

ATTORNEY'S FEES & COURT REGULATION OF ATTORNEY PRACTICE

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This outline focuses on when a party is entitled to attorney's fees in a court action before the courts of the Navajo Nation. Furthermore, this outline also focuses on the Navajo courts' inherent power to regulate attorney practice on the Navajo Nation. Given that this presentation will only be 1 hour, it is not intended to be a complete description of these topics.

I. Attorney's Fees

a. Overview

- i. Generally, Attorney's Fees are Generally Not Allowed.
- ii. Attorney's Fees Are Only Permitted by:
 1. Statute/Rule
 2. Special Circumstances
 3. Pleadings Not Submitted in Good Faith

b. History

- i. First Significant Case: *Hall v. Arthur*, 3 Nav. R. 35 (Nav. Ct. of App. 1980)
 1. The Court Adopted the *American Rule*
 - a. American Rule is "each party must bear its own attorney's fees in the absence of a special set of circumstances such as a contempt proceeding or where a contractual agreement between the parties calls for payment of attorney's fees."
 2. Contractual Arrangement
 - a. The Court found that "[i]f a contractual arrangement calls for payment of attorney's fees, then in the event one party substantially prevails, that party shall be awarded its attorney's fees."
- ii. *John v. Harrick*, 5 Nav. R. 129 (Nav. Sup. Ct. 1987)—Expounded Upon this Doctrine
 1. Clarified that the Default Rule is that Each Side Bears their Own Costs.
 2. Allowed Attorney's Fees under 3 Exceptions:
 - a. Statute Provides for Fees;
 - b. Special Set of Circumstances; or
 - c. Pleadings Not Submitted in Good Faith
 - i. Pleading was not submitted in good faith, or it contains material misstatements of law or fact, or is not made upon adequate investigation or research.

c. Bad Faith Conduct

- i. Courts have the inherent power to police themselves by imposing attorney's fees. *Begay v. NEA*, 7 Nav. R. 139 (Nav. Sup. Ct. 1995).
 1. The Court can protect against litigation abuses, such as a "frivolous appeal"
 - a. Not filed with the time permitted;
 - b. Appeal that is not perfected by filing the record; or,
 - c. When the appeal clearly lacks probable cause
 - i. Occurs when a matter is settled under the law; or,
 - ii. When a party does not have the right to appear.
 1. In this case, the party clearly did not have standing.
 2. Court also stated that attorney's fees could be imposed for:
 - a. Sloppy practice;
 - b. Bad faith;
 - c. Breach of the duty of honesty;
 - d. Frivolous appeals; or,
 - e. Attorney misconduct
 3. Court held that attorney's fees could be imposed against a party, counsel, or both.
 4. Designed to compensate the Navajo Nation and innocent parties for waste of time and expense.
 5. Procedure
 - a. Requires notice and an opportunity for the offending party to respond.

d. Special Circumstances

1. Contracts. *Hall*
2. Contempt. *Harrick*
3. Action for Dissolution of Marriage. *Morgan v. Morgan* 5 Nav. R. 64 (Nav. Sup. Ct. 1985).
 - a. This Case Used 7 NNC 204 (Reference to State Law) & 7 NNC 752 (Assessment of Costs).
 - i. Broad Interpretation of these Statutes.
4. Divorce Proceedings. *Naize v. Naize*, 7 Nav. R. 269, 273 (Nav. Sup. Ct. 1997)
5. Failure to Obey Orders of the Court and Discovery. *Chavez v. Tome*, 5 Nav. R. 183, 189-190 (Nav. Sup. Ct. 1987).
 - a. Client later tried to blame this on her counsel, however, court maintained the award and stated that the client had the remedy of a malpractice action; but, would not relitigate the issues. *Id.*

6. *Diné bi beenahaz'áanii*
 - a. The Court has stated that “unusual circumstances” led to an award of attorney’s fees to “equal the playing field” and allowed attorney’s fees “under equitable and *Diné bi beenahaz'áanii* principles.” *Nelson v. Initiative Comm. to Reduce Navajo Nation Council*, 9 Nav. R. 408, 412 (Nav. Sup. Ct. 2010) (the Court later held there was no proper funding source in *Nelson III* (Nav. Sup. Ct. Jan. 24, 2011)).
7. Clarifying the Law for Business Owners
 - a. The Navajo Supreme Court found that a company which sought clarity on business preferences, and waived any personal benefit from the case, was entitled to attorney’s fees because it was “clarify[ing] the preference laws for the future rights of Navajo business owners.” *InÁ Bá v. Navajo Bus. Regulatory*, 2015 Navajo Sup. LEXIS 5.
- ii. Must be Supported by Facts explaining what the special circumstances are. *Brown v. Todacheeney*, 7 Nav. R. 37, 44 (Nav. Sup. Ct. 1992).
 1. Must Fall within an existing set of special circumstances. *Id.*
 2. Or trial court must include supporting findings of fact and conclusions of law to justify a new exception. *Id.*
- iii. Where Special Circumstances Have Not Been Found
 - a. Special Circumstances Must be Exercised with Restraint. *Brown v. Todacheeney*, 7 Nav. R. 37 (Nav. Sup. Ct. 1992).
 - b. Lower Court Failed to Specify Special Circumstances. *Wirtz v. Black*, 9 Nav. R. 133 (Nav. Sup. Ct. 2007).
 - i. Stated that asking for a continuance and failure to appear were not a special circumstance.
 - c. Where a person refused to participate in a probate proceeding and to participate in Peacemaking. *Francis v. Betsuie* (In re Quiet Title to Livestock Grazing Permit No. 8-487), 9 Nav. R. 548 (Nav. Sup. Ct. 2011).
- e. Statutes that Provide for Attorney’s Fees
 - i. Exhaustive List Attached. *See* Appendix A.
 1. Approximately 54 Statutes Provide for Attorney’s Fees or “Costs”
 - ii. 7 NNC 752—Generally Provides that “[t]he court may assess the costs of the case against the party or parties against whom judgment is given.”
 1. Used for Special Circumstances.
- iii. Navajo Sovereign Immunity Act (“NSIA”)
 1. In Suits for Damages that are Covered by Insurance. 1 N.N.C. § 554(F)(5).
 2. Non-Monetary Suits Against Navajo Nation Officials to Compel Performance of Responsibilities. 1 N.N.C. § 554(G)(1).

- iv. Navajo Preference in Employment Act (“NPEA”)
 - 1. If the position of an Employer was Not Substantially Justified During the Litigation. 15 N.N.C. § 612(A)(2).
 - a. Substantially Justified
 - i. Labor Commission has discretion to award attorney’s fees. *Dilcon Navajo Westerner/True Value Store v. Jensen*, 8 Nav. R. 28 (Nav. Sup. Ct. 2000)
 - 1. Employer must show that its litigating position was substantially justified. *Id.*
 - ii. Commission/OHA must weigh the employer’s overall conduct against the mandate to determine if attorney’s fees should be awarded. *Goldtooth v. Naa Tsis'Aan Cmty. Sch., Inc.*, 9 Nav. R. 250 (Nav. Sup. Ct. 2009)
 - 1. Employer is Substantially Justified When:
 - a. The employee's pleading or document was not submitted in good faith, or that it contains material misstatement of fact or law; or that it is not made upon adequate investigation or research; or,
 - b. That the employee failed to participate in the proceedings. *Id.*
 - 2. Must be specific factual findings to support that an employer was substantially justified. *Id.*
 - 3. Commission/OHA must allow the employer to opportunity to respond to statement of fees. *See id.*
 - iii. Must Have a Remedies Hearing to Determine Attorney’s Fees When the Employer is the Navajo Nation. *Loley v. Dep't of Empl. & Training*, 7 Nav. R. 406 (Nav. Sup. Ct. 1999).
 - 1. Principles of sovereign immunity to protect the public treasury require this. *Id.*
- f. Rules that Provide for Attorney’s Fees
 - i. Navajo Rules of Civil Procedure
 - 1. Sanctions
 - a. Rule 11
 - 2. Failure to Comply with Discovery
 - a. Failure to attend a deposition. Rule 30(h)(1)

- b. If a party gives notice of deposition, and witness is not served, can get fees for attending. Rule 30(h)(2)
 - c. If a motion to compel discovery is granted after a hearing. Rule 37(a)(4)
 - i. If it is denied, and a party had to attend, and a party defeats it. *Id.*
 - d. Failure answer questions in a deposition after being ordered by the court, and failure to obey an order to permit discovery. 37(b)(2).
 - e. If a party fails to admit to the genuineness of a document under Rule 36 and it is proved genuine. Rule 37(c).
 - f. Failure to attend a party's own deposition, or failure to serve answers to interrogatories, or respond to request for inspection, or attend mental or physical examination. Rule 37(d).
 - 3. Summary Judgment
 - a. Affidavit made in bad faith. Rule 56(g)
 - ii. On Appeal.
 - 1. N.R.C.A.P., Rule 18.
- g. Amount of Attorney's Fees
 - i. Calculation of Attorney's Fees
 - 1. *Hall v. Arthur*
 - a. "[T]he court shall determine, on its own, what fair attorney's fees would be, without regard to whether attorney's fees have been paid or owing and the amount of such fees."
 - 2. Attorney's Fees is not an all or nothing proposition. *Goldtooth v. Naa Tsis'Aan Cmty. Sch., Inc.*, 9 Nav. R. 250 (Nav. Sup. Ct. 2009)
 - a. Costs can be split. *Id.*
 - 3. Attorney's Fees Must be Consistent with the Area
 - a. "The proper frame of reference to calculate attorney's fees is the hourly rates in the given area where the dispute arose, which here is the Tuba City judicial district. The proper standard is the fee rates of lawyers who practice there." *Manygoats v. Cameron Trading Post*, 8 Nav. R. 3 (Nav. Sup. Ct. 2000)
 - i. The Commission erred by using regional rates, and not Navajo Nation rates. *Id.*
 - 4. Submitting Costs
 - a. The Court has also asked parties to submit statements of costs. *See e.g. Wilson v. Van Keuren*, 7 Nav. R. 106 (Nav. Sup. Ct. 1994); *IinÁ BÁ v. Navajo Bus. Regulatory*, 2014 Navajo Sup. LEXIS 8.

5. Lodestar Method

- a. Certain statutes on the Navajo Nation require calculation using the Lodestar Method. *E.g.* 5 N.N.C. § 1107(C) & (F); 5 N.N.C. § 1122(K)

h. Contesting Attorney's Fees

i. Notice and Opportunity Prior to an Award of Fees

- a. *Wirtz v. Black*, 9 Nav. R. 133 (Nav. Sup. Ct. 2007)
 - i. “[P]arties must receive notice and opportunity for a hearing before a court may award attorney's fees.” *Id.*
 - ii. A party must be permitted to “respond to the request” for attorney’s fees. *Id.*

ii. On Appeal

- 1. If attorney’s fees are awarded on appeal, the losing party may file an objection. N.R.C.A.P., Rule 18(A).
- 2. If Appellants wish to contest the amount claimed, Appellants may petition this Court to convene an evidentiary hearing on the issue of the amount of fees and costs.” *Office of the Navajo Nation President v. Navajo Nation Council*, 9 Nav. R. 325 (Nav. Sup. Ct. 2010)

i. On Appeal

i. Within the Discretion of the Court.

- 1. Rule 18 of the Navajo Rules of Civil Appellate Procedure.
- 2. Court may impose attorney’s fees when appeal was without merit. *C.L.M. v. Mike*, 7 Nav. R. 130, 134 (Nav. Sup. Ct. 1995); *see also supra* Section I(c).

II. Court Regulation of Attorney Practice

a. The Supreme Court Has the Inherent Authority to Regulate Attorney Practice.

- i. The Supreme Court has Ultimate Authority over Admission to the Bar and Conduct of Attorneys. *In re Admission to Practice Law on the Navajo Nation & Admission to the Navajo Nation Bar Ass'n Of: Robert Frank Gentile*, No. SC-NB-05-18. (Nav. Sup. Ct. July 3, 2019).

b. Discipline

- i. Normally the NNBA is Charged with Regulating Discipline of Attorneys. *Bowman v. Macdonald*, 6 Nav. R. 101 (Nav. Sup. Ct. 1989)

- 1. However, the courts may step in for disciplinary matters when:
 - a. Gross misconduct occurs in proceedings before the court; or,
 - b. When the bar member participates in a scheme to interfere with the operation or proceeding of any court of the Navajo Nation. *Id.*

- ii. Suspension
 - 1. Attorney was suspended by the Supreme Court. *In re Seanez*, 9 Nav. R. 433 (Nav. Sup. Ct. 2010).
 - a. Suspension was for giving legal opinions that defied orders of the Court. *Id.*
 - iii. Disbarment
 - 1. Attorney was disbarred for unauthorized practice of law while suspended. *In re Seanez*, 9 Nav. R. 467 (Nav. Sup. Ct. 2011).
- c. Admissions
 - i. Special Petitions to Practice
 - 1. The Court can look at special petitions to practice that are outside the NNBA Process. *In re Practice of Law in the Courts of Navajo Nation*, 4 Nav. R. 75 (Nav. Ct. of App. 1983).
 - 2. Court stated that applicants must first apply for admission with the NNBA. *Id.*
 - ii. *Pro Hac Vice*
 - 1. Court clarified the *Pro Hac Vice* Process, and found that Counsel had not properly complied. *Corporation of the President of the Church of Jesus Christ of Latter Day Saints v. Window Rock District Court and Concerning BN, Real Party in Interest*, SC-CV-42-18, slip op at 5 (Nav. Sup. Ct. December 28, 2018)
 - a. Must Seek Leave of Court & Comply with NNBA Process. *Id.*
 - 2. Court Has Paused the Entire Process. *Thomas Bisup v. Kayenta District Court*. No. SC-CV-19-19 (Nav. Sup. Ct. 2019).
 - a. Court ordered the NNBA to cease acceptance of *Pro Hac Vice* applications pending further order of the court.
 - iii. Revocation of Admission by Motion
 - 1. False affidavit led to revocation of admission by motion. *In re Admission to Practice of Wilson*, 4 Nav. R. 137 (Nav. Ct. of App. 1983)
 - a. Could only be reversed upon admission after taking the NNBA Bar Exam. *Id.*
 - iv. Admission via Court Order
 - 1. Attorney who was erroneously granted Admission by the NNBA could continue to practice. *In re Battles*, 3 Nav. R. 92 (Nav. Ct. of App. 1982).
 - a. Passed the NNBA Bar Exam but is non-Indian and a non-professional attorney. *Id.*

d. Representation

i. Appearance/Withdrawal

1. Court denied entry of appearance for the Navajo Nation Department of Justice where a conflict existed. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 598 (Nav. Sup. Ct. 2004).
 - a. Because NNDOJ represents the Courts in Federal litigation, NNDOJ could not represent the Court in a Writ.
2. Court could deny a motion to withdraw and keep attorneys representing a criminal defendant. *Navajo Nation v. MacDonald*, 6 Nav. R. 222 (Nav. Sup. Ct. 1990).
 - a. Attorneys had complained that the costs of representation far exceeded the fee paid.
3. A court appointed attorney was not permitted to withdraw under claims that representation violated the law. *Boos v. Yazzie*, 6 Nav. R. 211 (Nav. Sup. Ct. 1990).
 - a. Attorney for DNA—People's Legal Services governing rules and statutes did not overcome the appointment by the court.

Appendix A—Examples of Statutes that Discuss Attorney’s Fees or Costs

1. 1 N.N.C. § 554(F)(5)—Navajo Sovereign Immunity Act—Insurance Claims
2. 1 N.N.C. § 554(G)(1)—Navajo Sovereign Immunity Act—Injunctive Relief
3. 2 N.N.C. § 1999A—Public Defender—If It’s Discovered the Client Can Pay, PD Can Get Fees Back
4. 4 N.N.C. § 153(C)—Solid Waste MGMT Act—Costs of Suits by the Nation
5. 4 N.N.C. § 154(E)—Solid Waste MGMT Act—Failure to Pay Penalty—Attorney’s Fees for Enforcement of Penalty
6. 4 N.N.C. § 155(D)—Solid Waste MGMT Act—Citizen suits—Award of Costs
7. 4 N.N.C. § 322(B)(2)—Navajo Nation Pesticide Act—Civil Administrative Remedies—If Director must have DOJ enforce, AG is authorized to get attorney’s fees
8. 4 N.N.C. § 1155(E)—Navajo Nation Air Pollution Prevention & Control Act (“NN Pollution Act”)—Failure to Pay Penalty
9. 4 N.N.C. § 1156(D)—NN Pollution Act—Citizen Suits—Award of Attorney’s Fees
10. 4 N.N.C. § 1383(E)—Navajo Nation Clean Water Act (“NN Clean Water Act”)—Failure to Pay Penalty—Enforcement by DOJ
11. 4 N.N.C. § 1384(E)—NN Clean Water Act—Failure to Pay Penalty—Enforcement by DOJ
12. 4 N.N.C. § 1385(D)—NN Clean Water Act—Citizen Suits—Award of Costs
13. 4 N.N.C. § 1553(C)—Navajo Nation Underground Storage Tank Act (“NN Storage Tank Act”)—Costs of Suit
14. 4 N.N.C. § 1554(E)—NN Storage Tank Act—Failure to Pay Penalty—Enforcement by DOJ
15. 4 N.N.C. § 1555(D)—NN Storage Tank Act—Citizen Suits--Award of Costs
16. 5 N.N.C. § 1107(C) & (F) –Unfair Trade Practices—Anyone Damaged by an unfair or deceptive trade practice—Allowed Costs of Defense using Lodestar
17. 5 N.N.C. § 1115(B)—Pyramid or Multilevel Sales--Private Remedies for Costs allowed to prevailing party for a pyramid scheme—groundless claim defense allowed
18. 5 N.N.C. § 1122(K)—Used Vehicles—For breach of implied warranty of merchantability—Lodestar Method

19. 5 N.N.C. § 1124—Motor Vehicle Warranties—Attorney’s Fees—A consumer who prevails in an action to enforce the Motor Warranties Compliance Assurance Act—Lodestar Method
20. 5 N.N.C. § 1135 (A)(2)—Rental-Purchase Agreements—Lessor who fails to comply with requirements of Rental—costs of an action using Lodestar Method
21. 5 N.N.C. § 1152—Violation of the Pawn Regulation Act—Lodestar method for consumer
22. 5 N.N.C. § 1156 (C)—Retail Installment Contracts—Lodestar Method for breach of Act
23. 5 N.N.C. § 1160(G)—Motor Vehicle Consumer Protection Act—Costs allowed to a buyer who must defend against an action—Lodestar Method
24. 5 N.N.C. § 1161 (A)(5)—Motor Vehicle Consumer Protection Act—Limitation on the Amount of Deficiency Judgments for Motor Vehicles
25. 5 N.N.C. § 1975 –NECA—Indemnification of directors, officers and employees—no employee of NECA is required to pay attorney’s fees
26. 5 N.N.C. § 3174(D)—Corporation Code—Transacting business without authority—AG or anyone can bring an action to enjoin a foreign corporation from transacting business within Indian Country without authority—Plaintiff can get Attorneys’ fees
27. 5 N.N.C. § 3415(B)—Corporation Code--Marketing Contract—contracts can provide for liquidated damages including attorney’s fees
28. 5A N.N.C. § 3-106(A)(5)—Navajo UCC—Commercial Paper—Sum Certain
29. 5A N.N.C. § 3-604(A)---Navajo UCC—Commercial Paper—Tender of Payment
30. 5A N.N.C. § 9-504(A)(1)—Navajo UCC—Sales of collateral—proceeds of disposition shall be applied to attorney’s fees incurred by the secured party
31. 5A N.N.C. § 9-506—Navajo UCC—Debtor’s Right to redeem collateral—attorney’s fees provided by agreement; expenses incurred by secured party in retaking
32. 7 N.N.C. § 606—Courts and Procedure—Unauthorized practice of law—treble attorney’s fees paid to them as damages
33. 7 N.N.C. § 752—Courts and Procedure--Assessment of Costs--Court may assess the costs of the case against the party whom judgment is given—USED BY THE COURTS
34. 7 N.N.C. § 1113(B)—Navajo Nation Arbitration Act--Arbitrator’s Fees only, not Attorney’s fees

35. 9 N.N.C. § 1120(B)—Family Court—Damages to or Destruction of Property by Child—Attorney’s fees for action to recover damages against parent/guardian
36. 9 N.N.C. § 1122—Family Court—Court Costs—Can be required to pay for service and other expenses (unclear if attorney’s fees)
37. 9 N.N.C. § 1660(A)(10)—Domestic Abuse Protection—Court can order costs of protection order –attorney fees
38. 9 N.N.C. § 1665—Domestic Abuse Protection—Can order respondent to pay for costs and fees of a protection order.
39. 13 N.N.C. § 404—Tobacco Liability—Liability for tobacco-related illnesses—if NN provides medical assistance, Nation can recover attorney’s fees against company
40. 13 N.N.C. § 410—Civil Tobacco Liability Enforcement and Recovery Act—Navajo Nation can recover costs if it prevails against defendants
41. 15 N.N.C. § 612(A)(2)—Navajo Preference in Employment Act (“NPEA”) attorney’s fees if respondent’s position was not substantially justified
42. 15 N.N.C. § 612 (B)(2)(b)—NPEA—failure to comply with a subpoena can result in attorney’s fees in the Labor Commission
43. 15 N.N.C. § 613(C)(1)(b)—NPEA—Appeal Bond—attorney’s fees incurred by appellee for stay of judgment
44. 15 N.N.C. § 1481(J)—Navajo Nation OSHA—Penalties—If the agency prevails, can award reasonable attorney’s fees NOSHA
45. 16 N.N.C. § 1806—Forcible Entry & Detainer Code—Costs are permitted for both sides
46. 16 N.N.C. § 2006—Navajo Nation Deeds of Trust--Transfers of Loan Property—Costs of Brining the action
47. 16 N.N.C. § 2202(B)(5)—Navajo Nation Civil Trespass—Purpose—To Get Attorney Fees
48. 16 N.N.C. § 2253(B)—Civil Trespass—Assessments—Attorney Fees
49. 16 N.N.C. § 2293—Civil Trespass—Reservation of Rights—Attorney Fees
50. 17 N.N.C. § 455(C)—Law & Order—Persistent Nonsupport—Costs of collection of nonsupport
51. 17 N.N.C. § 532(B)—Law & Order—Curfew Violations—Damages to property by a child—Recovery of attorney’s fees in action against parent/guardian

- 52. 21 N.N.C. § 521(C)—Public Utilities and Communications—Obtaining Cable Television Services Fraudulently—any person who gets illegal cable can liable for attorney's fees
- 53. 22 N.N.C. § 2583(E)—Navajo Nation Safe Drinking Water Act—Failure to pay penalty—AG can request attorney's fees
- 54. 24 N.N.C. § 115(A)—Tax—Charges for administrative Costs—attorney fees for costs of collection