

Three Issues Under the Navajo Nation Bar Association Rules of Professional Conduct: (1) “Peacemaking” and Rule 2.2; (2) Are Lay Advocates Subject to the Rules?; (3) Should A New Rule 6.5 Be Added to the Rules?



Myles V. Lynk

Peter Kiewit Foundation Professor of Law and the Legal Profession
Sandra Day O'Connor College of Law, Arizona State University

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Adoption of the NNBA Rules of Professional Conduct



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



Navajo Nation Bar Association



Introduction



- ☞ I also noted that since 1983 the ABA's Model Rules (hereinafter, "ABA Rules") have been amended many times.
- ☞ By contrast, while Navajo Nation Rule 8.4 amends ABA Model Rule 8.4 and Navajo Nation Rule 8.6 is new, I am not aware of any other amendments to the Navajo Nation Rules that have been adopted by the Navajo Nation Supreme Court since 1993.
- ☞ Therefore, it is not surprising that there now are significant differences between the two sets of rules.

Navajo Nation Rule 2.2



- ☞ For example, Rule 2.2 was deleted from the ABA Rules in 2002 because of concerns that a lawyer should not attempt to resolve a dispute between two parties who each view the lawyer as their representative, and because of the potential discrepancy between this rule and ABA Rule 1.7 regarding conflicts of interest.
- ☞ In place of Rule 2.2 the ABA added Model Rule 2.4, "Lawyer Serving as Third-Party Neutral." It is intended to apply to lawyers serving as mediators, arbitrators, conciliators or evaluators in a matter in which they do not represent any of the parties. Model Rule 2.4(a).
- ☞ However, this does not mean that Rule 2.2 should be dropped from the NNBA Rules.

Navajo Nation Rule 2.2



☞ In addition to the Navajo Nation, the U.S. Navy's Judge Advocate General's Corps also retains a version of Rule 2.2, applicable to mediation, where a lawyer may mediate between two parties who are not otherwise represented by counsel. See, Rule 2.2, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, JAG Instruction 5803.1E (2015).



Navajo Nation Rule 2.2



- ☞ This rule was retained in the Navy for the same reason it was retained in the Navajo Nation; there is an interest in protecting harmony within a community that sometimes supersedes individual interests.
- ☞ However, I am advised that this rule is no longer applied by the Navy in practice; it has been superseded by other policies and guidelines in order to avoid the possible confusion to the parties as to who is the lawyer's client. Is NNBA Rule 2.2 still applicable to the legal practice of Navajo lawyers?

Navajo Nation Rule 2.2



☞ **Rule 2.2: Intermediary**

- ☞ (a) A lawyer may act as intermediary between clients if:
 - ☞ (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
 - ☞ (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

Navajo Nation Rule 2.2



- ☞ (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
- ☞ (b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
- ☞ (c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Navajo Nation Rule 2.2



☞ This rule is consistent with the discussion of Peacemaking in the Navajo Nation Courts guide: *Courts & Peacemaking in the Navajo Nation: A Public Guide*.

☞ While Peacemakers may not need to be attorneys or lay (traditional) advocates, Rule 2.2 would permit lawyers and law advocates to act in this role.



“Peacemaking” and Navajo Nation Rule 2.2



“Peacemaking. People can also use Navajo peacemaking to resolve their disputes. Peacemaking is extrajudicial and uses Navajo fundamental law in a community setting. The consensus decision of the participants achieves *hózhóji k’é náhóodleel* (peacemaking).”

“Generally, participants have chosen the traditional method over the courts and do not wish to be involved in formal court procedures.”

“Peacemaking” and Navajo Nation Rule

2.2



“Peacemaking may be used to resolve many issues including land use permits, validation of paternity and marriage, dissolution of marriage, correction of records, traditional adoption, guardianship, declaration of death, and probate.

“Peacemakers are also asked by judges to make sentencing recommendations and obtain participants' consensus regarding *nályééh*, a traditional Navajo value through which harmony is achieved.”

“Peacemaking” and Navajo Nation Rule

2.2



- ☞ By serving as an intermediary a lawyer can help facilitate the goals of the peacemaking process.
- ☞ This is a unique role, where the lawyer is not acting as an “advocate” for either party against the other, but rather, seeks to help them achieve a result that is acceptable to all of the parties involved. Therefore, the lawyer should inform the parties of the lawyer’s role in this process so they understand what the lawyer can and cannot do on their behalf.
- ☞ Also, in considering whether to act as a peacemaker between individuals, an attorney should be mindful that if the process fails the result can be additional cost, embarrassment, and recrimination. Assess the risk of failure and the possibility of success before going forward.

To Whom Do the Ethics Rules Apply?



- ☞ Section F. “Court Practitioners,” of the *Courts & Peacemaking in the Navajo Nation: A Public Guide* (revised Jan. 30, 2018), provides:
- ☞ “Navajo Nation Bar Association (NNBA) membership is required to practice law in the Navajo Nation courts. . . . There are over 400 members of the NNBA The membership consists of attorneys (law school graduates) and law advocates (non-law school graduates, but with legal training). The NNBA’s disciplinary committee hears complaints against lawyers and advocates and disciplines when necessary.”

To Whom Do the Ethics Rules Apply?



- ☞ Rule 1.0 of the Navajo Nation Rules lists the defined terms that are used in the Rules. There is no explicit definition of attorneys or lay advocates.
- ☞ The words “Firm” or “law firm” are defined as follows: “denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization.”
- ☞ The word “lawyer” is used throughout the rules to describe the type of professional to whom the rules apply.

To Whom Do the Ethics Rules Apply?



- ☞ This raises the question: Is the word, “lawyer” intended to apply to only law school graduate attorneys, or is it intended to apply to law school graduate attorneys and lay advocates as well?
- ☞ If these rules apply to only law school graduate attorneys, is there a separate set of ethics rules that apply to law advocates?
- ☞ If the NNBA’s Disciplinary Committee has disciplinary jurisdiction over both law school graduate attorneys and law advocates, there must be some written standard against which the conduct of lay advocates can be measured.

To Whom Do the Ethics Rules Apply?



- ☞ On the other hand, if the NNBA’s Rules of Professional Conduct are intended to apply to both law school graduate attorneys and lay advocates, is it appropriate to hold both sets of professionals to the same standards?
- ☞ For example, would the duty of competence under Rule 1.1 be the same for both? Would the duty of confidentiality under Rule 1.6 be the same for both? What about the rules regarding a lawyer’s responsibility for the ethical conduct of subordinates and non-lawyers under Rules 5.1 and 5.3?

To Whom do the Ethics Rules Apply?



- ☞ Does “professional misconduct” under Rule 8.4 mean the same thing for law school graduate attorneys and lay advocates?
- ☞ These are questions that need to be addressed in the Rules, in order to clarify the applicability and coverage of the Navajo Nation Rules of Professional Conduct and provide clear standards of conduct for both types of advocates.

Should the NNBA Rules Add Current ABA Rule 6.5?



- ☞ ABA Rule 6.5 authorizes a lawyer to provide limited legal services through nonprofit and court-annexed limited legal services programs. There is no comparable provision in the NNBA Rules.
- ☞ Rule 6.5 applies to a “lawyer, who under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter.” Rule 6.5(a).
- ☞ In such a case, the conflict of interest Rules 1.7, 1.9(a) and 1.10 will generally not apply to the representation.

Should the NNBA Rules Add Current ABA Rule 6.5?



- ☞ Thus, a lawyer providing limited legal representation to a person in such a setting would not be subject to the conflict of interest rules regarding current and former clients and other members of the lawyer's firm.
- ☞ Note, however, that under NNBA Rule 1.2(c) a lawyer must obtain the client's consent to the limited objectives of the representation. Such consent should be obtained in writing.

Should the NNBA Rules Add Current ABA Rule 6.5?



- ☞ The purpose of ABA Rule 6.5 is to encourage and enable lawyers to participate in public interest programs intended to provide limited legal services usually on a pro basis to members of the public who cannot otherwise afford to obtain legal assistance.
- ☞ For example, in the Navajo Nation, the DNA Peoples Legal Services operates a "self help" clinic and a divorce clinic; New Mexico Legal Aid operates a domestic violence hotline.
- ☞ The addition of a Rule such as ABA Rule 6.5 would help facilitate the participation of NNBA members in these and other public interest limited legal services programs.

Addendum: Recent ABA Rules Amendments



- ☞ In August 2016 the ABA House of Delegates added paragraph (g) to Rule 8.4 to make discrimination and harassment in conduct related to the practice of law professional misconduct. In August 2018 the ABA House of Delegates adopted substantial revisions to Rules 7.1 through 7.5, dealing with lawyer advertising and the solicitation of clients, that were intended to clarify and simplify these rules.
- ☞ A review of these provisions is beyond the scope of today's presentation, but any updating of the NNBA Rules should take these changes into account.

Questions



☞?