 2007.)

The center's sample code takes into account certain characteristics of tribal courts that don't factor into the model code. Tribal courts, for instance, are more likely to have non-attorney judges. In addition, close-knit relationships within a tribe might require different types of rules regarding acceptance of gifts by judges and their family members — although cultural taboos against refusing gifts also must be taken into account. Mediation techniques might be more persistently followed in some settings, such as Navajo peace-making courts.

Whether to prohibit ex parte communications with judges could raise particularly difficult issues in close-knit Indian communities where judges are looked to as community pillars in the broader sense, says Jones. Judicial conduct rules, including the ABA model code, generally prohibit ex parte communications. "A lot of tribes don't strictly adhere to those rules," says Jones. "The tribal judge is more than an arbitrator of disputes. You've got to be actively involved in the community."

An important element of the sample code is that it is designed to encourage tribal courts to tweak it as much as they want, says Christine Folsom-Smith, a program attorney at the National Tribal Judicial Center.

"You never want your tribal courts to come in and do what a lot of them do, and take a code and just substitute whatever the state [name] is with the tribe's name," she says. "It's not necessarily going to capture the intricacies of the cultural relationships. We just try to get the information out there so people can have a look at it. We try not to tell people what to do here."

Folsom-Smith says that, by and large, tribal judges have reacted positively to the sample code. "They like having that certainty that a code of ethics lends, especially if they happen to be the presiding judge," she says. "They like to have a document they can turn to if things are not working properly. But they also want it to reflect what their values are, from their community."

SOVEREIGNTY CONCERNS

Others in the field agree that tribal courts should seek to develop legal ethics rules that reflect priorities of their communities.

"The biggest concern will always be, 'Does this proposed set of rules infringe on the tribe's sovereignty?" says Guedel. "That is what they protect first and foremost in any regard with their legal system. They don't want to open the door to people being able to say, 'You don't have the ability to do this anymore. We can come in and do this and that.' "

Robert O. Saunooke, an attorney in Cherokee, N.C., who chairs the Tribal Courts Council of the ABA's Judicial Division, says an all-or-nothing approach to the ABA Model Rules of Professional Conduct and Model Code of Judicial Conduct would never work in Indian country.

"The problem would come in trying to cookie-cutter a set of rules that could be adopted by 620 tribes," he says. "But there's some uniformity that would be beneficial-continuities to pleadings and procedures that would give confidence to off-reservation and on-reservation litigants."

The end results should help tribes create credible legal systems, says Guedel. "Helping tribes create a judicial system that's recognized as legitimate and where people can expect fairness and professional conduct will be very beneficial to tribes, and I think they recognize that," he says.

XI

Navaho Ethics in General

I. NON-LITERATE RATIONALISM[1]

Any philosopher who visits the Navahos cannot fail to be impressed by the extent to which 'talking it over' and 'thinking hard' are prized and practiced by these people. Hasty and undeliberated actions are frowned upon. Every decision made must first be discussed by all who happen to be around, and it is thought desirable to consult everyone, especially the older and wiser members of the family, before any course of action is decided upon. Even the most trivial matters must be mulled over before acting. One does not have to visit the Navahos to become convinced of this fact, for the published autobiographies of Navahos give detailed descriptions of such 'talks.' Furthermore, it is evident that this emphasis on public discussion is a theme deeply rooted in Navaho culture, since their religious myths are full of accounts of family councils among the Holy People who "talked it over before doing anything about it." (* 98–100)

I submit that this emphasis on public deliberation embodies the essential core of ethical rationalism — the view which stresses the crucial and necessary function of reason in the moral life. Although Western philosophy has traditionally assumed that reasoning is an intrasubjective process, taking place privately within the mind of the thinker, I have suggested earlier that we may consider talking to be a form of thinking, and perhaps thinking in private to be a kind of 'talking to oneself.' Hence, public deliberation is not an accidental by-product of intrasubjective thought processes, but as natural a manifestation of thinking as private deliberation. Accordingly, an emphasis on talking may be regarded as an emphasis on thinking publicly.[2]

Reasoning, being a kind of discourse, is that kind of talking and thinking which is distinguished from unorganized and casual thought by conforming to the rules of argumentation and by being concerned more with the subject matter than with the expression of the speaker's feelings or with his desire to impress others.

Navaho 'talks' are reasonable in precisely this sense, for if the reports of these 'talks' are examined, it will be evident that they are not merely oratory

or attempts to show off or to persuade — by any means, fair or foul; instead, they consist of carefully stated arguments for and against a particular course of action. In my opinion, many of these public deliberations come as near *in form* as is practically feasible to what could be called "reasonable discourse." One explanation for the 'cool reasonableness' of Navaho talk may be found in the strong cultural disapproval of 'trying to be better than the other fellow,' and this may possibly result in more attention to subject matter and logic than ordinarily occurs in similar situations in our society where our Egos often stand in the way of objectivity.

Therefore, when placing such stress upon 'talking it over,' the Navaho is assuming in his own way the crucial function of reason in practical discourse. This may be contrasted with ethical systems which rely upon ex cathedra utterances of an authority or which base moral choices on unquestionable intuition, for in such systems discursive thinking plays only a subsidiary role. Thus, the Navaho moralist is a rationalist par excellence. The fact that the Navahos have many beliefs which from our point of view are unscientific is beside the point. In calling the Navaho a "rationalist," I am referring to his use of reason in practical life, not to the content of his beliefs. Perhaps because of these false beliefs we might not wish to call his philosophy "rational," but to insist that others hold the same beliefs as are established by science in order to be called "rationalistic" as well as "rational" would entail that we withhold this label from all the great rationalistic philosophers of the past, as well as from the Navahos, for almost every great philosophical system contains some false beliefs.

In addition to the importance attached to talking and thinking in practice, Navaho ideology contains certain tenets about their causal efficacy which are characteristically rationalistic. In the first place, it is believed that 'talking it over' is the way to 'straighten out troubles' (disputes of one type or another). "Way back there, the Navaho people didn't have any kind of law. They used to just talking it together, and the things straightened up by talking together — maybe three or four people talking together." (*125)

Second, the Navahos believe fundamentally, and this belief is reflected in their mythology as well as in their daily life, that talking is the most effective means of persuasion. The spoken word has a peculiar form of 'compulsiveness' for them. It is supposed that if you ask for something in the correct manner, for example, four times, the person asked finds it difficult to refuse you. This technique is the fundamental method of invoking the help of the Holy People, and is used towards animals and other natural forces as well.[3] Talk is the preferred means of dissuading a person from doing something wrong. (*91) The Navahos dislike the use of force and are ever fearful of employing it.

A third aspect of Navaho rationalism is its adherence to the Socratic

tenet that virtue is knowledge and vice ignorance. A good man is one who 'has sense,' 'thinks hard,' or has a 'good head,' whereas a bad man is one who has none of these. To live successfully, one must think well: "All depends how the people thinks that makes them happy." (* 30) This follows from the characteristic Navaho principle that knowledge is power[4] — specifically, the power to achieve happiness.

Similarly, vice is ignorance, and is attributed to not thinking. A boy who does bad things is "one who hasn't any sense at all." [5] A frequent characterization of a person who has committed some crime, is to say that he is 'crazy' or 'has lost his mind.' [6] One should therefore expect that going crazy would be one of the most feared evils among the Navahos, and it probably is.[7] Becoming drunk is also regarded as a kind of loss of sense: "If you drink looks like you lose your mind and you think of things you never thought of, and you get into trouble." (* 9) The liquor problem is very acute for the Navahos, and my informant continually returned to the topic. Drinking is especially wrong because it makes you lose your mind.

A corollary of 'talking things over,' is that one must also *listen*. (Perhaps one reason why practical discussions in our own society are so often unreasonable, is because we do not listen to what others say, but are more intent on what we ourselves are going to say and on its effect.) Since the Navahos are aware that listening is as important a constituent of talk as speaking, they stress 'listening' and 'minding each other' as essential to the full efficacy of talk, and they consider them as desirable for the same reason. "They must work together and listen to each other." (* 48)

Another reason for listening is that only by listening can one learn. We find constant reiteration of the value of learning. Children are told to listen to their elders and to learn from them what to do and how to think about something correctly. In other words, virtue can be learned by listening, and can be taught to any pupil with the necessary intelligence. That virtue can be taught is usually regarded as a corollary of the proposition that virtue is knowledge.

Thus, we find the Navahos constantly stressing 'talking,' 'listening,' 'learning,' and 'thinking hard' as both necessary and, ideally at least, sufficient for the good life. This is the essence of what I have called "rationalism." However, one element which is generally associated with philosophical rationalism as it appears in the systems of Plato or Descartes is missing, namely, the belief that knowledge is certain and adequate. Here the Navaho parts company with the so-called "rationalistic" philosophers. You can never be certain that things will go as you planned. Mistakes are inevitable. (* 100) Human knowledge is always partial and incomplete. Everyone is always learning and he can never rest assured that he knows enough. Moreover, the Navaho is very much of an empiricist or experimentalist in that he

is always ready to try something new. He is also a pragmatic pluralist for he usually tries everything at once! This is well illustrated by the Navaho willingness to try out the white doctors as well as their own medicine men, and by the way they continually switch medicine men if one is not successful in curing the sickness. Thus, the Navaho combines ethical rationalism with experimental fallibilism in a fashion which is reminiscent of the philosophy of John Dewey.

Ultimately, the best evidence for the natural rationalism of Navaho thought is provided in the kind of ethical discourse which they conduct. Every prescription has a reason. Whatever one is told to do or not to do can be justified by some reason, and these reasons are generally mentioned in the course of the discussion. In my interviewing, I rarely had to ask the informant for a reason for some prescription he had mentioned — he gave it to me automatically. (This aspect of Navaho rationalism will be examined in more detail in Chapter XV.)

2. ESOTERIC KNOWLEDGE

A complete investigation of the ethical opinions of a non-literate people like the Navahos is frustrated at every turn because there are many things which the informant will not discuss, which may be essential elements in his whole scheme of thought. Some of these beliefs are common knowledge to the Navahos; for instance, beliefs about ghosts and witches are probably widely accepted, but are not immediately revealed to a white investigator, unless he knows the informant fairly intimately. In comparison to other non-literate groups they are communicative, but when compared to whites they are not. There are other beliefs that can be told only during the winter months, when there are no snakes and no danger from lightning. Finally, there is esoteric knowledge which is supposed generally not to be available to the average Navaho, but is guarded as the sacrosanct possession of the ceremonial Singers.[8] In order to obtain such knowledge, one must in theory be apprenticed to a Singer, or at least pay him something for it. One ancient practice was for an aged father to tell some of these secret stories and rites to his children just before he died. But again, the person who tells these things must always withhold some of it — for if he tells all, it is thought that he will lose his power.

In actuality, there is no rigid separation of esoteric and exoteric knowledge. Probably an intelligent layman among the Navahos picks up a good deal of esoteric knowledge during his lifetime. On the other hand, the fact that such knowledge is regarded as esoteric means that it is not cited in public moral discourses or in the teaching of children. The essential beliefs involved in ethical discourse are therefore entirely exoteric for the average

9 Am. Tribal Law 377
Supreme Court of the Navajo Nation.

In the Matter of Frank SEANEZ.

No. SC–CV–58–10. | Jan. 25, 2011.

Synopsis

Background: An order to show cause hearing was held in which former Chief Legislative Counsel (CLC) to tribal Nation Council was ordered to appear to show cause as to why he should not be held in contempt for unauthorized practice of law and violation of prior orders suspending him from practice of law.

Holdings: The Supreme Court held that:

[1] act of submitting draft resolution to Legislative Branch Chief of Staff in capacity as CLC was provision of legal representation in a legislative forum and legal services in violation of Navajo law;

[2] act of signing documents as CLC and "Attorney" was provision of legal representation in a legislative forum and legal services in violation of Navajo law;

[3] acts of using sole legal judgment to regulate and supervise himself and replacing Acting Chief Legislative Counsel's (CLC) legal judgment with his own assessment, constituted unauthorized practice of law in violation of Navajo law; and

[4] sanctions were warranted for unauthorized practice of law in amount of $72,612.

Ordered accordingly.

***378** An original action concerning Mr. Frank M. Seanez, a practitioner and member of the Navajo Nation Bar Association.

Attorneys and Law Firms

Levon B. Henry, Tohatchi, Navajo Nation, for Respondent.

Before YAZZIE, Chief Justice, and SHIRLEY, Associate Justice.

Opinion

ORDER OF CORRECTION

This matter comes before the Court on its own motion. Based upon our reread after the issuance of the opinion in this case, the Court made a few non-substantive changes and reissues the opinion as attached. The Court changed: 1) "six" to read "five" pay periods on pages 13 and 15, and 2) "CJA–06–10" to read "CF–12–10" on page 11. The corrected opinion, dated January 25, 2011, replaces the first opinion in its entirety.

OPINION

This matter is before the Court following a second Order to Show Cause hearing held on January 20, 2011 concerning the status of Frank M. Seanez as a member of the Navajo Nation bar. On October 22, ***379** 2010, Mr. Seanez was disbarred by this Court in a detailed opinion in which we found that his actions constituted gross misconduct. On November 24, 2010, we converted the disbarment to suspension upon Mr. Seanez's request that we reconsider and take this opportunity "to bring the Nation together and restore the harmony so badly needed at this time" in light of "the struggles that have plagued the Navajo Nation over the past two years." *Respondent's Petition for Reconsideration,* p. 3, November 12, 2010. Applying the principle of *baa hojoo bá'í yee',* we changed the disbarment to suspension solely on the bases of compassion and restoration. *Opinion and Order on Reconsideration,* No. SC–CV–58–10, slip op. at 14 (Nav.Sup.Ct. November 24, 2010). We considered the matter concluded.

The matter now returns to this Court with new allegations that Mr. Seanez has engaged in the unauthorized practice of law during his disbarment and subsequent suspension. Namely, he has continued to serve as and draw the full salary of Chief Legislative Counsel (CLC) of the Navajo Nation Council, signing documents and submitting draft resolutions under that title without attorney supervision.

Mr. Seanez appeared and filed his response through Counsel. Additionally, attorneys Mariana Kahn, Ron Haven, Ed McCool, Brian Quint, and Jennifer Skeet in the Office of Legislative Counsel (OLC Attorneys) filed a *Response to the Order to Appear and Report* on January 14, 2010 upon this Court's summons for an OLC principal attorney to appear and explain Mr. Seanez's employment status in that office. The OLC Attorneys

have informed the Court that the office had advised the Speaker that Mr. Seanez may not serve as, nor sign documents and draft resolutions as CLC while suspended. Upon review of the response and Mr. Seanez's reply and argument, the Court issued a verbal decision followed by a short order and now issues its detailed opinion.

I.

Upon the disbarment of Mr. Seanez on October 22, 2010, Mariana Kahn became the Acting Designated Chief Legislative Counsel (Acting CLC) of the Navajo Nation Council. We take judicial notice that when Mr. Seanez submitted his *Petition for Reconsideration* on November 14, 2010, it was generally understood that Ms. Kahn was the CLC and Mr. Seanez no longer served in that capacity. This was our understanding when we lifted Mr. Seanez's disbarment and imposed suspension on November 24, 2010.

On January 7, 2011, the Chief Prosecutor of the Navajo Nation filed a *Notice* alleging that Mr. Seanez has continued to serve as and be paid the salary of the CLC of the Navajo Nation Council during the period following his October 22, 2010 disbarment and November 24, 2010 suspension; has signed as the CLC on documents; and has submitted a draft resolution setting forth the proper procedure for the Council's selection of a Speaker Pro Tem in his capacity as CLC. On January 10, 2011, this Court issued a *Second Order to Show Cause and Order to Cease and Desist* in which we ordered Respondent to show cause at a January 20, 2011 hearing why he should not be held in contempt for unauthorized practice of law and violation of our prior orders. We further ordered that the principal attorney in the Office of Legislative Counsel (OLC) appear and explain the continued employment of Respondent as the CLC.

On January 14, 2011 we received a *Response to the Order to Appear and Report,* filed by the OLC Attorneys including Mariana Kahn, the Acting CLC. The OLC Attorneys provided to the Court copies of ***380** legal memoranda that had been provided by Ms. Kahn to the Speaker and Mr. Seanez in her capacity as Acting CLC. In a December 14, 2010 Memorandum, Ms. Kahn had advised the Speaker "that having a Navajo license [is] a basic qualification of the position of Chief Legislative Counsel" and that Mr. Seanez' conduct in signing documents and submitting draft resolutions as the CLC, "as if he has the active credentials to practice law in the Navajo Nation," constituted the "unauthorized practice of law." *Memorandum to Lawrence T. Morgan, Speaker, by Mariana Kahn, Acting Designated Chief Legislative Counsel,* December 14, 2010. At that time, Ms. Kahn obtained assurances from the Speaker that Mr. Seanez would be removed from the position and would cease to serve as CLC. However, the OLC Attorneys state that nothing was done, and Mr. Seanez continues to be on the payroll and hold himself out as CLC as of January 14, 2011. In a January 11, 2011 Memorandum to Mr. Seanez, Ms. Kahn instructed Mr. Seanez not to return to the Office of Legislative Counsel.

On January 19, 2011, Respondent filed a *Reply* in which he did not dispute any of the allegations in the Chief Prosecutor's *Notice.* However, he stated that he disagreed with the legal conclusions of the Acting CLC and OLC Attorneys and further stated that they were not his supervisors. He contended that none of his actions constitute the practice of law nor has he violated any express order of this Court. He states that pursuant to 2 N.N.C. § 963, the CLC is not required to possess an active Navajo bar license. Contending that he has no duty to resign, he asserts that this Court cannot find him in contempt for continuing to serve as the CLC because there has been no express order issued by this Court for him to resign the position. He claims that only the Council may remove him because he serves at the pleasure of the Council. Finally, he states that drafting legislation and submitting them to the Council using the title of CLC during his suspension does not constitute unauthorized "legal services" under 7 N.N.C. § 606 or 17 N.N.C. § 377.[1]

Mr. Seanez attached to his *Reply* a Legal Memorandum he submitted to Speaker Morgan at the Speaker's request which Mr. Seanez signed as "Attorney." *Reply, Exh. A.* The Speaker had requested this memorandum for Mr. Seanez to explain the legal ramifications of this Court's October 22, 2010 disbarment order. In the memorandum, Mr. Seanez provided the sought-for explanation and further, asked to continue as CLC pending the Court's reconsideration, stating that he would self-regulate his job functions as CLC and refrain from performing functions that in his opinion constitute the practice of law. The Speaker signed his concurrence. *Id.*

We placed no time limit on Mr. Seanez's oral argument at the Order to Show Cause hearing on January 20, 2011, which lasted one and one-half hours.

At the hearing, Mr. Seanez denied there was any impropriety in his serving as CLC and being paid the full salary of the CLC while Ms. Kahn was presented to the public as the Acting CLC. He stated that at some point, Mariana Kahn had been removed as Acting CLC and that he was legitimately the CLC. He further stated that none of the OLC Attorneys were his supervisors. When asked

whether he was now the supervisor of OLC Attorneys, he *381 did not respond. He stated that he had no obligation to come forward with information that he was still employed as CLC, even when requesting reconsideration of his October 22, 2010 disbarment from this Court.

Contending that the requirement for a Navajo bar license is only relevant if he performs legal services, which he is not performing through self-regulation, he stated that the Acting CLC and OLC Attorneys are wrong and that he is qualified to serve as CLC without a Navajo Nation bar license. When asked if he, as a suspended lawyer working in the OLC, could legitimately disagree with the legal opinion of the Acting CLC which considered his activities legal practice, Mr. Seanez did not respond.

Stating that he was performing only administrative functions, Mr. Seanez asserted that so long as he self-limits his job functions to non-legal work, he violates no law. He stated that the signing of documents and submitting draft resolutions as CLC are not the practice of law within the meaning of 7 N.N.C. § 606(B) if such documents are non-legal documents. However, Mr. Seanez conceded that when draft resolutions are submitted by counsel in the OLC, Council members assume that the resolution has been properly vetted and provided the necessary review as required by the Navajo Nation Council and committee resolutions procedure.

On January 20, 2011 following the hearing, we verbally announced our decision and also issued a short order finding that Mr. Seanez engaged in the unauthorized practice of law in violation of 7 N.N.C. § 606(B). We reinstated our October 22, 2010 order of disbarment of Mr. Seanez and ordered that he immediately vacate his position as CLC. We indicated that we would be imposing sanctions as mandated under 7 N.N.C. § 606 and promised that an opinion setting forth the sanctions and including further findings would be forthcoming.

We now issue our Opinion.

II.

The allegations of the Chief Prosecutor concerning Mr. Seanez's employment status and actions have not been disputed. The only issues concern whether they constitute unauthorized legal practice within the meaning of 7 N.N.C. § 606 and what affirmative duties, if any, Mr. Seanez has to his client and this Court following his disbarment and subsequent suspension.

a. Submitting Draft Resolutions as the Chief Legislative Counsel

[1] Mr. Seanez claims that his mere drafting of a resolution for the Council is not a "legal practice." He cites several provisions in the Navajo Nation Code and an opinion of this Court in which non-attorneys and advocates are permitted to perform drafting functions.

However, mere drafting does not reflect the full extent of what was actually performed by Mr. Seanez. The matter drafted proposed a procedure for the selection of a Speaker Pro Tem. Mr. Seanez submitted the draft resolution to the Legislative Branch Chief of Staff in his capacity as CLC. By doing so, as conceded by Mr. Seanez himself, he indicated to the Council that the draft resolution had undergone the necessary review as required by the Navajo Nation Council and committee resolutions process at 2 N.N.C. § 164(A)(1). Mr. Seanez also conceded that Council Delegates would assume that any draft resolution submitted by the OLC would have previously undergone legal review. We note that the draft resolution here was submitted directly by Mr. Seanez, who drafted the resolution, to the Chief of Staff *382 without going through any other review by OLC Attorneys, as Mr. Seanez has denied the authority of any OLC Attorney to supervise his work. It is apparent to this Court that Mr. Seanez simply continued the performance of his previous legislative drafting and review duties for his former clients, the Council, unabated and without supervision. We find that in so doing, Mr. Seanez provided legal representation in a legislative forum and legal services in violation of 7 N.N.C. § 606(B).

b. Signature on documents as the Chief Legislative Counsel

[2] Two documents were provided to this Court, one signed by Mr. Seanez as CLC and another signed by him as "Attorney," both dated during the period of his disbarment and subsequent suspension. The first was a cover memorandum to a resolution Mr. Seanez drafted, submitting the resolution to the Council. *Memorandum to Charles Long, Chief of Staff, Office of the Speaker by Frank M. Seanez, Chief Prosecutor's Exh. 1* (December 8, 2010). The second provided advice to the Speaker, at the Speaker's request, on the ramifications of this Court's disbarment order, and in which Mr. Seanez further requested to stay on as the CLC while performing only administrative duties. *Memorandum to Speaker Morgan by Frank M. Seanez, October 25, 2010, Respondent's Reply Exh. A* (October 25, 2010). Mr. Seanez asserts that neither of these documents were legal documents, and he did not engage in the practice of law when he signed them as CLC. We disagree.

Firstly, Mr. Seanez's October 25, 2010 Memorandum to the Speaker identifies himself as "Attorney" and clearly provides legal advice, not only on the ramifications of our disbarment order, but also on what Mr. Seanez believed constitutes non-legal administrative duties that he could perform during his disbarment. Secondly, Mr. Seanez's identification of himself as "Chief Legislative Counsel" in the submission of draft legislation to the Council plainly submits the draft legislation as attorney work product.

[3] Although Mr. Seanez possesses a New Mexico bar license, this license does not by itself permit legal practice within the boundaries of the Navajo Nation. It is self-evident that without a Navajo Nation bar license, no individual may hold himself or herself out as an attorney or advocate on the Navajo Nation regarding matters of legal practice on the Navajo Nation. By holding himself out as the CLC in the above instances, Mr. Seanez further held himself out as no less than the top legal representative of the Navajo Nation Council, which is a "legislative forum" under 7 N.N.C. § 606(B) and further provided legal services, thereby violating that provision.

[4] We would further emphasize that the public must be protected from unauthorized legal practices of suspended or disbarred attorneys and advocates, and especially individuals formerly employed in the capacity of Navajo Nation government lawyers such as Mr. Seanez. We hold that these individuals may not represent themselves as attorneys or advocates in any communication with former Navajo Nation clients or public no matter what the content of the communication may be due to the inherent dangers for abuse in their situation. There is ample guidance for such a holding from other jurisdictions. Prohibited conduct of a disbarred or suspended lawyer includes "being present during conferences with clients, talking to clients either directly or by telephone, signing correspondence to clients, contacting clients either directly or indirectly, or being present in the courtroom or present during any court proceeding involving ***383** clients." *In the Matter of John E. Wilkinson,* 251 Kan. 546, 834 P.2d 1356 (Kan.1992); *In re Petition for Reinstatement of Parsons* 849 So.2d 852 (Miss.2002) (proscribed work includes dictating letters and meeting with clients); and *In the Matter of Rodney P. Sniadecki,* 924 N.E.2d 109 (Ind.2010) (accepting clients subsequent to Order of Suspension and representing clients while suspended prohibited).

c. Affirmative Duties to the Court

Mr. Seanez asserts that because this Court did not expressly order that he resign as CLC, he did not have a duty to do so. However, it must be emphasized that at the time we lifted Mr. Seanez's disbarment, it was made clear to the governmental branches and the Navajo Nation public that Mr. Seanez was no longer the CLC. Mr. Seanez had admitted that while Ms. Kahn was presented as the Acting CLC, he was serving as and signing himself as CLC. The secrecy surrounding his continued employment was so encompassing that only the investigations of the Chief Prosecutor brought it to the attention of this Court. The secrecy all but ensured that no express order for Mr. Seanez to vacate the position would be issued by this Court. Under the circumstances, Mr. Seanez had an affirmative duty to inform this Court of his continued employment as CLC and also to ensure that the true circumstances of his employment was put forward in the public view.

When we converted Mr. Seanez's disbarment to suspension on November 24, 2010, we had done so at Mr. Seanez's urging that we take "the opportunity to bring the Nation together and restore the harmony so badly needed at this time." *Petition for Reconsideration,* p. 3, November 14, 2010. In so doing, we acknowledged our duty to aid in healing and the strong importance of *k'é* as a duty of Navajo leaders, including our government lawyers. *See Shirley v. Morgan,* No. SC–CV–02–10, 9 Am. Tribal Law 46, 53 (Nav.Sup.Ct. May 28, 2010). *K'é* requires that Mr. Seanez's own behavior reflect the restorative treatment which he sought and received from this Court. *K'é,* the duty of candor under NNBA Rules of Professional Conduct Rule 3.3, and the duty to serve the public trust are paramount in a government lawyer. By both failing to be forthcoming about his continued service as CLC, and by not querying the Court or any attorney regarding whether his continued employment was permissible, he showed great disrespect to this Court and violated the spirit of our *Opinion and Order on Reconsideration.*

d. Self–Regulation of Legal Practice

[5] Mr. Seanez has asserted he meets the basic qualifications of the CLC with his state bar license alone pursuant to 2 N.N.C. § 963(A), and that neither 7 N.N.C. § 606 nor 17 N.N.C. § 377 are relevant to his position at this time because he has been self-regulating his job functions and self-ensuring that he is not practicing law during his suspension.

There are two issues of major concern with Mr. Seanez's above position. Firstly, he isolates 2 N.N.C. § 963(A) and applies it without regard to present Navajo Nation governmental policy. Secondly, he apparently works under no attorney supervision and has obtained no legal

opinion permitting him to serve as the CLC, approving his administrative duties, or permitting him to self-regulate his functions during his suspension. In actuality, an opposite legal opinion has been provided by the Acting CLC.

We previously noted that Mr. Seanez has shown a pattern of disregarding the whole of our laws in a legally unsound fashion. *See Opinion and Order on Reconsideration,* ***384** *supra* at 5, 11–13. However, he is well able to read our laws comprehensively and in combination when it suits his position, namely, when arguing that resolutions may be drafted by non-attorneys. Our Navajo Nation laws must be read comprehensively and in combination, not piñon picked for provisions that support a given position. Policies evolve over time and are written by human drafters, and the wording of earlier provisions will not reflect the full evolved governmental policy expressed in later provisions, nor will the later provision always repeal the earlier provision. As we stated in *Allen v. Fort Defiance Housing Corp.,* 8 Nav. R. 759, 6 Am. Tribal Law 713 (Nav.Sup.Ct.2005), this Court will not automatically take one provision over another based on apparent conflict but will assess the policies behind them and see if the underlying policies may be harmonized. *Id.* at 765, 6 Am. Tribal Law 713. We stated that "this approach recognizes the great responsibility of the Council to carefully consider previous statutes when passing new ones." *Id.* In other words, our provisions must be read in whole cloth.

2 N.N.C. § 963(A) was promulgated in 1989 and addresses only the CLC position. 7 N.N.C. § 606 and 17 N.N.C. § 377, both promulgated in 2000, expresses the later governmental policy that all Navajo Nation legal practitioners possess a Navajo bar license. Policies embodied in all three provisions are set forth in the Personnel Classification Plan for the CLC requiring that the CLC hold both a state and Navajo bar license. It has been long settled that only applicants with both such licenses are welcome to apply for and serve in the position. Mr. Seanez's argument that no Navajo bar license is required for the position of top lawyer for the legislative branch has no merit.

[6] Mr. Seanez states that he was self-limiting his duties to only administrative functions. We state uncategorically that a suspended or disbarred lawyer is *not* competent to determine himself what is or is not the practice of law. At minimum, there should have been appropriate boundaries set for Mr. Seanez by the Legislative Branch administration with close supervision by attorneys to ensure adherence to these boundaries so that there is no unauthorized practice. Mariana Kahn, the Acting CLC had attempted to establish such boundaries in repeated legal advice to Legislative Branch administration, which was apparently ignored by the Legislative branch administration. We note that pursuant to Resolution CF–12–10, the CLC is given an equivalent legal standing within the Legislative Branch as that of the Attorney General in the Executive Branch. Mr. Seanez while on suspension lacked the authority to reject Ms. Kahn's advice, and additionally lacked legal competence to replace her advice with his own competing advice. We find that by using his sole legal judgment to regulate and supervise himself in the Office of Legal Counsel, and by replacing Ms Kahn's legal judgment with his own assessment, Mr. Seanez engaged in the unauthorized practice of law in violation of 7 N.N.C. § 606.

e. Exposure of Clients to Criminal Charges

Mr. Seanez's conduct has exposed his former clients to potential criminal charges.

The CLC, similar to the Attorney General or the Chief Justice, is required to wear two hats—one in a legal capacity and the other as chief administrator. The job description for CLC sets forth the following specific job functions:

> Serves as legal counsel to the Navajo Nation Council; provides comprehensive ***385** legal guidance and advice to the Navajo Nation Council, standing committees, boards, commissions, and the Legislative Branch; coordinates with the Department of Justice and other attorneys providing legal services to the Nation; provides advice and counsel, interpretation of law, research, analysis and representation in mediation and administrative hearings; provides training and orientation in specific laws and areas on legal issues; directs and performs complex legal research and analysis of laws, legal precedents and issues.
>
> Drafts, reviews and prepares proposed legislation, reports, legal documents, and correspondence for the Navajo Nation Council and entities of the Legislative Branch; responsible for the codification of Navajo Nation laws, rules and regulations; develops annual work plan and budget for the Office of Legislative Counsel; attends meetings, training and seminars in support of continuing legal education requirements; prepares and submits activity reports to the Office of the Speaker.

Job Description for Chief Legislative Counsel, revised 7/2/2009

Clearly, the great bulk of the job duties of the CLC constitute legal functions which Mr. Seanez may not perform, and which he asserts he did not perform.

As evidenced by Ms. Kahn's authoritative legal advice and the *Response* of the OLC Attorneys, there was grave concern in that office that the continued service of Mr. Seanez as CLC, at the salary level of CLC, while another individual was held out to the public as Acting CLC, exposed individuals in the Legislative Branch administration to charges of fraud and other criminal charges. There was concern that Mr. Seanez's actions constituted the unauthorized practice of law, carrying possible conspiracy charges for the enabling administration. Pursuant to 17 N.N.C. § 376, a person commits unsworn falsification by knowingly concealing any scheme containing false statements in connection with any matter within the jurisdiction of any Navajo Nation department or agency. Additionally, under 17 N.N.C. § 362, there is the offense of "paying or receiving Navajo Nation Government funds for services not rendered."

We have previously elaborated on the ethical duties of Navajo Nation government lawyers, including the duty of candor and the duty to inform clients when questionable actions may be subject to court challenge. *Opinion and Order on Reconsideration, supra,* slip op. at 11. By insisting on remaining in the position of the CLC against the legal advice of the Acting CLC, Mr. Seanez exposed individuals in the Legislative Branch administration responsible for his employment to a range of potential civil and criminal charges including fraud, unsworn falsification, paying or receiving Navajo Nation Government funds for services not rendered, and conspiracy in the unauthorized practice of law. Such offenses are not to be taken lightly, given the amount of public funds paid to Mr. Seanez during his disbarment and subsequent suspension. Timesheets for Mr. Seanez from October 22, 2010 through December 31, 2010 submitted to this Court by the Chief Prosecutor show that he was paid a total of $24,204 over five pay periods. *Notice, Chief Prosecutor's Exh. 2.* We understand that Mr. Seanez had continued to be on the payroll at least through January 11, 2011, and may not have tendered his resignation as of the date of this opinion.

This information having been brought to our attention by the Chief Prosecutor pursuant to investigations by that office, we assume that the Chief Prosecutor will now determine what crininal charges should be *386 filed against the relevant individuals, including Mr. Seanez, in order to recoup public funds unlawfully expended from such individuals.

III.

SANCTIONS

[7] Based on the foregoing, we find that Mr. Seanez intentionally violated the terms of our *Order on Reconsideration,* and such violation has not only caused injury to the legal system and legal profession, but has exposed his former clients to potential civil and criminal charges as set forth above. The nature of Mr. Seanez's misconduct goes to the very heart of the characteristics of candor and *k'é* that are to be maintained by lawyers practicing on the Navajo Nation.

There are aggravating factors here. Mr. Seanez continues to fail to accept responsibility for his actions and has been purposeful, deliberate and unremorseful in pursuing his present actions. Mr. Seanez's conduct here is essentially, a continuation of actions that led to his initial disbarment. These latest actions coupled with Mr. Seanez's explanations show that he continues to approach with arrogance our Navajo Nation laws, our court orders, and even the legal opinions of the Acting CLC within his own branch. He has shown gross disdain for the Diné value system which expects those entrusted with the welfare of the Diné in ensuring the rule of law to carry such trust with honor.

[8] This Court has inherent authority over attorneys as officers of the court to take disciplinary action against such attorneys, including the power to impose sanctions. *See Eriacho v. Ramah Dist. Ct.,* 8 Nav. R. 598, 5 Am. Tribal Law 469 (Nav.Sup.Ct.2004); *Navajo Nation v. MacDonald,* 6 Nav. R. 222 (Nav.Sup.Ct.1990); *Boos v. Yazzie,* 6 Nav. R. 211 (Nav.Sup.Ct.1990); *In re Practice of Law by Avalos,* 6 Nav. R. 191 (Nav.Sup.Ct.1990); *In re Practice of Law in the Courts of the Navajo Nation,* 4 Nav. R. 75 (Nav.Ct.App.1983); *In re Battles,* 3 Nav. R. 92 (Nav.Ct.App.1982). Additionally, we have statutory authority pursuant to 7 N.N.C. § 606(C) to impose monetary and other sanctions as follows:

> "Persons conducting the unauthorized practice of law shall be subject to civil penalties, including triple the amount of all legal fees, costs, and other funds paid to them by persons to whom they have purported to provide legal representation or other legal services, a civil fine in the amount of five hundred dollars ($500) per occurrence, and, if not a member of

> the Navajo Nation, will be subject to exclusion from the Navajo Nation."

7 N.N.C. § 606(C).

Because we have found that Mr. Seanez engaged in the unauthorized practice of law through the self-regulation of his job functions as CLC, sanctions will be based on the salary paid to him out of public funds following his October 22, 2010 disbarment and subsequent suspension.

The Chief Prosecutor submitted timesheets for Mr. Seanez from October 22, 2010 through December 31, 2010 showing that he was paid a total of $24,204 over five pay periods, *Notice, Chief Prosecutor's Exh. 2.* Even though it is clear that Mr. Seanez has continued to work past this time period, we will limit our calculation of sanctions to the time period of these time sheets, which are part of the court record.

We choose not to impose the sanction of exclusion.

CONCLUSION

Pursuant to the above findings, the Court hereby VACATES its Order of Suspension dated November 24, 2010.

***387** The Court ORDERS the reinstatement of our October 22, 2010 permanent disbarment of Frank M. Seanez, effective *nunc pro tunc* as of January 20, 2011. The Navajo Bar Association shall remove the name of Frank M. Seanez from the roll of attorneys and advocates in the Navajo Nation and inform the public of this disbarment.

The Court FURTHER ORDERS that Frank M. Seanez shall vacate the position of Chief Legislative Counsel, effective *nunc pro tunc* as of January 20, 2011.

The Court FURTHER ORDERS that Frank M. Seanez pay a civil penalty of ***$72,612,*** which is triple the amount of the $24,204 salary paid to him by the Navajo Nation between October 25, 2010 and December 31, 2010 as authorized by 7 N.N.C. § 606(C). This penalty shall be payable to the Navajo Nation Supreme Court which shall promptly deposit payments received into the Navajo Nation public treasury.

The Court FURTHER ORDERS that Frank M. Seanez shall not be eligible to be employed by nor enter into contracts with the Navajo Nation, as defined at 2 N.N.C. § 552, in any capacity until the above civil penalty is fully paid.

The Court FURTHER ORDERS the Navajo Nation Controller, Navajo Nation Department of Personnel Management, and Navajo Nation Division of Finance to take whatever actions are necessary to withhold all sums that remain to be paid Mr. Seanez in connection with his employment as Chief Legislative Counsel, which may include payroll amounts, deferred compensation, and any other final financial payout otherwise due to Mr. Seanez as he leaves the service of the Navajo Nation government. Such withheld funds will count towards payment of the $72, 612 civil penalty imposed on Mr. Seanez pursuant to this opinion.

With the reinstatement of the disbarment of Frank M. Seanez and imposition of monetary penalties against Mr. Seanez, this matter is concluded.

We urge members of the Navajo Nation Bar not to ignore the unmistakable message contained in this Opinion. We are now in a period of governmental reform for the benefit of our future generations. Our government heavily relies on Navajo Nation attorneys and advocates. The governmental and justice system in the Navajo Nation require attorneys and advocates who practice in this court *comprehensively* follow the letter and spirit of our laws and rules of practice and procedure. Especially in this period of reform, attorneys and advocates should accept the responsibility of heightened duty to the public trust. We expect and will accept no less.

Footnotes

[1] 17 N.N.C. § 377 lists the unauthorized practice of law as a criminal offense. As this provision was not relied on by this Court in its previous orders, the Court will not proceed under this provision.

State Adoption of the ABA Model Rules of Professional Conduct (previously the Model Code of Professional Responsibility)

Dates of initial adoption

Alphabetical Order

Jurisdiction	Date of Adoption
Alabama	5/2/90
Alaska	4/14/93
Arizona	9/7/84
Arkansas	12/16/85
Colorado	5/7/92
Connecticut	6/23/86
Delaware	9/12/85
District of Columbia	3/1/90
Florida	7/17/86
Georgia	6/12/00
Hawaii	12/6/93
Idaho	9/3/86
Illinois	2/8/90
Indiana	11/25/86
Iowa	4/20/05
Kansas	1/29/88
Kentucky	6/12/89
Louisiana	12/18/86
Maine	2/26/09
Maryland	4/15/86
Massachusetts	6/9/97
Michigan	3/11/88

Minnesota	6/13/85
Mississippi	2/18/87
Missouri	8/7/85
Montana	6/6/85
Nebraska	6/8/05
Nevada	1/26/86
New Hampshire	1/16/86
New Jersey	7/12/84
New Mexico	6/26/86
New York	12/16/08
North Carolina	10/7/85
North Dakota	5/6/87
Ohio	8/1/06
Oklahoma	3/10/88
Oregon	1/1/05
Pennsylvania	10/16/87
Rhode Island	11/1/88
South Carolina	1/9/90
South Dakota	12/15/87
Tennessee	8/27/02
Texas	6/20/89
Utah	3/20/87
Vermont	3/9/99
Virgin Islands	1/28/91
Virginia	1/25/99
Washington	7/25/85
West Virginia	6/30/88
Wisconsin	6/10/87
Wyoming	11/7/86

YOURABA April 2012 e-news for members

Ethics 20/20: The future of the Model Rules of Professional Conduct

What impact will technology and the globalization of business have on the legal profession? And in light of that impact, should any changes be made to the ABA Model Rules of Professional Conduct and other policies governing lawyer regulation?

In 2009, the ABA created the Ethics 20/20 Commission to conduct a thorough, three-year review of its Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of technology advances and global legal practice developments.

"Our challenge ... is to study these issues and, with 20/20 vision, propose policy recommendations that will allow lawyers to better serve their clients, the courts and the public now and well into the future," wrote commission co-chairs Jamie Gorelick and Michael Traynor on the Ethics 20/20 Commission webpage.

The commission will respond to the following developments as reported to it by various segments of the legal profession as well as clients, consumer groups and business that support, sell to and report on the profession:

- Legal advice and information about legal services are increasingly communicated through electronic media—including email, texts, podcasts, blogs, tweets and websites—reaching easily across domestic and international jurisdictional lines.
- Client confidences are no longer kept just in file cabinets, but on laptops, smartphones, tablets and in "the cloud."
- Connections with potential clients are sought not just through print advertisements but via social networks, lead generation services, "pay-per-click" ads and "deal of the day" coupon sites.

Return to "Avoiding extinction" Q&A with Mitchell Kowalski

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- Legal and non-legal services are increasingly outsourced, both domestically and internationally, raising questions for lawyers working with other people and entities about who is responsible for the work that is being outsourced.

EYE ON ETHICS

Lawyers marketing legal services on group-coupon websites

TECHNOLOGY TRANSLATORS

Eight tips on creating and maintaining secure passwords

FIRST FOCUS

Avoiding extinction: Are you prepared for the future of law practice?

AROUND THE ABA

Advice on managing online reputation issues

Six tips on reducing the cost of e-discovery

Five reasons for employee turnover and strategies for overcoming them

Lessons from recent merger challenges

Financing a law practice: lawsuit funding, business incubators, more

Tips on public speaking in and out of court

Creating effective special needs trusts

Young lawyers: Tips on getting noticed, making a positive impression

ABA supports legislation for one standard for prosecutor

- Lawyers in all practice settings increasingly need to cross state and national borders—virtually and physically—in order to serve their clients. They need to know what rules apply to them.
- Non-U.S. lawyers increasingly seek to practice in the United States, and U.S. lawyers increasingly need to practice internationally in order to meet their clients' needs.
- In other countries, there is movement toward both more liberal multijurisdictional practices and permitting new law firm practice structures, including nonlawyer ownership interests in law firms.
- Lawyers change jobs regularly, triggering potential conflicts of interest and other ethics issues that need to be addressed.
- Many new ways of funding litigation are emerging.

"In general, we have found that the principles underlying our current Model Rules are applicable to these new developments," wrote commission co-chairs Gorelick and Traynor in a memo summarizing the commission's actions to date. "As a result, many of our recommendations involve clarifications and expansions of existing Rules and policies rather than an overhaul. In sum, our goal has been to apply the core values of the profession to 21st century challenges."

Information on the commission, including its materials on technology (confidentiality and client development); uniformity, conflicts of interest and choice of law; outsourcing; alternative litigation financing; alternative law practice structures; inbound foreign lawyers; and rankings can be found at the ABA Commission on Ethics 20/20 webpage.

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disclosure of evidence favorable to defendants

MEMBERSHIP

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MEMBER ADVANTAGE

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Law Firms And Associations

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

Navajo Nation Code Annotated
Title 17. Law and Order
Chapter 3. Offenses
Subchapter 8. Obstruction of Navajo Nation Administration

17 NAVAJO CODE § 377

§ 377. Unauthorized Practice of Law

Currentness

A. Offense. The unauthorized practice of law is committed when, without being an active member in good standing of the Navajo Nation Bar Association, a person:

1. Provides legal representation before the Courts of the Navajo Nation, any quasi-judicial, administrative, or legislative body to another person; or

2. Provides legal services within the Navajo Nation or to another person within the Navajo Nation, including but not limited to, the rendering of legal advice to another person, the drafting or completion of legal pleadings for another person, or the legal interpretation of documents for another person.

B. Exception. The acts set forth in Subsection (A) shall not be considered the unauthorized practice of law when legal representation is provided to another person in accord with Navajo Nation Court rules allowing association of lawyers unlicensed in the Navajo Nation with a member of the Navajo Nation Bar Association.

C. Sentence

1. The trial court shall review all charges to ascertain whether there is a personal victim of the offense(s) and whether restitution or nályéél shall be paid to the victim(s).

2. The trial court may utilize the services of the Navajo Peacemaker Court to determine nályéél and make a sentencing recommendation regarding that sentence, and the trial court may require the defendant to pay the fee of the peacemaker.

3. The trial court may consider the imposition of a peace or security bond upon the defendant, including the pledges of family or clan sureties.

4. Upon the imposition of a bond or security pledges, the district Office of Probation and Parole shall counsel the sureties of the consequences of breach of the bond or pledge.

5. The trial court shall consider the utility of labor or community service sentences, under the supervision of the Navajo Nation Department of Public Safety or a public or private organization, including the chapter in which the defendant resides.

Notes of Decisions (4)

Current through December 2009.

State Bar of Arizona Ethics Opinion

99-13: Paralegals; Nonlawyers; Unauthorized Practice of Law; Employees of Lawyers; Jurisdiction; Conflicts of Law

12/1999

An Arizona attorney may permit his non-lawyer paralegal, who is a licensed tribal advocate, to represent clients in tribal court if that court's rules so permit, because that court's rules govern the conduct. Such representations will not run afoul of the Arizona lawyer's duty to not assist unauthorized practice of law as long as the paralegal representation is limited to tribal court. [ER 5.3, 5.4, 5.5, 8.5]

FACTS[1]

Attorney is licensed to practice law in Arizona and in the Salt River Pima-Maricopa Tribal Court ("SRPM Court"). In SRPM Court, attorneys and non-attorneys may be licensed as "tribal advocates." Attorneys may represent tribal members in the criminal division of SRPM Court, but are not permitted to represent plaintiffs in the civil division. Attorney's paralegal ("Paralegal") is a licensed tribal advocate, and because she is not an attorney, under the rules of SRPM Court she may represent plaintiffs in the civil division of SRPM Court.

Attorney's practice includes representation of lenders in collection matters in SRPM Court. Attorney's client is aware of the restriction on representation in the civil division of SRPM Court, and consents to representation by Paralegal, under Attorney's supervision.

QUESTION PRESENTED

Given the fact that non-attorneys may represent clients as licensed tribal advocates in the civil division of SRPM Court, may an Arizona attorney's paralegal, under the attorney's supervision, so represent clients in the civil division of SRPM, with informed consent of the arrangement by clients?

APPLICABLE ETHICAL RULES

ER 5.3 Responsibilities Regarding Non-lawyer Assistants

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ER 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan in based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a non-lawyer is a corporate director or officer thereof; or

(3) a non-lawyer has the right to direct or control the professional judgment of a lawyer.

ER 5.5 Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

ER 8.5 Jurisdiction

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

OPINION

These facts raise two questions.[2] First, which ethical rules govern the situation? Second, if the representation is governed by the SRPM Court rules, may the Attorney ethically supervise the Paralegal without "assisting the unauthorized practice of law"?

The Committee previously has issued a formal opinion regarding the jurisdictional question in the context of tribal court. In Opinion 90-19, the inquiring attorney was a member of both the Arizona bar and the Navajo bar. The ethical rules of the two bars were in conflict on an issue concerning judicial appointments for indigent defendants. Under the Arizona rules, the attorney would have been obligated to decline an appointment due to conflict of interest. Under the Navajo rules, however, the attorney was obligated to accept the appointment.

In answering the inquiring attorney's seeming dilemma, the Committee concluded:

> [A]n attorney who is a member of both the Arizona and Navajo Nation Bars, and who is appointed by a Navajo Nation court to represent an indigent Navajo citizen in a criminal proceeding before a Navajo court, is not subject to disciplinary action by the State Bar of Arizona if the attorney complies with the Navajo Nation's ethical rules and court directives.

In reaching that conclusion, the Committee considered the comment to ER 8.5, which provides that "[w]here the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation." This, the Committee reasoned, means that "there may be limitations on the binding force of the Arizona Rules on such a lawyer when the lawyer is licensed to practice in another jurisdiction whose ethical rules impose obligations which conflict with Arizona's rules." The Committee then analyzed the choice of law rules from the Restatement (Second) of Conflicts of Law, and concluded that the Navajo rules applied to the situation.

For the same reasons discussed in Opinion 90-19, in the instant case the SRPM Court rules should apply to this situation. This situation differs somewhat from that analyzed in 90-19, however, because the proposed behavior here (supervision of a paralegal who is representing clients) is an optional behavior, not one that is required by the court (as the appointment was required by the Navajo courts in Opinion 90-19). Non-lawyers are specifically authorized to represent clients in SRPM Court and non-lawyers clearly cannot represent clients in Arizona courts. This has the potential to create a conflict for an Arizona attorney who assists a non-lawyer in representing clients (in and outside of Court) on matters pending in SRPM Court. The conclusion that the tribal laws govern the representation in tribal court, however, remains the same.

Having concluded that the SRPM Court rules apply to the representation of clients in SRPM Court, even if they create a conflict with Arizona's Ethical Rules, the question remains whether the Attorney's supervision, which does not necessarily occur only in SRPM Court, is assisting the unauthorized practice of law in violation of ER 5.5. That rule provides that a lawyer shall not "assist a person who is not a member of the bar in performance of activity that constitutes the unauthorized practice of law." This Committee recently considered the meaning of that phrase in Opinion 99-07. That Opinion concerned activity by public adjusters that was specifically allowed by state statute. Nonetheless, the Committee found that the activity by the public adjusters constituted the unauthorized practice of law and that lawyers who negotiated with such public adjusters thereby were impermissibly assisting the unauthorized practice of law.

Under the reasoning of Opinion 99-07, it is clear that the activity in which the Paralegal is engaging (representing clients in court) constitutes the practice of law. *See also* Opinion 98-08 (paralegal may conduct interviews and meetings with clients under limited circumstances under attorney's supervision.) Under the same reasoning, it is equally clear that the Attorney's supervision of such activity is assisting the practice of law. The question is whether the practice is "unauthorized." This situation differs significantly from that in Opinion 99-07, because here we are dealing with the ethical rules of another jurisdiction (SRPM Court) that is outside the jurisdiction of the Arizona Supreme Court; we are not dealing with statutes that apply in our jurisdiction (as was the case in Opinion 99-07). For this reason, the Committee finds that Opinion 99-07 is not controlling of the instant situation. Rather, for the reasons discussed above, the Committee finds that because the SRPM Court rules allow the representation by the Paralegal and the supervision by the Attorney, the Attorney will not be assisting the unauthorized practice of law in violation of ER 5.5[3].

CONCLUSION

For all the reasons set forth above, the Committee concludes that when an Attorney and his non-attorney assistant represent clients in conformance with applicable rules of a Native American tribal court, the ethical rules of such court govern the conduct. If such rules conflict with Arizona rules, the Attorney will not be in violation of the Arizona rules if she follows the tribal court rules.

[1] **Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 1999**

[2] This Opinion assumes that the inquiring attorney has accurately portrayed the practice and rules in SRPM Court, and no independent analysis of the SRPM Court or its rules has been done. This Opinion assumes that under the ethical rules of SRPM Court, the supervision of the Paralegal by the Attorney is ethically permissible.

[3] The Committee cautions the Attorney and the Paralegal to limit the proposed arrangement to representation and supervision in the SRPM Court where it is permitted under the rules applicable thereto. In areas of Attorney's practice outside of SRPM Court, the arrangement would violate ER 5.5. *See* Opinion 98-08.

OPINION NO. 90-19
December 28, 1990

FACTS:

The inquiring lawyer is a member of both the State Bar of Arizona and the Navajo Nation Bar Association. The Navajo Nation courts regularly appoint members of the Navajo Nation Bar Association to represent indigent criminal defendants. A significant number of Navajo lawyers have a connection with the Navajo Nation, either as employees of the Navajo Nation Department of Justice or as lawyers on contract with the Nation or its tribal enterprises.[1] The Navajo Nation Department of Justice is comprised of (i) the Office of the Prosecutor, which prosecutes almost all criminal cases, (ii) the Navajo Legal Aid and Defender Service, which we are told provides some representation for criminal defendants, but is not a Public Defender's office in the broader sense, and (iii) various other offices which provide legal advice to the Navajo Nation on such matters as natural resources, human services and economic development.

The Navajo Nation Supreme Court has adopted the A.B.A. Model Code of Professional Responsibility ("the Model Code") to govern the conduct of lawyers admitted to practice before its courts.[2] An order recently issued by the Navajo Nation Supreme Court provides that "[a]s a condition of membership in the Navajo Nation Bar Association all members not in positions exempted by Rule of the Supreme Court shall accept pro bono appointments to represent indigent criminal defendants, indigent parents who are subject to termination of parental rights proceedings under the Children's Code, and to serve as guardian ad litem or as legal representative for children, mentally handicapped or impaired and incompetents."

In its order, the Navajo Nation Supreme Court recognized that the majority of active members of the Navajo Nation Bar Association are employed in some manner by the Navajo Nation. Nevertheless, because of the large number of indigent persons under the jurisdiction of the Navajo courts, the Court imposed a

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1. For example, at the time he submitted his inquiry, the inquiring lawyer was counsel for the Navajo's arts and crafts enterprise. Additionally, at other times, he has worked for the Navajo Nation on a contract basis.

2. In July, 1990, the Navajo Nation Bar Association recommended the adoption of the Model Rules of Professional Conduct ("the Model Rules"). As of the date of this opinion, however, the Navajo Nation Supreme Court has not yet adopted the Model Rules.

duty on bar members to represent indigents charged with crimes irrespective of such members' association with the Navajo Nation. The Rule exempts only the following persons from these pro bono appointments: (a) Judges and Justices; (b) Navajo Nation council delegates; (c) the Attorney General and Deputy Attorney General of the Navajo Nation; (d) all prosecutors of the Navajo Nation; (e) certain officers of the Navajo Nation; (f) the Solicitor to the courts of the Navajo Nation and all attorneys in the office of the Solicitor; (g) court law clerks; (h) court paralegals and other court staff; and (i) Navajo Nation Bar Association members on other than active status.

QUESTION:

If an attorney who is a member of both the State Bar of Arizona and the Navajo Nation Bar Association accepts an appointment by the Navajo Nation courts to represent an indigent Navajo criminal defendant, is the attorney subject to disciplinary action by the State Bar of Arizona if Arizona's ethical rules would prohibit the representation?

ETHICAL RULES INVOLVED:

ER 1.7(a). Conflict of Interest: General Rule

ER 1.13(a). Organization As Client

ER 6.2. Accepting Appointments

ER 8.5. Jurisdiction

OPINION:

The inquiring lawyer poses a question that is of increasing importance for lawyers licensed to practice in two or more jurisdictions. Which jurisdiction's ethical rules should be followed when the rules impose conflicting obligations on the lawyer?[3]

If the situation presented by the inquiring lawyer occurred in Arizona, but outside the Navajo Reservation, the attorney would most likely be excused from the appointment based on ER 1.13(a), ER 1.7(a) and ER 6.2 of the Arizona Rules of Professional Conduct. ER 1.13(a) provides that, when an attorney is retained or employed by a governmental organization, the attor-

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3. For a discussion of some of the issues arising out of a multistate practice, see O'Brien, Multistate Practice and Conflicting Ethical Obligations, 16 Seton Hall Law Review 678-721 (1986); see also Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States, Vol. 45, No. 3, The Business Lawyer, pp. 1229-1237 (May 1990).

attorney's client is that organization, in this instance, the Navajo Nation. If the lawyer then simultaneously undertook to represent a Navajo citizen being prosecuted by the Navajo Nation, that representation would be in direct conflict with the lawyer's representation of the Navajo Nation and would be prohibited under ER 1.7(a). ER 6.2 provides that "[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law; . . ."

Under the Model Code, the Navajo courts' pro bono appointment of attorneys who are representing the Navajo Nation to simultaneously represent indigent criminal defendants facing prosecution by the Navajo Nation would also create a conflict of interest. See DR 5-105(A) and (B). It appears, however, that the Navajo Nation Supreme Court's order has, in effect, created an exception to the normal application of the Model Code in that jurisdiction. The Court has apparently determined that, in the unique circumstances existing in the Navajo Nation, policy concerns relating to the provision of adequate legal representation for indigents outweigh the policy concerns which underlie the conflict rules of the Model Code. Thus, it is assumed for purposes of this opinion that the Navajo Nation Supreme Court has expressly modified the ethical rules concerning conflicts of interest to require attorneys not exempted from the rule to undertake pro bono appointments under circumstances in which such appointments would otherwise be prohibited. The issue is whether a Navajo Nation lawyer (who is also a member of the State Bar of Arizona) who accepts such an appointment can be sanctioned for violating Arizona's ethical rules.[4]

The jurisdictional scope of the Arizona Rules of Professional Conduct is relevant to our inquiry. ER 8.5 provides that: "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." The Comment to that Rule, however, provides in pertinent part:

> "Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. . . ."

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4. Because the Navajo Nation Supreme Court's order requires Navajo Nation lawyers to accept the appointments, it could be argued that there is no conflict between the ethical obligations imposed by the Navajo and Arizona rules. Arizona Ethical Rule 1.16(c) provides that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

Thus, although Arizona's Rules of Professional Conduct govern Arizona attorneys practicing outside this state, the Comment recognizes that there may be limitations on the binding force of the Arizona Rules on such a lawyer when the lawyer is licensed to practice in another jurisdiction whose ethical rules impose obligations which conflict with Arizona's Rules. In such situations, the Comment provides that "applicable" choice-of-law rules will determine which jurisdiction's ethical rules apply.

There are no sections of the Restatement (Second) of Conflicts of Law which specifically address this issue, and it appears that the applicable choice-of-law rule is § 6 of the Restatement (Second), "Choice-of-Law Principles."[5] Section 6(2) identifies the following factors which are to be considered when choosing the jurisdiction whose laws should apply:

(2) "... the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

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5. Arizona courts follow the Restatement when analyzing conflict-of-laws problems. Wendelken v. Superior Court in and for the County of Pima, 137 Ariz. 455, 457, 671 P.2d 896, 898 (1983); Schwartz v. Schwartz, 103 Ariz. 562, 565, 447 P.2d 254, 257 (1968). This committee's determination that Restatement (Second) § 6 constitutes the "applicable" choice of law rule is based on the particular facts of this case. There may be instances where other choice-of-law rules would be applicable. Cf. Bernick v. Frost, 210 N.J. Super. 397, 510 A.2d 56 (N.J. Super. App. Div. 1986) (in an action brought by a former client against his attorney based on two states' conflicting rules concerning contingent fee contracts, the court applied Restatement (Second) § 188, "Law Governing in Absence of Effective Choice by the Parties" (contracts), and § 6).

(g) ease in the determination and application of the law to be applied."[6]

We believe that application of these factors to the facts presented here compels the conclusion that the Navajo Nation's ethical rules govern this situation rather than those of Arizona.

Cases which have considered the first factor -- the needs of the interstate and international systems -- have focused on the maintenance of a "harmonious relationship" between the competing jurisdictions. See, e.g., Bryant v. Silverman, 146 Ariz. 41, 46-47, 703 P.2d 1190, 1195-1196 (1985). In this instance, maintenance of the harmonious relationship between the State of Arizona and the Navajo Nation would be promoted by the application of the Navajo Nation's rules rather than those of Arizona. If Arizona were to discipline Navajo Nation lawyers (who were also members of the State Bar of Arizona) for following express orders of the Navajo Nation Supreme Court, this would constitute an affront to the Navajo Nation's exercise of its own inherent powers to regulate lawyer conduct, and would result in a disharmonious relationship between Arizona and the Navajo Nation.

The second and third factors, the relevant policies of the forum state and those of other interested states, also favor application of the Navajo Nation's ethical rules. The Navajo Nation is a separate sovereign, empowered to operate its own court system.[7] As a separate sovereign, the Navajo Nation has the power, as does the State of Arizona, to promulgate rules governing the practice of law in its court system.[8] See generally Handbook of Federal Indian Law, supra, at 250-251.

The State of Arizona has no direct interest in the representation of indigent Navajo citizens in Navajo Nation courts

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6. Section 6(1) of the Restatement (Second) states: "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." However, in this case, there is no applicable statutory directive relating to the resolution of conflicts between ethical rules.

7. This power is exclusive except where restricted by explicit United States legislation or where it is relinquished by the tribe. United States v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). See also discussion in F. Cohen, Handbook of Federal Indian Law, 127-153, 250-252 and 666-670 (1982 ed.).

8. The only restraint on the Navajo Nation's plenary power to administer its court system is the Indian Civil Rights Act (1968, as amd. 1986), Title 25, United States Code, Sections 1301 et seq., which imposes various constitutional restrictions in the nature of due process limitations on the tribe's exercise of its right of self-government.

by lawyers authorized to practice law in those courts. To the extent that Arizona has an interest in the issue, it would seem that its interest is that of promoting and fostering such representation. By contrast, the Navajo Nation has a direct and significant interest in assuring that its citizens receive adequate legal representation. Indeed, it appears from the facts submitted by the inquiring lawyer that: (1) there are not enough Navajo lawyers available to represent the large number of indigent Navajo citizens in need of representation, and (2) the Navajo Nation has been unable or unwilling as yet to fund the creation of a separate public defender's office which would provide broad-based representation to those in need. It appears that the Navajo courts, which are closest to the problem, have adopted policies designed to alleviate an unfortunate situation. Moreover, the courts of the Navajo Nation are capable of policing any serious conflicts of interest that might arise as a result of these appointments. As far as we can determine, Arizona has no predominant interest in applying its own ethical rules to protect Navajo citizens from conflicts of interest in Navajo courts.

The fifth factor, the basic policies underlying the particular field of law (in this case, legal ethics), also suggests that the Navajo Nation's rules should govern. The rules governing lawyer conduct in general, and conflicts of interest in particular, are designed to maintain the integrity of the court system and protect clients from inadequate or improperly influenced representation. See, generally, Sellers v. Superior Court, 154 Ariz. 281, 742 P.2d 292 (App. 1987); Alexander v. Superior Court, 141 Ariz. 157, 685 P.2d 1309 (1984). In this case, if Arizona were to attempt to override the Navajo Nation's policies governing pro bono representation, not only would the Navajo Nation's citizens not be better protected but, as suggested in the Navajo Nation Supreme Court's order, they may in fact be substantially harmed by being deprived of any legal representation whatsoever.

The sixth and seventh factors, certainty, predictability and uniformity of result, and ease of determination, also suggest that the Navajo Nation's ethical rules should control. As the Arizona Supreme Court has noted, these factors "are of greatest importance when parties are likely to give advance thought to the legal consequences of their transactions, . . ." Bryant v. Silverman, 146 Ariz. 41, at 46, 703 P.2d 1190, at 1195 (1985). The fact that the inquiring lawyer has come to this committee is certainly evidence of the thought which he, and undoubtedly others in the same predicament, have given to this issue. Applying the rules of the Navajo Nation Supreme Court to the practice of law in that jurisdiction will promote all of the objectives stated.[9]

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9. Although an attempt is made in this opinion to give general guidance to those faced with conflicting ethical obligations, the committee cautions that, often, choice-of-law issues can only be resolved on a case-by-case basis.

Finally, protection of justified expectations also favors the application of the Navajo Nation's rules. As noted in Comment g to Restatement (Second) § 6, "it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state." This would appear to be particularly true in this case, where the lawyer is confronted with an express order requiring that Navajo Nation attorneys accept pro bono appointments made by Navajo Nation courts. Under the circumstances presented, this committee believes that an attorney would be fully justified in acting pursuant to a specific court order, especially when the court's order will have no impact on the practice of law in Arizona courts.

Our conclusion that the Navajo Nation's rules should be applied in this instance is consistent with opinions from ethics committees of other jurisdictions which have dealt with conflicting ethical rules. See Committee on Ethics of the Maryland State Bar Association, Opinion 86-28 (Oct. 7, 1985) (ABA/BNA Lawyers' Manual on Professional Conduct, p. 801:4365); and Committee on Professional and Judicial Ethics of the State Bar of Michigan, Informal Opinion CI-709 (Dec. 29, 1981) (ABA Lawyers' Manual, supra, p. 801:4834). Those committees concluded that, when an attorney licensed to practice in two jurisdictions acts in a manner that is consistent with the rules of professional conduct prescribed by the jurisdiction in which he or she is practicing law at the time, his or her conduct will not be found to be unethical under the ethical rules of the other state.

For example, the Michigan Bar Committee considered the case of a lawyer licensed in Michigan and California, who was practicing in California. The lawyer's inquiry arose out of the fact that "the California Rules of Professional Conduct differ[ed] from the Michigan Code of Professional Responsibility in various respects, including matters concerning contingent fees, legal advertising, and conflicts of interest." Although the lawyer's conduct technically violated the Michigan Code, the committee concluded that the attorney would not be subject to disciplinary action in Michigan if he conformed his conduct to the California standards:

> "We must assume that our Code of Professional Responsibility is intended to protect a legitimate interest of the State of Michigan and its judiciary. We, therefore, believe the Code assumes some relationship or contact between the lawyer's activities and the State of Michigan beyond the single fact of the lawyer's membership in the State Bar of Michigan. Exactly what that relationship or contact must be to render our Code applicable we are not now prepared to say, and for purposes of your inquiry we do not believe that issue needs to be resolved.
>
> "We understand your professional activities in California are carried on as a member of the California

> Bar. We assume your clients are not Michigan residents, that you do not practice in Michigan, and that you do not hold yourself out or function as a Michigan lawyer, as for instance advising as to the law in Michigan. We assume you are engaging in no activities under or by virtue of your Michigan license. Under such facts, and where the California standards of ethics on a certain subject differ from the applicable Michigan standards, we believe your conduct, if it conformed to the applicable California standards, would not subject you to discipline under the conflicting Michigan provisions...."

Committee on Professional and Judicial Ethics of the State Bar of Michigan, Informal Opinion CI-709 (Dec. 29, 1981), at 3.

Similarly, the Committee on Ethics of the Maryland State Bar Association considered the case of an attorney licensed to practice in both Maryland and the District of Columbia. The attorney was representing a client in a case in the District of Columbia, when he discovered that his client had committed a fraud on the court. The District of Columbia Code provided that the lawyer should do no more than call on his client to rectify the fraud, while the stricter Maryland Code required the lawyer to reveal the fraud to the court if the client did not rectify it. Relying on the Comment to ER 8.5 and the Informal Opinion from Michigan discussed above, the Maryland committee concluded that the attorney would be deemed to have acted ethically if he conformed his behavior to the ethical rules of the District of Columbia, since that was the jurisdiction in which he was practicing law at the time:

> "[t]he practice of law frequently requires lawyers to act in more than one jurisdiction. Obviously, each jurisdiction has the authority to determine what ethical conduct is required of its attorneys and what conduct is proscribed. Where a Maryland attorney is acting in a foreign jurisdiction in accordance with that jurisdiction's Code of Professional Responsibility, it is the opinion of this Committee that his conduct is ethical per se. While the Maryland Code of Professional Responsibility may impose different or more stringent requirements on its attorneys, it does not require its attorneys to behave in a manner that is inconsistent or at variance with the code of conduct prescribed by another jurisdiction when practicing law there."

Committee on Ethics of the Maryland State Bar Ass'n., Opinion 86-28 (Oct. 7, 1985), at 3-4.

This committee concludes that the conduct of an Arizona attorney who is also licensed to practice in the Navajo Nation courts, while representing an indigent criminal defendant in those courts, is governed by the conflict of interest rules of

the Navajo Nation if and to the extent that those rules conflict with the Arizona Rules of Professional Conduct.[10]

It is, accordingly, our conclusion that an attorney who is a member of both the Arizona and Navajo Nation Bars, and who is appointed by a Navajo Nation court to represent an indigent Navajo citizen in a criminal proceeding before a Navajo court, is not subject to disciplinary action by the State Bar of Arizona if the attorney complies with the Navajo Nation's ethical rules and court directives.

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10. It should be noted that a serious conflict of interest might give rise to a constitutional violation. See, e.g., Fitzpatrick v. McCormick, 869 F.2d 1247, 1251 (9th Cir. 1989), in which the Ninth Circuit held that counsel's representation of the defendant at trial, after having represented a co-defendant in a previous trial, denied the defendant the effective assistance of counsel. See also Wheat v. United States, 486 U.S. 153, ____, 108 S. Ct. 1692, 1698, 100 L. Ed. 2d 140, ____ (1988). Whether such a constitutional claim might arise in a particular case is beyond the jurisdictional limitations of this committee.

Arizona Supreme Court
Judicial Ethics Advisory Committee

ADVISORY OPINION 93-02
(March 16, 1993)

State Judges Serving as Visiting Judges on Indian Tribal Courts

Issue

May state court judges serve without compensation as visiting trial judges or appellate judges on Indian tribal courts?

Answer: Yes.

Discussion

Service as a visiting tribal judge at the request of that tribe fulfills a need and promotes cooperation between state and tribal courts. There are various reasons why a tribal court might wish to have the service of a visiting judge, including the assurance and appearance of impartiality in cases that have impact on the tribe as a whole or involve tribal politics. State courts utilize visiting judges for similar reasons. Although Arizona's Native American tribes retain sovereignty over their affairs and courts, many times a tribal judge or visiting tribal judge applies primarily state law.

Canon 5G provides that, "A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice."

Service as a visiting tribal judge does not conflict with this provision. Nor do other Canons which prescribe how a judge should uphold the independence and standards of his office, and which proscribe conduct which detracts from impartial service or involves conflicts of interests.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 5G (1985).

Arizona Supreme Court
Judicial Ethics Advisory Committee

ADVISORY OPINION 93-04
(September 2, 1993)

Effect of Judicial Appointment on Position As Elected Tribal Official

Issue

May an elected tribal official serve the balance of the term of his executive office after appointment as a justice of the peace?

Answer: No.

Facts

The president of a local chapter of an Indian tribe was recently appointed to fill the remaining term of a justice of the peace who resigned. A chapter presidency is an executive office attained through non-partisan election and a chapter president is primarily responsible for the tribal governmental unit. Since the boundaries of the chapter and the justice court precinct overlap, it is likely that some of the same electors would vote in elections for both offices.

Discussion

Canon 5 of the 1993 Code of Judicial Conduct requires a judge to refrain from political activity inappropriate to his judicial office. More specifically, Section A(4) of the canon requires a judge to resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office. This appears to be the reverse of the issue at hand; nevertheless, we believe the intent of the preceding language contained in Canon 5 was to preclude any individual from holding both political and judicial office simultaneously. Furthermore, Section A(5) provides that a judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice. Taken together, these sections reinforce the conclusion that holding executive and judicial elective offices simultaneously is inappropriate.

It is the opinion of the Advisory Committee that continuing to serve as chapter president after appointment to the justice court would clearly require involvement in the types of political activities that are precluded by Canon 5. (*See also* Ariz. Op. 82-01, which discusses a similar issue.)

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 5, Sections A(4) and A(5) (1993).

Other References

Arizona Judicial Ethics Advisory Committee, Opinion 82-01 (Jan. 22, 1982).

Arizona Supreme Court
Judicial Ethics Advisory Committee

ADVISORY OPINION 99-05
(October 22, 1999)

Propriety of Superior Court Judge Serving As Juvenile Tribal Court Judge

Issues

Can an Arizona superior court judge ethically hold the office of a juvenile tribal judge for a federally recognized Native American tribe?

Answer: No.

Facts

A federally recognized Native American tribe's reservation is located adjacent to a city and county of this state. Currently, law enforcement on the reservation is provided by both the tribal police and the county sheriff's office pursuant to an intergovernmental agreement. Native American juveniles arrested on the reservation are detained in the county detention center pursuant to another intergovernmental agreement. Juvenile cases resulting from these arrests are presently being heard by a justice of the peace acting *pro tempore* as a tribal judge.

The tribal authorities and the presiding superior court juvenile judge desire uniform treatment for juveniles who commit crimes in that county, whether on or off the reservation. The tribe has therefore asked the judge to serve as its juvenile judge. The tribe has suggested that the judge receive no compensation for duties performed during the normal business week (Monday through Friday) but wishes to compensate the judge, pursuant to a contract, for duties performed on weekends or holidays.

Discussion

In Advisory Opinion 93-02, this committee addressed the propriety of state court judges acting as visiting tribal judges. The judges served for a temporary term without compensation, and we opined that there was no impropriety and no violation of former Canon 5G of the Arizona Code of Conduct. The temporary service was viewed as helpful to the tribe's needs and it promoted the relationship between the state and tribal courts.

In the case at hand, however, the judge in question would act as the only tribal juvenile court judge. The judge would not be "visiting," but would hold the office. This implicates the Arizona Constitution. We may render opinions on judicial conduct based on constitutional provisions. *See* Rule 82(b)(1), Rules of the Arizona Supreme Court. Needless to say, however, our opinion is advisory, and may only be used as a defense in a disciplinary proceeding. *See* Rule 82(h). It has no binding effect in any proceeding in which the judge's jurisdiction or the validity of his incumbency in office might be raised.

The Arizona Constitution, Article 6, Section 28, provides in relevant part:

> Justices and judges of courts of record shall not be eligible for any other public office or for any other public employment during their term of office, except that they may assume another judicial office, and upon qualifying therefor, the office formerly held shall become vacant. . . .

Article 6, Section 30, provides:

> The supreme court, the court of appeals and the superior court shall be courts of record. Other courts of record may be established by law, but justice courts shall not be courts of record.

Thus, the Constitution strictly prohibits a superior court judge, as a judge of a court of record, from assuming another judicial office during his or her tenure, except upon vacating the existing judicial post. The tribal position is, in our opinion, a "public office." A full-time superior court judge cannot also concurrently serve as a juvenile tribal court judge. Because of our determination, we need not address the issue of compensation for such employment.

Our prior Opinion 93-02 is easily reconciled with our conclusion here. A judge who sits on another court on a temporary, occasional basis does not assume the office of judge of the other court. In contrast, the proposal here is that the superior court judge become a tribal judge. Even in pro tempore assignments, judges must take care to comply with Canon 3A, which provides: "The judicial duties of a judge take precedence over all the judge's other activities." A judge therefore may not accept duties as a pro tempore judge of another court if that interferes with the performance of the duties of the judge's office.

Applicable Code Sections

Arizona Code of Judicial Conduct, former Canon 5G, Canon 3A (1993).

Other References

Arizona Constitution, Article 6, §§ 28, 30

Arizona Judicial Ethics Advisory Committee, Opinion 93-02 (March 16, 1993)

1996 WL 34506631 (NM Adv. Comm. Jud. Eth.)

Advisory Committee on the Code of Judicial Conduct

Re: Judicial Advisory Opinion 96-04

Judicial Advisory Opinion 96-04
May 6, 1996

***1** Hon. Frank H. Allen. Jr. Chairman

Hon. Thomas A. Donnellly

Prof. William T. MacPhearson. Jr.

Hon. Marie A. Baca

Dear

You have asked this committee to give you an opinion concerning a request you received from Judge _____ of the _____ Court to serve as a pro tem judge within the _____ Tribal Court. Judge _____ agrees to serve without pay and would act as pro tem judge during vacation time from his judgeship with the _____ Court.

You have also furnished us with a letter from Chief Judge _____ of the _____ Tribal Court indicating that he would like to have Judge _____ as a judge pro tem of his court but has decided that SCRA 21-500(I) prohibits such an undertaking. Judge _____ after setting out a strong argument for the benefits to both the Tribal Court and our state judges asks that the Supreme Court consider a rule change which "... would be a monumental policy statement regarding State-Tribal relations ..."

SCRA 21-500 (I) states as follows:

No full-time municipal, magistrate, metropolitan, district or appellate judge may hold any other judicial position, elected or appointed.

There seems no question that the clear wording of paragraph I prohibits a ___ judge (or any other judge) from serving as a pro tem judge in the Tribal Court.

Although SCRA 21-500 (I) does not appear in any of the model codes this paragraph follows prohibitions against acting as a fiduciary (paragraph E), service as an abitrator or mediator (paragraph F) and practice of law (paragraph G) which were added to the model codes in 1972. Paragraph I would seem to be a logical progression of these other similar type of prohibitions which are found in most all state codes of Judicial Conduct. It should be noted also that these prohibited activities in SCRA 21-500(E)(F)(G) and (I) do not depend on whether the judge is compensated or not or whether he or she does the activity during office hours or on his or her own time.

In Judicial Conduct and Ethics Section 7.25, 2d ed. 1995, the reasoning for including a prohibition against a judge acting as an arbitrator and mediator in the 1972 Code is set out. It was determined by the drafters that the potential conflicts inhering in arbitration by judges were simply too great. Judges are appointed and paid for the purpose of resolving disputes, and that allowing what is essentially a private practice of the same profession necessarily exploits the judicial office. The judge acting as an arbitrator could be drawn into social and political controversies and the judicial office could be exploited in a effort to secure its dignity and prestige in support of an award.

The perception of the public in viewing a full-time state judge serving on another court should be considered. If we are paying him to be a full time judge why is he working a second job? Doesn't he have enough to do?, etc. As stated in the commentary to 21-300(B)(8):

> *2 The practices of a judge in the enjoyment of hours of personal holiday or recreation should leave no pnblic perception that the business of the court is not a fulltime demand or that the avoidance of delays in the administration of justice is not dependant upon active management of the judiciary.

It is noted that paragraph E, F and G state, "A judge shall not" while Paragraph I states, "No full-time (judge) may". If the Supreme Court wishes to revisit SCRA 21-500(I) it is our recommendation that specific requirement be set out in each case such as approval by the Supreme Court, time limitations on the days and hours of pro tem service, and the amount of compensation and per diem if any.

Very truly yours,

Frank H. Allen, Jr.
Chairman
Judicial Advisory Committee

xc: Judge

Chief Judge

1996 WL 34506631 (NM Adv. Comm. Jud. Eth.)

End of Document

2001 WL 36341168 (NM Adv. Comm. Jud. Eth.)

Advisory Committee on the Code of Judicial Conduct

Re: Judicial Advisory Opinion 01-07

Judicial Advisory Opinion 01-07
October 18, 2001

***1** Hon. Frank H. Allen, Jr., Chairman

Hon. Marie A. Baca

Hon. James J. Wechsler

Prof. William MacPherson

Dear

You have asked this committee to advise you as to whether or not it would be of violation of the Code of Judicial Conduct for a _____ Court Judge to also serve as a judge on a _____ Court.

You also indicate that the judge would be performing identical duties on the _____ Court as those required in _____ Court. There would be no conflict in schedules since the _____ Court matters would be heard on evenings, weekends and holidays. Also, given the sovereign jurisdiction of the Tribe, there would be no conflict of interest.

The answer to your question is found in Rule 21-500 I which provides:

> No full-time municipal, magistrate, metropolitan, district or appellate judge may hold any other judicial position, elected or appointed.

Very truly yours,

Frank H. Allen, Jr.
District Judge
Division

2001 WL 36341168 (NM Adv. Comm. Jud. Eth.)

End of Document

2005 WL 6589901 (NM Adv. Comm. Jud. Eth.)

Advisory Committee on the Code of Judicial Conduct

Re: Advisory Opinion No. 05-01

Advisory Opinion No. 05-01
February 7, 2005

***1** Hon. James J. Wechsler, Chair

Hon. Marie A. Baca

Paul L. Biderman, Esq.

Thaddeus Bejnar, Esq.

Dear Judge

You have asked the Advisory Committee on the Code of Judicial Conduct for an opinion as to whether you can serve as a part-time tribal judge while you are employed as a full-time magistrate judge. You have advised that you have been asked to serve as a tribal judge pro tempore during the evening or on Saturday mornings for two to three hours on a biweekly basis.

NMSA 1978, § 35-1-36.1 (1994) provides that a magistrate judge serves on a ""full-time" basis. It provides that a magistrate judge may not hold "other employment that may conflict" with the judge's fulltime judicial duties. Section 31-1-36.1(B).The Code of Judicial Conduct requires that a judge devote the time required by the position and precludes a judge from holding another position that conflicts with the hours and duties of the judge or is performed simultaneously with the judge's position. Rule 21-500(H) NMRA.

Although Rule 21-500(H) contemplates that a judge may hold another judicial position as long as it does not conflict with the hours and duties of the judge's other judicial position, another provision of the Code specifically prohibits a full-time judge from holding more than one judicial position. Rule 21-500 (I) NMRA provides: "No full-time municipal, magistrate, metropolitan, district or appellate judge may hold any other judicial position, elected or appointed." Rule 21-500 (I) NMRA. Because you are a full-time judge, we believe that this provision controls your inquiry. As a result of this provision, the Committee advises that you may not serve as a magistrate judge and, at the same time, hold the position of tribal judge pro tempore.

Very truly yours,

James J. Wechsler

cc:

Hon. Marie A. Baca

Paul Biderman, Esq.

Thaddeus Bejnar, Esq.

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