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(*) Addendum material under separate cover

Navajo Nation Law CLE

Section 1

Conference Speaker Biographies

Sandra Day O'Connor College of Law
Arizona State University
Indian Legal Program

Navajo Nation Law CLE Conference

Friday, October 20, 2017

Indian Legal Program / Sandra Day O'Connor College of Law
Beus Center for Law and Society / Arizona State University

Speaker Biographies

Brenda Anderson
Managing Attorney, Fort Defiance DNA Office, DNA-People's Legal Services, Inc.

Brenda Anderson's primary role is to assist the clients at DNA-People's Legal Services, Inc. in providing free civil legal services to low-income people who are not able to afford to hire an attorney, as well as providing full representation, litigation, legal advice and assistance, brief legal services, and negotiation. In addition to offering community legal education with Pro Se clinics, she volunteers for various projects which includes working with the Navajo Nation Bar Association to improve the quality of our legal system within the Navajo Nation.

Brenda Anderson has over 35+ years of experience in the legal field and active with the Navajo Nation Bar Association and licensed to practice law on the Navajo Nation and been a Board of Bar Commissioner and officer and continues to be involved with the bar association throughout her professional career and continues.

Rodgerick T. Begay
Acting Duty Attorney General, Navajo Nation Department of Justice

Rodgerick T. Begay is Todik'ozhi (Salt Water Clan), born for the Biih Bitoodni (Deer Spring Clan), maternal grandfathers are Kiyaa'aanii (Towering House People), paternal grandfathers are Tsi'naajinii (Black Streak Wood People), this is how he is a Diné (member of the Navajo Nation). His wife and 4 kids are Hashk'aa Hadzohi (Yucca Fruit Strung Out In a Line Clan). He was a Chinle Wildcat before obtaining his B.A. from Arizona State University. He received his J.D. from the University Of Tulsa College Of Law. He has been a member of the Arizona State Bar since 2004 and a member of the Navajo Nation Bar since 2005. He began his legal career in 2005 as an attorney with the Navajo Nation Department of Justice where one of his assignments was assisting all one-hundred and ten (110) Chapter governments with various legal issues. From 2007 to 2013, he worked as a staff attorney for the Chinle District Court and the Window Rock District Court. In 2013, he returned to the Navajo Nation Department of Justice as an Assistant Attorney General in the Economic/Community Development Unit. In 2016, he was appointed as Deputy Attorney General for the Navajo Nation.

Dana Bobroff
Attorney, Counsel to the Navajo Nation Office of the Speaker and Office of Legislative Counsel

Dana Bobroff has worked for the Navajo Nation for close to twenty years, including four years as Deputy Attorney General from 2011 to 2015. She is currently in private practice working as outside counsel for the Navajo Nation Council. Ms. Bobroff received her Juris Doctor from University of Arizona's James E. Rogers College of Law. She practiced as a Certified Public Accountant prior to attending law school.

Colin Bradley
Attorney, Navajo Nation Department of Justice

Colin Bradley is a member of the Navajo Nation (Nation), originally from Flagstaff, Arizona, and attended the Sandra Day O'Connor College of Law at Arizona State University (ASU). While at ASU Law, Colin received a certificate in federal Indian law and was an active member of the Native American Law Students Association (NALSA).

Currently, Colin is an attorney in the Litigation and Employment Unit (LEU) of the Navajo Nation Department of Justice. As a part of LEU, Colin represents the Nation in various civil litigation matters and assists entities of the Nation with employment law issues.

Daymon Ely
Attorney, Law Office of Daymon B. Ely

Daymon Ely is a 1982 graduate of Arizona State University College of Law. While he is licensed to practice in Arizona and New Mexico, he has spent his entire legal career practicing law in New Mexico. For the last 20 years, Daymon has focused his practice on suing attorneys. He has sued attorneys representing tribal entities. He is a sole practitioner.

He is a former President of the New Mexico Trial Lawyers Association and former Chief Editor for the New Mexico Trial Lawyers Magazine.

He is currently a State Representative at the New Mexico Legislature.

Veronika Fabian
Partner, Choi & Fabian, PLC

Veronika Fabian has been a partner with Choi & Fabian, PLC since 2003. Ms. Fabian received her Juris Doctorate in Law from the University of Michigan Law School in 1993. She also received a Bachelor's of Arts Degree from Cornell University in 1990. She worked at DNA People's Legal Services, Inc., from 1994 to 2003, and was the Director of DNA's Consumer Law Project from 1996-2003. In 2003, she was awarded the Sharon A. Fullmer Legal Aid Attorney of the Year Award. Ms. Fabian's efforts have resulted in the following published decisions Walker v. Gallegos, 167 F.Supp. 2d 1105 (D.Ariz. 2001) (FDCPA); (D.Ariz. 2002), Wide Ruins v. Stago, 281 F.Supp.2d 1086 (D.Ariz. 2003); Howell v.

Midway Holding, Inc., 362 F.Supp. 2d 1158 (D.Ariz. 2005); Hayward v. Arizona Central Credit Union, 241 Ariz. 350 (App. 2017). She focuses on automobile fraud, abusive debt collection, and credit reporting issues.

Gertrude Lee

Chief Prosecutor, Navajo Nation Office of the Prosecutor

As Chief Prosecutor, Ms. Lee is the chief law enforcement officer of the Navajo Nation. Chief Lee is licensed to practice law in the Navajo Nation and the State of New Mexico. Chief Lee was born in Shiprock, NM, and raised in Kirtland, NM. Chief Lee is Tó'áhání (Near to Water) born for Tótsohnii (Big Water). She began her legal career as a prosecutor in 2010 at the 11th Judicial District, Division II District Attorney's Office in Gallup, NM. In her years of service as a prosecutor for the State of New Mexico, Chief Lee was primarily assigned to criminal cases involving children, sexual assault, and domestic violence. In November 2016, Ms. Lee accepted the position of Chief Prosecutor of the Navajo Nation. As Chief Prosecutor, Ms. Lee leads the Navajo Nation Office of the Prosecutor, which is tasked with prosecuting crimes occurring on the Navajo Nation and entering on juvenile justice matters involving abuse and neglect and delinquency. Chief Lee received her B.A. in Political Science from Creighton University in 2006 and her J.D. from the University of New Mexico School of Law in 2009.

Emery McCabe

Managing Attorney, Chinle DNA Office, DNA-People's Legal Services, Inc.

Emery McCabe has practiced in Navajo Nation courts for 25 (+) years. He has worked for the Navajo Nation Department of Justice, Navajo Housing Authority and DNA People's Legal Services, Inc. His background includes litigation covering contracts, housing, employment, family law and consumer issues. Presently Emery is the Managing Attorney at the Chinle DNA Office.

He is active with the Navajo Nation Bar Association and licensed to practice law on the Navajo Nation and on the Admissions committee with the bar association and has been involved throughout his professional career.

Kiyoko Patterson

Assistant U.S. Attorney, District of Arizona

Kiyoko Patterson is currently assigned to the Violent Crime Section and handles major crime cases arising in Arizona from the eastern Navajo Nation. Prior to joining the U.S. Attorney's Office in 2011, Mrs. Patterson practiced Indian Law with the Gila River Indian Community as Senior Assistant General Counsel and as Tribal Prosecutor. While with the Community, she focused on violent crime, public safety matters, education, housing, code revision and compliance with the Adam Walsh Act. Mrs. Patterson is a member of the Navajo Nation and a graduate of the Indian Legal Program at Arizona State University's Sandra Day O'Connor College of Law.

Paul Spruhan
Assistant Attorney General, Navajo Department of Justice

Paul Spruhan is the Assistant Attorney General for the Litigation and Employment Unit at the Navajo Nation Department of Justice in Window Rock, Arizona. He received his A.B. in 1995 and his A.M. in 1996 from the University of Chicago. He received his J.D. in 2000 from the University of New Mexico. He graduated Order of the Coif and received an Indian law certificate. He and his wife, Bidtah Becker, have two children, and live in Fort Defiance, Arizona.

Gary Stuart
Attorney, Gary L. Stuart, P.C.

Gary Stuart spent 32 years as a partner in Jennings, Strouss & Salmon, PLLC, in Phoenix Arizona. He now practices part time as Gary L. Stuart, P.C. He earned degrees in Finance and Law at the University of Arizona. Martindale-Hubble lists him as an A-V lawyer and a Premier American Lawyer. He was profiled in *Who's Who in American Law* (First Edition). He is a sustaining member of *Best Lawyers in America*, *Arizona's Finest Lawyers, and Southwest Superlawyers*. The Maricopa County Bar Association inducted him into its *Hall of Fame* in October 2010. The *National Institute of Trial Advocacy* honored him with its *Distinguished Faculty* designation in 1994. The University of Arizona Alumni awarded him its *2016 Professional Achievement Award.* He holds the juried rank of Advocate and served as President of the *American Board of Trial Advocates* (Arizona Chapter). Stuart completed an eight-year term on the *Arizona Board of Regents,* and served as its President in 2004-2005. He taught as Adjunct Faculty at the University of Arizona James E. Rogers College of Law (2000-2005). He has been on the Adjunct Faculty at the Sandra Day O'Connor College of Law since 1994, where he continues to teach Legal Ethics, Legal Writing, and Appellate Advocacy. He also serves as *Senior Policy Advisor* to the Dean at the ASU College of Law. He limits his part-time law practice to legal ethics, bar admission, professional discipline, law firm consulting, and expert witness work in legal malpractice and ethics cases. He served three terms on the Arizona State Bar's Case Conflict Committee as its *Probable Cause Panelist* and is a current member of the Arizona Supreme Court's *Attorney Disciplinary Panel*, which hears disciplinary cases. He was a member of the Arizona State Bar Rules of Professional Conduct Committee for 23 years and served as its chair for ten years. He has written more than fifty ethics committee opinions. He served on numerous ethics-related committees at the state and national levels. He wrote two published books on ethics, and more than one hundred law review and journal articles, op-ed pieces, essays, stories, and CLE monographs. His ten published books are: *"The Ethical Trial Lawyer,"* State Bar of Arizona, 1994; *"Litigation Ethics,"* Lexis-Nexis Publishing, 1998; *"The Gallup 14,"* a novel, University of New Mexico Press, 2000; *"Miranda—The Story of America's Right to Remain Silent,"* University of Arizona Press, 2004; *"AIM For The Mayor—Echoes from Wounded Knee,"* a novel, Xlibris Publishing, 2008; "*Innocent Until Interrogated—The Story of the Buddhist Temple Massacre and the Tucson Four.*" University of Arizona Press, 2010; "*Ten Shoes Up*," a novel, 2015, Gleason & Wall Publishing; *The Valles Caldera*, a novel, 2015, Gleason & Wall Publishing; and, "*Anatomy Of A Confession—The Debra Milke Case*," ABA Publishing, 2016; *The Last Stage to Bosque Redondo*, a novel, 2016, Gleason & Wall Publishing.

Navajo Nation Law CLE

Section 2

Case Law Update including in depth overview of Window Rock School District Case

2017 ASU NAVAJO LAW CONFERENCE

PAUL SPRUHAN
NAVAJO NATION DEPARTMENT OF JUSTICE

FEDERAL INDIAN LAW CASE UPDATE

FEDERAL APPELLATE CASES

Board of Education of the Gallup-McKinley County Schools v. Henderson **(10th Circuit)**
Jurisdictional challenge to NPEA by state-organized school district; trial court dismissed for lack of standing.
(Affirmed by Tenth Circuit in unpublished decision; no en banc or cert. petition. Case closed.)

Hopi Tribe v. U.S. EPA **(9th Circuit)**
Four consolidated challenges to EPA regional haze rule issued under Clean Air Act concerning Navajo Generating Station. US EPA used Tribal Authority Rule to adopt Technical Working Group Agreement as BART alternative
(9th Circuit issued opinions 3/20/17 upholding EPA haze rule; en banc petition by To'Nizhoni et al. denied; no cert. petition. Case closed.)

Navajo Housing Authority v. U.S. Dept. of Housing and Urban Development **(9th Cir.)**
NHA challenge to disallowed cost finding requiring NHA to pay back $96 million in NAHASDA funds.
(In mediation discussions)

Navajo Nation v. Department of Interior **(9th Circuit)**
Suit by Navajo Nation alleging violation of National Environmental Policy Act and breach of trust for failing to consider Navajo water rights to Colorado River in the operation and management of the various programs the Secretary of Interior operates on the Colorado River

(Oral Argument held 02/14/2017; Awaiting decision)

***Navajo Nation v. Department of Interior* (D.C. Circuit)**
Suit by Navajo Nation against BIA for failure to fully fund Judicial Branch 638 contract. D.C. District Court dismissed claims based on failure of Nation to inform BIA that it considered date of submittal to be different than BIA's date
(Opinion issued siding with Navajo Nation; in damages phase before D.C. District Court)

***Navajo Nation v. Daley* (10th Circuit)**
Action by Nation and Northern Edge Casino to enjoin New Mexico court from hearing personal injury claim by casino patron. District Court ruled Nation validly waived immunity in state court for such claims in gaming compact.
(Oral argument held; Awaiting decision)

***Public Service Co. of New Mexico v. Barboan* (10th Circuit)**
Condemnation action by PNM concerning two allotments the Nation has fractional interest in. Trial court ruled Nation is indispensable party who cannot be joined and that tribal interest means land is not "allotment" under condemnation statute.
(Tenth Circuit opinion issued holding 25 U.S.C. Sec. 357 does not apply to allotments with tribal government ownership interests. En banc review denied. Awaiting PNM decision whether to file for cert.)

***Window Rock Unified School Dist. v. Nez* (9th Circuit)**
Suit by Arizona school districts to enjoin NPEA jurisdiction. District Court ruled Nation has no jurisdiction over employment decisions at school districts.
(Ninth Circuit issued opinion holding Navajo jurisdiction is "plausible" and therefore school districts must exhaust Navajo court remedies. 2-1 opinion with lengthy dissent. Cert. petition to be filed.)

***Carter v. Washburn* (9th Circuit)**
Constitutional challenge to Indian Child Welfare Act by Goldwater Institute**.**
(District court dismissed for lack of standing; Appeal filed; in briefing stage)

DISTRICT COURT CASES

***Corporation of the President of the Church of Jesus Christ of Latter Day Saints v. RJ* (D. Utah)**
Jurisdictional challenge concerning tort claim filed in Window Rock District Court for sexual abuse of Navajos in Indian Student Placement Program**.**
(Dismissed for failure to exhaust; cases pending in Window Rock Dist. Ct.)

***Dine Citizens Against Ruining our Environment v. Bureau of Indian Affairs* (D.Az.)**
Challenge to approval of Four Corners Power Plant lease and Navajo Mine permit under National Environmental Policy Act and Endangered Species Act
(Dismissed as Navajo Transitional Energy Company is indispensable party who cannot be joined under Rule 19 of Federal Rules of Civil Procedure)

***In re Recon Oil, Inc.* (Bankptcy. D. Az.)**
Bankruptcy case involving company incorporated under Navajo law concerning contracts with Navajo Department of Transportation and two trespass actions filed in the Navajo Office of Hearings and Appeals
(In briefing stage on Motion for Assumption)

***Navajo Nation v. Department of Interior* (D. Az.)**
Suit by Nation for return of human remains removed by National Park Service from Canyon de Chelly.
(On remand from Ninth Circuit on whether Hopi is indispensable party; Judge granted Hopi motion to intervene; case stayed pending settlement discussions)

***Navajo Nation v. Rael* (D.N.M.)**
Suit by Nation on behalf of allottee to enjoin Cibola County Court from hearing civil suit concerning use of acequia on allotted land.
(Court dismissed complaint for collateral estoppel due to ongoing state proceeding)

***Navajo Nation v. San Juan County*, (D. Utah)**
Suit by Nation alleging apportionment of county commission districts violates federal Voting Rights Act and U.S. Constitution for packing Navajo voters in one district.
(Court ruled County Commissioner districts violated Equal Protection Clause; Special master to redraw districts)

***Navajo Nation v. United States* (D.N.M.)**
Suit by Nation against US EPA and mining companies under CERCLA and NM state las concerning spill at Gold King Mine.
(Nation filed proposed amended complaint to add FTCA claims; motion fully briefed and awaiting decision)

***Navajo Nation v. Urban Outfitters*, (D.N.M.)**
Suit by the Nation alleging federal and state trademark and Indian Arts and Crafts Act violations for use of "Navajo" on clothing and other items.
(Case settled)

***Navajo Nation Human Rights Commission v. San Juan County*, (D. Utah)**
Suit by Human Rights Commission and individual Navajos against County alleging mail-in ballot election violates federal Voting Rights Act.
(Court denied preliminary injunction; in settlement discussions)

ADMINISTRATIVE CASES

***Navajo Nation v. Acting Western Regional Director*, (Interior Bd. Ind. App.)**
Suit by Nation and Gaming Enterprise against BIA challenging trust land acquisition for Hopi Tribe next to Twin Arrows Casino.
(Initial briefs filed)

AMICUS CASES

***Lee v. Tam* (U.S. Supreme Court)**
Suit challenging denial of trademark based on disparagement provision of Lanham Act as violation of First Amendment Free Speech guarantee.

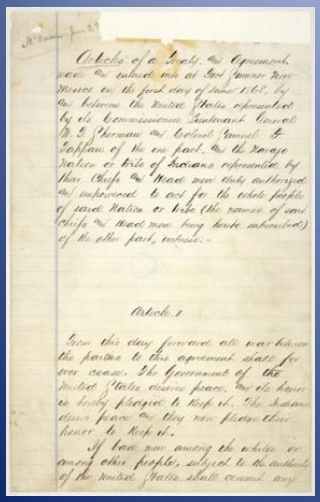
(U.S. Supreme Court issued opinion that Lanham Act provision violates first amendment; Washington football team case over)

Lewis v. Clarke **(U.S. Supreme Court)**
Suit for personal injury against tribal employee in personal capacity. Connecticut Supreme Court ruled tribal sovereign immunity barred suit.
(Court ruled tribal employees may be sued in individual capacity and sovereign immunity cannot be raised a defense)

Pro Football, Inc. v. Blackhorse **(4th Cir.)**
Suit challenging cancellation of Washington football team trademark. District Court upheld cancellation under disparagement provision of Lanham Act.
(Dismissed based on *Lee v. Tam*)

Standing Rock Sioux Tribe v. Army Corps of Engineers **(D.C. Cir.)**
Challenge to appeal of easement for Dakota Access Pipeline under Lake Oahe in North Dakota.
(Court issued opinion holding Army Corps EA violated NEPA; briefs filed on remedies; awaiting decision)

WINDOW ROCK UNIFIED. v. REEVES
PAUL SPRUHAN NAVAJO DOJ

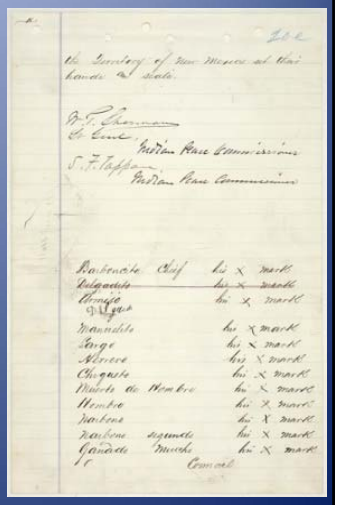


Articles of a Treaty and Agreement made and entered into at Fort Sumner New Mexico on the first day of June 1868, by and between the United States represented by its Commissioners Lieutenant General W. T. Sherman and Colonel S. F. Tappan of the one part, and the Navajo Nation or tribe of Indians represented by their Chiefs and Head men duly authorized and empowered to act for the whole people of said Nation or tribe (the names of said Chiefs and Head men being hereto subscribed) of the other part, namely:-

Article I

From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace and its honor is hereby pledged to keep it. The Indians desire peace and they now pledge their honor to keep it.

If bad men among the whites or among other peoples, subject to the authority of the United States shall commit any

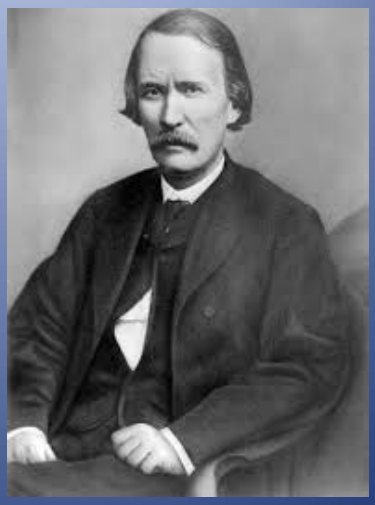


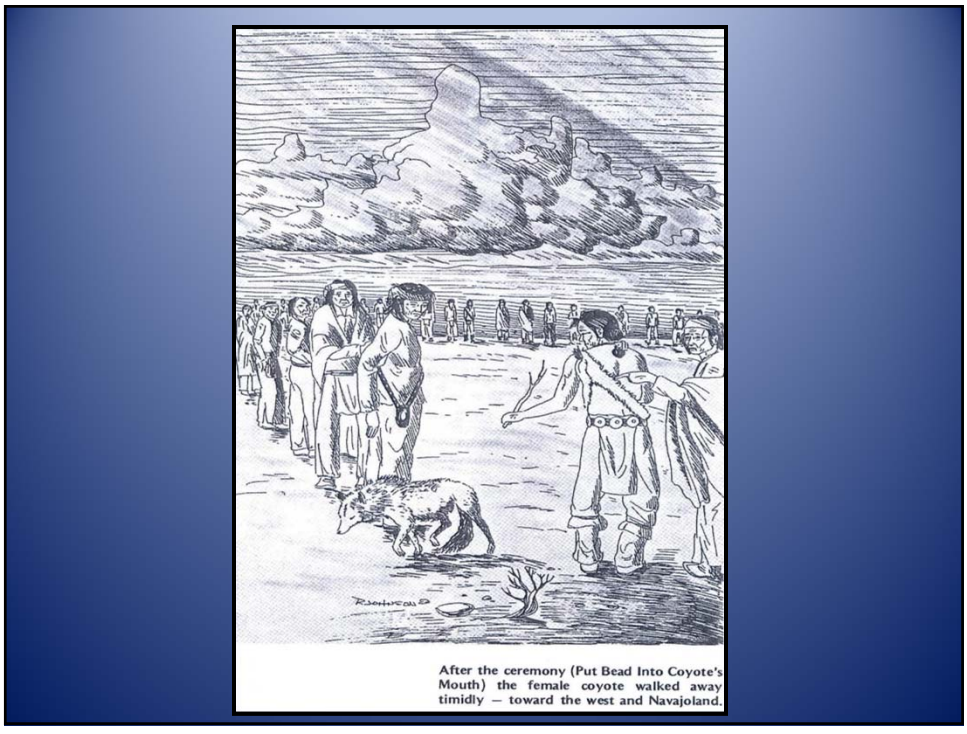
the Territory of New Mexico at their homes in said State.

W. T. Sherman
Lt. Genl
Indian Peace Commissioner
S. F. Tappan
Indian Peace Commissioner

Barboncito Chief his X mark
Ridgeado his X mark
Armijo his X mark
Manuelito his X mark
Largo his X mark
Herrero his X mark
Chiquito his X mark
Muchos de Hombre his X mark
Hombre his X mark
Narbona his X mark
Narbona segunda his X mark
Ganado Mucho his X mark
Council

General James Henry Carleton, circa 1862-1863
Courtesy Library of Congress





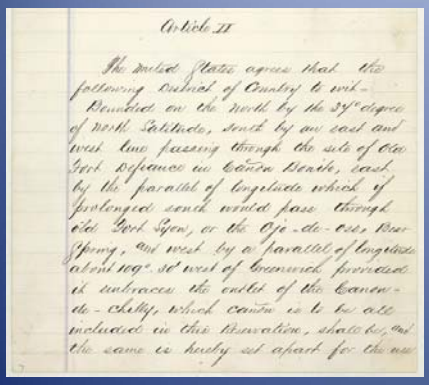
After the ceremony (Put Bead Into Coyote's Mouth) the female coyote walked away timidly — toward the west and Navajoland.

TREATY OF 1868, JUNE 1, 1868, HWÉÉLDI

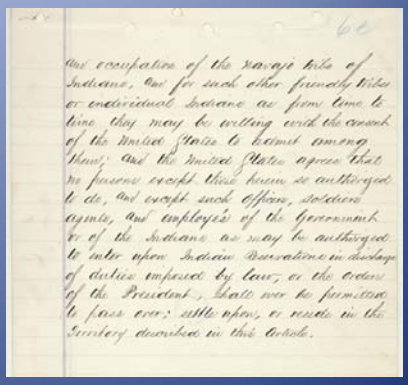




ARTICLE II, BOUNDARIES OF THE TREATY RESERVATION

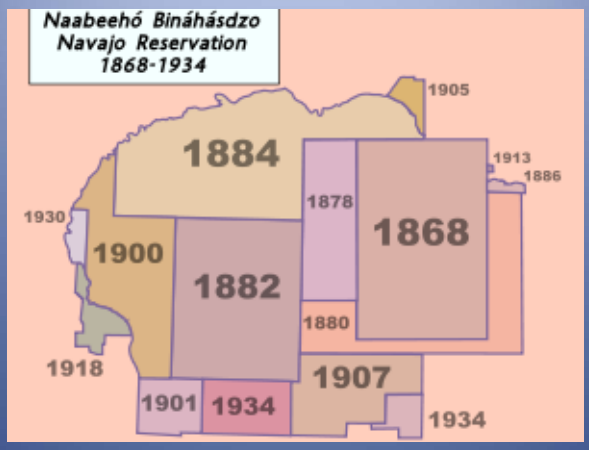

Article II

The United States agrees that the following District of Country to wit- Bounded on the North by the 37th degree of North Latitude, South by an east and west line passing through the site of Old Fort Defiance in Cañon Bonito, East by the parallel of Longitude which if prolonged would pass through Old Fort Lyon, or the Ojo-de-oso Bear Spring, and West by a parallel of Longitude about 109° 30' west of Greenwich provided it embraces the outlet of the Canon-de-Chilly, which canon is to be also included in this Reservation, shall be, and the same is hereby set apart for the use


and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing with the consent of the United States to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such Officers, soldiers agents, and employés of the Government or of the Indians as may be authorized to enter upon Indian Reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over; settle upon, or reside in the territory described in this article.

ARTICLE II TEXT

“The United States agrees that the following district of country, to wit:



BOUNDARIES OF 1868 TREATY RESERVATION
With additions to Reservation by year of acquisition

shall be, and the same is hereby, set apart for *the use and occupation of the Navajo tribe of Indians,*

- and the United States agrees *that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the Government,* or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, *shall ever be permitted to pass over, settle upon, or reside in, the territory described in the article*."

ARTICLE VI

- In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and *they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school*

- the United States agrees that, ***for every thirty children between said ages who can be induced or compelled to attend school***, a house shall be provided, ***and a teacher competent to teach the elementary branches of an English education shall be furnished***, who will reside among said Indians, and faithfully discharge his or her duties as a teacher

Window Rock Unified School Dist. v. Nez

- Concerns whether the Navajo Preference in Employment Act applies to Arizona public schools leasing Navajo trust land
- Central issue is whether the School District must exhaust their remedies before Labor Commission and Supreme Court
- Federal District Court ruled Nation's jurisdiction is "plainly lacking"- reversed by Ninth Circuit 2-1.

HOLDINGS BY MAJORITY

- Navajo Nation may exclude state school districts pursuant to the Treaty
- Not plain that the Arizona statehood statute or compulsory attendance statute overrides/abrogates the Treaty
- State schools are not the federal government for purposes of Article VI of the Treaty
- Under Water Wheel right to exclude on trust lands means Nation's jurisdiction is "plausible" and *Nevada v. Hicks* does not apply.

CERT. PETITION

- FILED 9/25/2017
- QUESTION PRESENTED:
- Whether a tribal court has jurisdiction to adjudicate employment claims by Arizona school district employees against their Arizona school district employer that operates on the Navajo reservation pursuant to a state constitutional mandate to provide a general and uniform public education to all Arizona children.

Legal Questions

- What does the "plainly lacking" exception from exhaustion mean ("plausible" versus *Dish Network v. Laducer* frivolous standard?)
- Does Treaty of 1868's right to exclude exempt the Nation from needing to fulfill *Montana's* exception? (*See Montana* , Section III)
- Does *Water Wheel* or *Nevada v. Hicks* apply to state-organized school districts such that *Montana's* "main rule" does or does not apply?

EVEN MORE QUESTIONS!

- Are the schools "the state" and are they completely exempt from tribal jurisdiction?
- If the school districts are fulfilling educational obligation under Enabling Act, can they consent under *Montana*?
- Assuming leases are consensual relationships under *Montana*, is there a "nexus" to regulating employment?

Navajo Nation Law CLE

Section 3

Legislative Update

NAVAJO NATION COUNCIL RESOLUTIONS

FISCAL YEAR 2017

October 1, 2016 through September 30, 2017

LEGISLATION NO.	TITLE	SPONSOR	COMMITTEES
0160-17	An Action Relating to Naabik'iyati' Committee, Navajo Nation Council; Confirming the Appointment of Joelynn M. Ashley as Executive Director of the Division of General Services	Amber Crotty	1. Naa'bik'iyati' Committee 2. Navajo Nation Council
0237-17	An Action Relating to Naabik'iyati' Committee, Navajo Nation Council; Confirming the Appointment of Mr. Anslem Morgan as Eastern Navajo Agency Council Representative to the Navajo Nation Government Development Commission	Edmund Yazzie	1. Naa'bik'iyati' Committee 2. Navajo Nation Council
0232-17	An Action Relating To Budget And Finance And Naabik'iyati' Committees And Navajo Nation Council; Accepting The Audit Report Of KPMG LLP On The Primary Government Financial Statement Of The Navajo Nation For Fiscal Year 2016.	Seth Damon	1. Budget & Finance Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0230-17	An Action Relating To Naabik'iyati' Committee And The Navajo Nation Council; Confirming The Appointment Of Joann Dedman To The Commission On Navajo Government Development For A Term Of Four Years, As The Chinle Navajo Agency Representative	Kee Begay Jr	1. Naa'bik'iyati' Committee 2. Navajo Nation Council
0231-17	An Action Relating To The Navajo Nation Council; Confirming The Appointment Of Herbert Clah, Jr. To The Navajo Nation Gaming Enterprise Board Of Directors For A Four Year Term	Tom Chee	1. Navajo Nation Council
0224-17	An Action Relating To The Navajo Nation Council; Confirming The Appointment Of Affie Ellis To The Navajo Nation Gaming Enterprise Board Of Directors For A Four Year Term.	Alton Shepherd	1. Navajo Nation Council

NAVAJO NATION COUNCIL RESOLUTIONS

FISCAL YEAR 2017

October 1, 2016 through September 30, 2017

0151-17	An Action Relating to Law And Order Committee, Naabik'iyati' Committee And The Navajo Nation Council; Amending Of 12 N.N.C. § 1330 (A) And (B), Of The Bond Financing Act.	Seth Damon	1. Law & Order Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0219-17	An Action Relating To An EMERGENCY For the Navajo Nation Council; Approving Supplemental Funding From The Unreserved, Undesignated Fund Balance In The Amount Of $2,103,140 (Two Million One Hundred Three Thousand And One Hundred Forty Dollars) For Summer Youth Employment To 110 Navajo Nation Chapters	Seth Damon	1. Navajo Nation Council
0215-17	An Action Relating To Budget And Finance, Naabik'iyati' Committees And Navajo Nation Council; Redistributing Monies Held In The Debt Service Permanent Fund Set Aside Account In Fiscal Year 2017 For Deposit Into The Unreserved, Undesignated Fund Balance Of The Navajo Nation General Fund	Seth Damon	1. Budget & Finance Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0204-17	An Action Relating to the Health, Education and Human services and Naabik'iyati' Committees; and Navajo Nation Council; Recommending and Confirming Dr. Glorinda Segay as the Health Director of the Navajo Department of Health	Jonathan Hale	1. Health Education & Human Services Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0194-17	An Action Relating to Health, Education and Human Services, Resources and Development, Budget and Finance, Naabik'iyati' Committees and the Navajo Nation Council; Approving the Replacement Lease Between the Navajo Nation and Salt River Project Agricultural Improvement and Power District, Arizona Public Service Company, Tucson Electric Power Company, Nevada Power Company D/B/A NV Energy, and Department of Water and Power of City of Los Angeles; Lease Amendment NO. 1 to Existing Lease; Approval of Restrictive Covenants Related to Ash Disposal Area and Solid Waste Landfill and Pond Solids; Waiver of Sovereign Immunity	Lorenzo C Bates	1. Health Education & Human Services Committee 2. Resources & Development Committee 3. Budget & Finance Committee 4. Naa'bik'iyati' Committee 5. Navajo Nation Council

NAVAJO NATION COUNCIL RESOLUTIONS

FISCAL YEAR 2017

October 1, 2016 through September 30, 2017

0166-17	An Act Relating to Resources and Development, Health, Education and Human Services; Budget and Finance and Naabik'iyati' Committees, and the Navajo Nation Council; Approving Supplemental Funding from the Unreserved, Undesignated Fund Balance in the amount of Four Hundred Thirteen Thousand, Four Hundred Ninety- Four Dollars ($413,494) for Summer Youth Employment Among the Five Navajo Nation Agencies	Jonathan Hale	1. Resources & Development Committee 2. Health Education & Human Services Committee 3. Budget & Finance Committee 4. Naa'bik'iyati' Committee 5. Navajo Nation Council
0161-17	An Action Relating to Naabik'iyati' Committee and Navajo Nation Council; Confirming the Appointment of Mr. Perry Charley to the Diné Uranium Remediation Advisory Commission	Amber Crotty	1. Naa'bik'iyati' Committee 2. Navajo Nation Council
0143-17	An Action Relating To Resources And Development, Law And Order And Naabik'iyati' Committees And Navajo Nation Council; Amending 2 N.N.C. § 503, Meetings	Davis Filfred	1. Resources & Development Committee 2. Law & Order Committee 3. Naa'bik'iyati' Committee 4. Navajo Nation Council
0145-17	An Action Relating to an EMERGENCY; Amending CJA-13-17 Regarding the Effective Date to Address the Threat to Direct Services to the Navajo Nation	Jonathan Perry	1. Navajo Nation Council
0431-16	An Action Relating to Budget And Finance, And Naabik'iyati' Committees And The Navajo Nation Council; Approving Supplemental Funding From The Unreserved, Undesignated Fund Balance In The Amount Of $248,587 To The Navajo Nation Election Administration Office To Hold The Transportation Stimulus Plan Referendum	Walter Phelps	1. Budget & Finance Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council

NAVAJO NATION COUNCIL RESOLUTIONS

FISCAL YEAR 2017

October 1, 2016 through September 30, 2017

0137-17	An Action Relating To Resources And Development, Budget And Finance, Naabik'iyati' Committees And The Navajo Nation Council; Approving The Establishment Of The Naat'aanii Development Corporation; Granting And Extending The Navajo Nation's Sovereign Immunity To The Corporation; No Waiver Of The Navajo Nation's Sovereign Immunity.	Alton Shepherd	1. Resources & Development Committee 2. Budget & Finance Committee 3. Naa'bik'iyati' Committee 4. Navajo Nation Council
0378-16	An Action Relating To Resources and Development, Budget and Finance and Naabik'iyati' Committees and Navajo Nation Council; Adopting the Sihasin Fund Navajo Community Development Financial Institution Economic Development Expenditure Plan Pursuant to CD-68-14 and 12 N.N.C §§ 2501 - 2508.	Leonard Tsosie	1. Resources & Development Committee 2. Budget & Finance Committee 3. Naa'bik'iyati' Committee 4. Navajo Nation Council
0120-17	An Action Relating To Budget And Finance, Resources And Development, Naabik'iyati' Committees And The Navajo Nation Council; Petitioning The Secretary Of The Interior To Issue A Federal Charter Of Incorporation To The Navajo Nation For The Naat'aani Development Corporation As A For-Profit Company Under The Indian Reorganization Act, 25 U.S.C. § 5124, As Amended.	Alton Shepherd	1. Budget & Finance Committee 2. Resources & Development Committee 3. Naa'bik'iyati' Committee 4. Navajo Nation Council
0117-17	An Act Relating To Health, Education And Human Services, Law And Order, Naabik'iyati' Committee And Navajo Nation Council; Amending Navajo Nation Code, Title 17 And Enacting The Law Against Human Trafficking 2017	Nathaniel Brown	1. Health Education & Human Services Committee 2. Law & Order Committee 3. Naa'bik'iyati' Committee 4. Navajo Nation Council

NAVAJO NATION COUNCIL RESOLUTIONS

FISCAL YEAR 2017

October 1, 2016 through September 30, 2017

0119-17	An Action Relating To Health, Education And Human Services, Naabik'iyati' Committees And The Navajo Nation Council; Amending CAU-66-01, Amending Resolution CMY-35-85 By Changing The Date Of "Navajo Nation Sovereignty Day" Within The Navajo Nation From April 16th Of Each Year To The Fourth Monday Of The Month Of April Of Each Year, To An Observed Holiday On April 16th Of Each Year Within The Navajo Nation.	Jonathan Hale	1. Health Education & Human Services Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0115-17	An Action Relating to Law and Order and Naabik'iyati' Committees and the Navajo Nation Council; Amending 2 N.N.C. §§ 952, 953 and 954, the Office of Legislative Services	Jonathan Hale	1. Law & Order Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0111-17	An Action Relating to Health, Education and Human Services, Naabik'iyati' Committee and Navajo nation Council; Amending CD-67-06, Establishing August 14th of Each Year as the Navajo Nation Code Talkers Day and as a Navajo Nation Holiday, to an Observed Holiday of the Navajo Nation	Jonathan Hale	1. Health Education & Human Services Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0108-17	An Action Relating to Law and Order and Naabik'iyati' and the Navajo Nation Council; Amending the Navajo Nation Code Title 2 at 2 N.N.C. § 3769	Dwight Witherspoon	1. Law & Order Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0047-17	An Action Relating to Naabik'iyati' Committee; Appointing Mr. Emmett Kerley to the Commission on Navajo Government Development as the Western Agency Council Representative	Walter Phelps	1. Naa'bik'iyati' Committee 2. Navajo Nation Council
0107-17	An Action Relating to Naabik'iyati' Committee and Navajo Nation Council; Approving and Confirming the Nomination of Crystal J. Cree to the Navajo Government Development Commission	Jonathan Hale	1. Naa'bik'iyati' Committee 2. Navajo Nation Council
0102-17	An Action Relating to Resources and Development and Naabik'iyati' Committees and Navajo Nation Council; Confirming Paulene T. Thomas as the Navajo Gaming Regulatory Office Executive Director	Alton Shepherd	1. Resources & Development Committee

NAVAJO NATION COUNCIL RESOLUTIONS

FISCAL YEAR 2017

October 1, 2016 through September 30, 2017

			2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0098-17	An Action Relating To Law And Order, Naabik'iyati' And Navajo Nation Council; Amending The Navajo Election Code At 11 N.N.C. §§ 22 And 23 By Shortening Candidate Filing Period From 90 TO 14 Days And Shortening The Candidate Application Review Period From 30 To 14 Days.	Jonathan Hale	1. Law & Order Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0063-17	An Action Relating to the Navajo Nation Council, Appointing Pearline Kirk as Navajo Nation Controller	Dwight Witherspoon	1. Navajo Nation Council
0039-17	An Action Relating To Cessation Of Direct Services; Respectfully Requesting Congress Retain The Indian Healthcare Improvement Act As Enacted Within The Affordable Care Act Of 2010	Jonathan Hale	1. Navajo Nation Council
0038-17	An Action Relating to Disaster Relief Services; Waiving 12 N.N.C. §§ 820 (E), 820 (F) and 820 (L) Relating to the Designation of Recurring and Non-Recurring Revenues and Operating Expenses and use of the Unreserved, Undesignated Fund Balance for Recurring Expenses; Waiving 12 N.N.C. § 820 (J) Regarding Maintenance of the Minimum Fund Balance; And, Approving Supplemental Funding from the Minimum Fund Balance of the Unreserved, Undesignated Fund Balance in the Amount of $242,576.08 for the Navajo Nation Chapter for Disaster Relief Services	Seth Damon	1. Navajo Nation Council
0035-17	An Action Relating To Health, Education And Human Services, Naabik'iyati' And Navajo Nation Council; Approving The Reinstatement Of Sean Jeffry King As A Member Of The Navajo Nation.	Edmund Yazzie	1. Health Education & Human Services Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council

NAVAJO NATION COUNCIL RESOLUTIONS

FISCAL YEAR 2017

October 1, 2016 through September 30, 2017

0030-17	An Action Relating To The Navajo Nation Council; Selecting And Confirming The Speaker Of The 23rd Navajo Nation Council For A Two Year Term	Seth Damon	1. Navajo Nation Council
0024-17	An Action Relating To The Navajo Nation Council; Confirming the Appointment of Herbert Clah, Jr. to the Navajo Nation Gaming Enterprise Board of Directors for a Four Year Term	Tom Chee	1. Navajo Nation Council
0430-16	An Action Relating to Naabik'iyati' Committee; Amending NABIAU-52-15, The Plan Of Operation For The Dine Uranium Remediation Advisory Commission.	Amber Crotty	1. Naa'bik'iyati' Committee 2. Navajo Nation Council
0001-17	An Action Relating To Resources And Development, Budget And Finance, Naabik'iyati', And Navajo Nation Council; Approving Supplemental Fund From The Unreserved, Undesignated Fund Balance In The Amount Of Five Hundred Forty Three Thousand Two Hundred Dollars ($543,200) For Housing For The Former Bennett Freeze Area Within Tonalea/Red Lake Chapter, Waiving 2 N.N.C. § 820(I) And 860(C) Relating To The Capital Improvement Process	Tuchoney Slim Jr	1. Resources & Development Committee 2. Budget & Finance Committee 3. Naa'bik'iyati' Committee 4. Navajo Nation Council
0005-17	An Action Relating To Budget And Finance, Naabik'iyati' And The Navajo Nation Council; Amending CO-59-16, A Resolution Entitled "An Action Relating To Budget And Finance, Naabik'iyati' Committee And The Navajo Nation Council; Referring A Referendum Measure On Expenditure Of Fund Principal Pursuant To 12 N.N.C. § 904, Permanent Trust Fund, To Support The Navajo Nation Transportation Stimulus Plan;" Referendum Election To Be Conducted No Sooner Than 60 Days And No Later Than 90 Days Of Appropriation Of Funds To Conduct The Election.	Lee Jack Sr	1. Budget & Finance Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council

NAVAJO NATION COUNCIL RESOLUTIONS

FISCAL YEAR 2017

October 1, 2016 through September 30, 2017

0003-17	An Action Relating to Budget And Finance, Law and Order, Naabik'iyati' Committees and the Navajo Nation Council; Amending 12 N.N.C. § 602, Bank Balances	Dwight Witherspoon	1. Budget & Finance Committee 2. Law & Order Committee 3. Naa'bik'iyati' Committee 4. Navajo Nation Council
0006-17	An Action Relating To Navajo Nation Council; Confirming The Permanent Appointment Of The Honorable Cynthia Thompson As Navajo Nation District Court Judge	Kee Begay Jr	1. Navajo Nation Council
0008-17	An Action Relating To An Emergency ; Waiving 12 N.N.C. §§ 820(E), 820(F) And 820(L) Relating To The Designation Of Recurring And Non-Recurring Revenues And Operating Expenses And U Se Of The Unreserved D, Undesignated Fund Balance For Recurring Expenses ; Waiving 12 N.N.C. § 820(J) Regarding Maintenance Of The Minimum Fund Balance ; And, Approving Supplemental Funding From The Minimum Fund Balance Of The Unreserved , Undesignated Fund Balance In The Amount Of $5,038,678.00 For The Division Of Social Services Department Of Family Services For General Assistance And Welfare Services.	Seth Damon	1. Navajo Nation Council
0417-16	An Action Relating To The Navajo Nation Council; Removing Jim R. Parris As Controller Of The Navajo Nation.	Seth Damon	1. Navajo Nation Council
0408-16	An Act Relating to Law and Order, Naabik'iyati' Committees and Navajo Nation Council; Appointing Mr. Rodgerick T. Begay as the Navajo Nation Deputy Attorney General	Edmund Yazzie	1. Law & Order Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0400-16	An Action Relating To Naabik'iyati' And Navajo Nation Council; Confirming Nomination Of Mr. Philmer Bluehouse To Commission On Navajo Government Development	Jonathan Hale	1. Naa'bik'iyati' Committee 2. Navajo Nation Council

NAVAJO NATION COUNCIL RESOLUTIONS

FISCAL YEAR 2017

October 1, 2016 through September 30, 2017

0393-16	An Action Relating to Budget and Finance Committee, Naabik'iyati' Committee, and Navajo Nation Council; Amending CS-49-16, The Navajo Nation Fiscal Year 2017 Comprehensive Budget; and Waiving CF-07-11	Seth Damon	1. Budget & Finance Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0388-16	An Action Relating to Resources and Development, Law and Order, Naabik'iyati' Committees and the Navajo Nation Council; Amending 2 N.N.C. § 3454 (A), Navajo Telecommunications Regulatory Commission Membership of the Commission	Walter Phelps	1. Resources & Development Committee 2. Law & Order Committee 3. Naa'bik'iyati' Committee 4. Navajo Nation Council
0362-16	An Action Relating to Budget and Finance, and Naabik'iyati' Committees and the Navajo Nation Council; Approving Supplemental Funding from the Unreserved, Undesignated Fund Balance in the Amount of $510,616.00 to the Navajo Election Administration	Lee Jack Sr	1. Budget & Finance Committee 2. Naa'bik'iyati' Committee 3. Navajo Nation Council
0359-16	An Action Relating to Resources and Development, Budget and Finance and Naabik'iyati' Committees and Navajo Nation Council; Adopting the Sihasin Fund Pasture Range and Forage Expenditure Plan Pursuant to CD-68-14 and 12 N.N.C. 2501-2508	Leonard Tsosie	1. Budget & Finance Committee 2. Resources & Development Committee 3. Naa'bik'iyati' Committee 4. Navajo Nation Council

Navajo Nation Law CLE

Section 4

Fundamentals of Researching Navajo Law

Navajo Nation Law CLE

Section 5

Exploring the Fundamental Law Contours of Title 1

Rodgerick T. Begay
Navajo Nation Deputy Attorney General
2017 ASU CLE Conference

EXPLORING THE FUNDAMENTAL CONTOURS OF TITLE 1

CN-69-02
1 N.N.C. §201-§206

- **§201**: Diné Bi Beehaz'áanii Bitsé Siléí
- **§202**: Diné Bi Beenahaz'áanii
- **§203**: Diyin Bits'ąądęę' Beehaz'áanii - Dine Traditional Law
- **§204**: Diyin Dine'é Bitsąądęę'Beehaz'áanii – Diné Customary Law
- **§205**: Nahasdzáán dóó Yádiłhił Bits'ąądęę' Beehaz'áanii – Diné Natural Law
- **§206**: Diyin Nohookáá Diné Bi Beehaz'áanii – Diné Common Law

§201: Bitsé Siléí (slide 1 of 3)

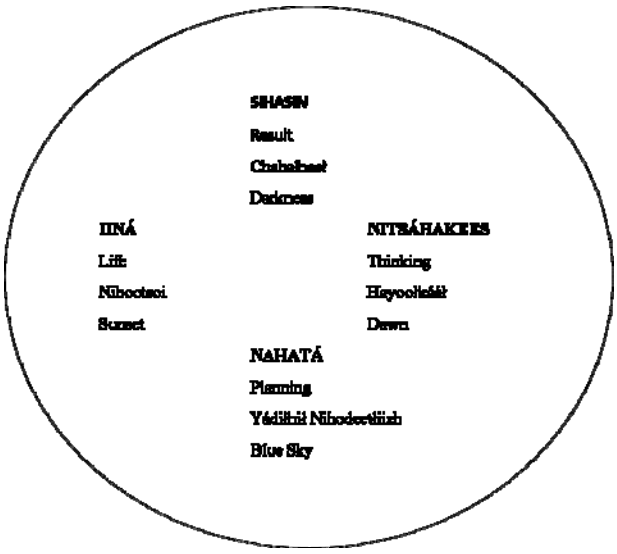
Diné Bizaad	English Translation as provided in the Statute
Diyin Dine'é,	The Holy People ordained,
Sin dóó sodizin,	Through songs and prayers,
Bee	That,
Nahasdzáán dóó yádiłhił nitsáhákees yił hadeidiilaa,	Earth and universe embody thinking,
Tó dóó dził diyinii nahat'á yił hadeidiilaa,	Water and the sacred mountains embody planning,
Niłch'i dóó nanse alłtaas'ei iiná yił hadeidiilaa,	Air and variegated vegetation embody life,
Kǫ', adinídíín dóó ntł'iz náádahaniijį' sihasin yił hadediilaa,	Fire, light, and offering sites of variegated sacred stones embody wisdom,
Díí ts'ídá aláaji' nihi beehaz'áanii bitse siléí niha'ályaa.	These are the fundamental tenets established.

§201: Bitsé Siléí (slide 2 of 3)

Nitsáhákees éí nahat'á bitsé silá	Thinking is the foundation of planning
Iiná éí sihasin bitsé silá.	Life is the foundation of wisdom.
Hanihi'diilyaadi díí nihiihdaaya' dóó bee hadíníit'é.	Upon our creation, these were instituted within us and we embody them.
Binahji' nihéého'dílzingíí éíí:	Accordingly, we are identified by:
Nihízhi',	Our Diné name,
Ádóone'é niidlíinii,	Our clan,
Nihinéí',	Our language,
Nihee ó'ool íił,	Our life way,
Nihi chaha'oh,	Our shadow,
Nihi kék'ehashchíín.	Our footprints.
Díí bik'ehgo Diyin Nohookáá Diné nihi'doo'niid.	Therefore, we were called the Holy Earth Surfaced People.

§201: Bitsé Siléí (slide 3 of 3)

Kodóó dah'adíníisá dóó dah'adiidéél.	From here growth began and the journey proceeds.
Áko dííshjígi éí nitsáhákees, nahat'á, iiná, saad, oodlą', Dóó beehaz'áanii ał'ąą ádaat'éego nihitah nihwiileeh,	Different thinking, planning, life ways, languages, beliefs, and laws appear among us,
Ndi nihi beehaz'áanii bitsé siléí nhá ndaahya'ą́ą t'ahdii doo łahgo ánéehda.	But the fundamental laws placed by the Holy People remain unchanged.
Éí biniinaa t'áá nanihi'deelyáhą́ą doo níłch'i diyin hinááh nihiihdaahya'ą́ą ge'át'éigo, T'áá Diné niidlíígo náásgóó ahool'á.	Hence, as we were created and with living soul, we remain Diné forever.



§203: Diyin Bits'ą́ądę́ę́ Beehaz'áanii Dine Traditional Law

- Laws from the laws of the Holy People
- Bitsé Siléí
- In Songs & Prayers
- Teachings by Elders and Medicine People

§204: Diyin Dine'é Bitsą́ądę́ę́' Beehaz'áanii – Diné Customary Law

- Our practice of the laws from the Holy People
- Example: Use of Ts'aa' Bahane in the execution and teachings of a Navajo wedding ceremony

§205: Nahasdzáán dóó Yadiłhił Bits'ąądęę Beehaz'áanii – Diné Natural Law

- Laws of the Earth and Sky
- Relationship of Shitaa' Yádiłhił dóó Shimá Nahasdzáán
- Natural path of the Sun
- Water, air, fire/light, vegetation, etc.

§206: Diyin Nohookáá Diné Bi Beehazáanii - Diné Common Law

- Laws of the Holy Earth-surfaced People
- Laws from case law, statutes, regulations, policies, etc., we have put in place for ourselves.
- This includes full or partial incorporation of federal, state, and other laws.

What is Diné Bi Beehaz'áanii?

- Fundamental Law (laws of the Holy People)?
- Teachings from our songs, stories, and prayers?
- Laws of nature?
- Having a Hózhǫ́ǫjí ceremony or Hóchxǫ́'íjí ceremony?
- Common law marriages?
- Laws of all beings?

Answer the question with a question

- Which part of Diné Bi Beehaz'áanii are you talking about?
- QUESTIONS?

jo Nation, 5 Nav. R. 152, 153 (Nav. Sup. Ct. 1987).

"As a general matter, a criminal sentence [including a consecutive sentence] is not cruel and unusual punishment as long as it falls within the boundaries set by the legislature." *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432, 447 (Nav. Sup. Ct. 1991).

"This Court recognizes that a '[a] substantial liberty interest is at stake in sentencing." *Begay v. Navajo Nation*, 6 Nav. R. 132, 133 (Nav. Sup. Ct. 1989).

2. Treatment of juveniles

" . . . [W]e also hold that at the minimum a detained juvenile must be provided with a padded area to lie on, a blanket, and food to eat to comply with the Navajo Bill of Rights Section against cruel and unusual punishment." *In the Matter of A.W.*, 6 Nav. R. 38, 41 (Nav. Sup. Ct. 1988).

3. Due process

"The Navajo Nation Election Code, as it applies to these schools, does not affect property interests. It only affects management issues which are of interest to the Navajo Nation as a sovereign. Accordingly, we hold that there was no 'taking' by the imposition of new regulatory requirements and thus no violation of due process." *Rough Rock Community School, Inc. v. Navajo Nation*, 7 Nav. R. 199, 201 (Nav. Sup. Ct. 1996).

"We disagree with TBI's position that 7 N.T.C. § 204(a) authorizes suits against the Navajo Tribe if a violation of civil rights is asserted. Neither the Navajo Bill of Rights, 1 N.T.C. §§ 1–9, nor 7 N.T.C. § 204(a) explicitly authorizes suits against the Navajo Nation. [. . .] . . . [T]his is a breach of contract action brought against the Navajo Nation, therefore, arguments of civil rights abuse under the Navajo Bill of Rights is inappropriate. [. . . .] Instead of arguing civil rights violations, TBI should have argued whether any provisions in the contract waived the Tribe's immunity from suit." *TBI Contractors v. Navajo Tribe*, 6 Nav. R. 57, 61 (Nav. Sup. Ct. 1988).

Chapter 2. The Foundation of the Diné, Diné Law and Diné Government

Section

History

CN–69–02, November 1, 2002.

Preamble. CN–69–02 contains the following preamble:

"Whereas: 2. The Diné have always been guided and protected by the immutable laws provided by the Diyin, the Diyin Diné'é, Nahasdzáán and Yádiłhił; these laws have not only provided sanctuary for the Diné Life Way but has guided, sustained and protected the Diné as they journeyed upon and off the sacred lands upon which they were placed since time immemorial; and

"3. It is the duty of the Nation's leadership to preserve, protect and enhance the Diné Life Way and sovereignty of the people and their government; the Nation's leaders have always lived by these fundamental laws, but the Navajo Nation Council has not acknowledged and recognized such fundamental laws in the Navajo Nation Code; instead the declaration and practice of these fundamental laws have, up to this point in time, been left to those leaders in the Judicial Branch; and

"4. The Navajo Nation Council is greatly concerned that knowledge of these fundamental laws is fading, especially among the young people; the Council is also concerned that this lack of knowledge may be a primary reason why the Diné are experiencing the many negative forms of behavior and natural events that would not have occurred had we all observed and lived by these laws; and

"5. The Navajo Nation Council finds that the Diné Life Way must be protected and assured by incorporating these fundamental laws into the Navajo Nation Code in a manner that will openly acknowledge and recognize their importance and would generate interest to learn among all Diné; and

"6. The Navajo Nation Council finds that the acknowledgment, recognition and teaching of these laws do not contravene 1 N.N.C. § 4; the

incorporation of these fundamental laws into the Navajo Nation Code is not governmental establishment of religion nor is it prohibiting the free exercise of religion; the Navajo Nation Council and the Diné have always recognized and respected the principle of these fundamental laws and the Diné have the right and freedom to worship as they choose; and the Navajo Nation Council and the Diné recognize that the Diné Life Way is a holistic approach to living one's life whereby one does not separate what is deemed worship and what is deemed secular in order to live the Beauty Way; and

"7. The Navajo Nation Council further finds that it is entirely appropriate for the government itself to openly observe these fundamental laws in its public functions such as the installation or inauguration of its leaders and using and placing the appropriate symbols of the Diné Life Way in its public buildings and during legislative and judicial proceeding; and

"8. The Navajo Nation Council further finds that all elements of the government must learn, practice and educate the Diné on the values and principles of these laws; when the judges adjudicate a dispute using these fundamental laws, they should thoroughly explain so that we can all learn; when leaders perform a function using these laws and the symbols of the Diné Life Way, they should teach the public why the function is performed in a certain way or why certain words are used; and

"9. The Navajo Nation Council further finds that all the details and analysis of these laws cannot be provided in this acknowledgment and recognition, and such as effort should not be attempted; the Navajo Nation Council finds that more work is required to elucidate the appropriate fundamental principles and values which are to be used to educate and interpret the statutory laws already in place and those that may be enacted; the Council views this effort today as planting the seed for the education of all Diné so that we can continue to Walk in Beauty."

§ 201. Diné Bi Beehaz'áanii Bitsé Siléí—Declaration of the Foundation of Diné Law

We, the Diné, the people of the Great Covenant, are the image of our ancestors and we are created in connection with all creation.

Diné Bi Beehaz'áanii Bitsí Siléí

Diyin Dine'é,

Sin dóó sodizin,

Bee

Nahasdzáán dóó yádiłhił nitsáhákees yił hadeidiilaa,

Tó dóó dził diyinii nahat'á yił hadeidiilaa,

Nił ch'i dóó nanse' ałtaas'éí iiná yił hadediilaa,

Kǫ', adinídíín dóó ntł'iz náádahaniihjį' sihasin yił hadediilaa.

Díí ts'ídá aláají' nihi beehaz'áanii bitse siléí nihá' ályaa.

Nitsáhákees éí nahat'á bitsé silá.

Iiná éí sihasin bitsé silá.

Hanihi'diilyaadi díí nihiihdaahya' dóó bee hadíníit'é.

Binahji' nihéého'dílzingíí éíí:

Nihízhi',

Ádóone'é niidlíinii,

Nihinéí',

Nihee ó'ool íił,

Nihi chaha'oh,

Nihi kék'ehashchíín.

Díí bik'ehgo Diyin Nohookáá Diné nihi'doo'niid.

Kodóó dah'adíníisá dóó dah'adiidéél.

Áko díishjɭɭgi éí nitsáhákees, nahat'á, iiná, saad, oodlą',

Dóó beehaz'áanii ałʼąą ádaat'éego nihitah nihwiileeh,

Ndi nihi beehaz'áanii bitsé siléí nhá ndaahya'áá t'ahdii doo łahgo ánéehda.

Éí biniinaa t'áá nanihi'deelyáhą́ą doo níłch'i diyin hinááh nihiihdaahya'ą́ą ge'át'éigo,

T'áá Diné niidlíɭgo náásgóó ahool'á.

The Holy People ordained,

Through songs and prayers,

That

Earth and universe embody thinking,

Water and the sacred mountains embody planning,

Air and variegated vegetation embody life,

Fire, light, and offering sites of variegated sacred stones embody wisdom.

These are the fundamental tenets established.

Thinking is the foundation of planning.

Life is the foundation of wisdom.

Upon our creation, these were instituted within us and we embody them.

Accordingly, we are identified by:

Our Diné name,

Our clan,

Our language,

Our life way,

Our shadow,

Our footprints.

Therefore, we were called the Holy Earth–Surface–People.

From here growth began and the journey proceeds.

Different thinking, planning, life ways, languages, beliefs, and laws appear among us,

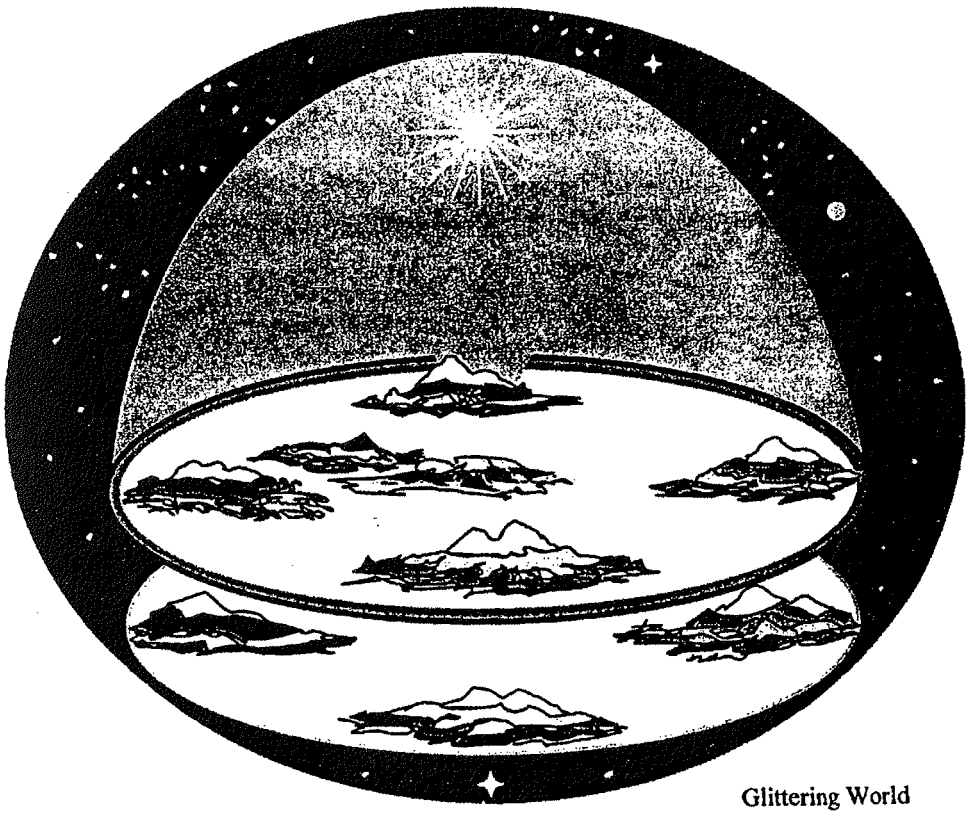
But the fundamental laws placed by the Holy People remain unchanged.

Hence, as we were created and with living soul, we remain Diné forever.[1]

[1] The Navajo Nation is grateful to Mike Mitchell, Wilson Aronilth, Peggy Scott, Laura Wallace, the late Andrew Natonabah, and the late Dr. Dean Jackson who developed the declaration, with guidance from the Navajo Medicine–Men Association and Navajo Community College. The revision of the declaration interpretation was made by: Laura Wallace, Division of Diné Education; Roger

Begay, Diné Language and Cultural Development–Division of Diné Education; and Henry Barber, Office of the Speaker.

Mother Earth and Father Universe



History

CN–69–02, November 1, 2002.

Annotations

1. Application

"As the test we announce today requires clear intent in the plain language or structure of a statute to override an exemption, we do not fill any omissions or interpret ambiguous language under *Diyin Nohookáá Dine' é Bi Beehaaz'áanii* (Navajo Common Law). Our general rules of statutory construction changed with Council passage of Resolution Nos. CN–69–02 (November 13, 2002) (Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Diné) and CO–72–03 (October 24, 2003) (Amending Title VII of the Code), which mandate that we interpret statutes consistent with Navajo Common Law. We have applied this mandate when the plain language of a statute does not cover a particular situation or is ambiguous, but have applied the plain language directly when it applies and clearly requires a certain outcome." *Tso v. Navajo Housing Authority*, No. SC–CV–10–02, slip op. at 5–6 (Nav. Sup. Ct. August 26, 2004).

"Resolutions CN–69–02 (recognizing the Fundamental Laws of the Diné) and CO–72–03 (adopting amendments to 7 N.N.C. § 204 choice of law provisions) expand the *Belone* rule beyond the initial pleading requirement for asserting the application of *Diné bi beenahaz'áanii* in our Courts. Resolution CN–69–02 instructs our judges and justices to take notice of *Diné bi*

beenahaz'áanii in their decisions, when applicable. Thus, the failure to raise *Diné bi beenahaz'áanii* in the initial pleading will not lead to exclusion of the claim. Importantly, we do not suggest that common law be raised with reckless abandon wherever and whenever it strikes one's fancy, nor that it be raised in dilatory fashion. We suggest that whenever common law is raised, and whether it is raised *sua sponte* or by a party, the parties should be given ample time and opportunity to address the issue." *Judy v. White*, No. SC–CV–35–02, slip op. at 17 (Nav. Sup. Ct. August 2, 2004).

§ 202. Diné Bi Beenahaz'áanii

The Diné bi beenahaz'áanii embodies Diyin bitsą́ądęę' beehaz'áanii (Traditional Law), Diyin Dine'é bitsą́ądęę' beehaz'áanii (Customary Law), Nahasdzáán dóó Yádiłhił bitsą́ądęę' beehaz'áanii (Natural Law), and Diyin Nohookáá Diné bi beehaz'áanii (Common Law).

These laws provide sanctuary for the Diné life and culture, our relationship with the world beyond the sacred mountains, and the balance we maintain with the natural world.

These laws provide the foundation of Diné bi nahat'á (providing leadership through developing and administering policies and plans utilizing these laws as guiding principles) and Diné sovereignty. In turn, Diné bi nahat'á is the foundation of the Diné bi naat'á (government). Hence, the respect for, honor, belief and trust in the Diné bi beenahaz'áanii preserves, protects and enhances the following inherent rights, beliefs, practices and freedoms:

A. The individual rights and freedoms of each Diné (from the beautiful child who will be born tonight to the dear elder who will pass on tonight from old age) as they are declared in these laws; and

B. The collective rights and freedoms of the Diyin Nihookáá Diné as a distinct people as they are declared in these laws; and

C. The fundamental values and principles of Diné Life Way as declared in these laws; and

D. Self-governance; and

E. A government structure consisting of Hózhǫ́ǫjí Nahat'á (Executive Branch), Naat'ájí Nahat'á (Legislative Branch), Hashkééjí Nahat'á (Judicial Branch), and the Naayee'jí Nahat'á (National Security Branch); and

F. That the practice of Diné bi nahat'á through the values and life way embodied in the Diné bi beenahaz'áanii provides the foundation of all laws proclaimed by the Navajo Nation government and the faithful adherence to Diné bi nahat'á will ensure the survival of the Navajo Nation; and

G. That Diné bi beenahaz'áanii provides for the future development and growth of a thriving Navajo Nation regardless of the many different thinking, planning, life ways, languages, beliefs, and laws that may appear within the Nation; and

H. The right and freedom of the Diné to be educated as to Diné bi beenahaz'áanii; and

I. That Diné bi beenahaz'áanii provides for the establishment of governmental relationships and agreements with other nations; that the Diné shall respect

and honor such relationships and agreements and that the Diné can expect reciprocal respect and honor from such other nations.

History

CN-69-02, November 1, 2002.

Library References

Indians ⇐32(4.1).
Westlaw Topic No. 209.

Annotations

1. Failure to plead

"As the test we announce today requires clear intent in the plain language or structure of a statute to override an exemption, we do not fill any omissions or interpret ambiguous language under *Diyin Nohookáá Dine' é Bi Beehaaz'áanii* (Navajo Common Law). Our general rules of statutory construction changed with Council passage of Resolution Nos. CN-69-02 (November 13, 2002) (Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Diné) and CO-72-03 (October 24, 2003) (Amending Title VII of the Code), which mandate that we interpret statutes consistent with Navajo Common Law. We have applied this mandate when the plain language of a statute does not cover a particular situation or is ambiguous, but have applied the plain language directly when it applies and clearly requires a certain outcome." *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 5-6 (Nav. Sup. Ct. August 26, 2004).

"Resolutions CN-69-02 (recognizing the Fundamental Laws of the Diné) and CO-72-03 (adopting amendments to 7 N.N.C. § 204 choice of law provisions) expand the *Belone* rule beyond the initial pleading requirement for asserting the application of *Diné bi beenahaz'áanii* in our Courts. Resolution CN-69-02 instructs our judges and justices to take notice of *Diné bi beenahaz'áanii* in their decisions, when applicable. Thus, the failure to raise *Diné bi beenahaz'áanii* in the initial pleading will not lead to exclusion of the claim. Importantly, we do not suggest that common law be raised with reckless abandon wherever and whenever it strikes one's fancy, nor that it be raised in dilatory fashion. We suggest that whenever common law is raised, and whether it is raised *sua sponte* or by a party, the parties should be given ample time and opportunity to address the issue." *Judy v. White*, No. SC-CV-35-02, slip op. at 17 (Nav. Sup. Ct. August 2, 2004).

§ 203. Diyin Bits'ą́ądę́ę́' Beehaz'áanii—Diné Traditional Law

The Diné Traditional Law declares and teaches that:

A. It is the right and freedom of the Diné to choose leaders of their choice; leaders who will communicate with the people for guidance; leaders who will use their experience and wisdom to always act in the best interest of the people; and leaders who will also ensure the rights and freedoms of the generations yet to come; and

B. All leaders chosen by the Diné are to carry out their duties and responsibilities in a moral and legal manner in representing the people and the government; the people's trust and confidence in the leaders and the continued status as a leader are dependent upon adherence to the values and principles of Dine bi beenahazáanii; and

C. The leader(s) of the Executive Branch (Alą́ąjį' Hózhǫ́ǫ́jí Naat'ááh) shall represent the Navajo Nation to other peoples and nations and implement the policies and laws enacted by the legislative branch; and

D. The leader(s) of the Legislative Branch (Alą́ąjį' Naat'ájí Naat'ááh and Alą́ąjį' Naat'ájí Ndaanit'áii or Naat'aanii) shall enact policies and laws to address the immediate and future needs; and

E. The leader(s) of the Judicial Branch (Alą́ąjį' Hashkéédjí Naat'ááh) shall uphold the values and principles of Diné bi beenahaz'áanii in the practice of peace making, obedience, discipline, punishment, interpreting laws and rendering decisions and judgments; and

F. The leader(s) of the National Security Branch (Alą́ąjį' Naayéé'jí Naat'ááh) are entrusted with the safety of the people and the government. To this end, the leader(s) shall maintain and enforce security systems and operations for the Navajo Nation at all times and shall provide services and guidance in the event of severe national crisis or military-type disasters; and

G. Our elders and our medicine people, the teachers of the traditional laws, values and principles must always be respected and honored if the people and the government are to persevere and thrive; the teachings of the elders and medicine people, their participation in the government and their contributions of the traditional values and principles of the Diné life way will ensure the growth of the Navajo Nation; and from time to time, the elders and medicine people must be requested to provide the cleansing, protection prayers, and blessing ceremonies necessary for securing healthy leadership and the operation of the government in harmony with traditional law; and

H. The various spiritual healings through worship, song and prayer (Nahaghá) must be preserved, taught, maintained and performed in their original forms; and

I. The Diné and the government must always respect the spiritual beliefs and practices of any person and allow for the input and contribution of any religion to the maintenance of a moral society and government; and

J. The Diné and the government can incorporate those practices, principles and values of other societies that are not contrary to the values and principles of Diné Bi Beenahaz'áanii and that they deem is in their best interest and is necessary to provide for the physical and mental well-being for every individual.

History

CN-69-02, November 1, 2002.

Library References

Indians ⇐6.2, 32(4.1, 6).
Westlaw Topic No. 209.
C.J.S. Indians § 51.

Annotations

1. Application

"As the test we announce today requires clear intent in the plain language or structure of a statute to override an exemption, we do not fill any omissions or interpret ambiguous language under *Diyin Nohookáá Dine' é Bi Beehaaz'áanii* (Navajo Common Law). Our general rules of statutory construction changed with Council passage of Resolution Nos. CN-69-02 (November 13, 2002) (Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Diné) and CO-72-03 (October 24, 2003) (Amending Title VII of the Code), which mandate that we interpret statutes consistent with Navajo Common Law. We have applied this mandate when the plain language of a statute does not cover a particular situation or is ambiguous, but have applied the plain lan-

guage directly when it applies and clearly requires a certain outcome." *Tso v. Navajo Housing Authority*, No. SC–CV–10–02, slip op. at 5–6 (Nav. Sup. Ct. August 26, 2004).

"Resolutions CN–69–02 (recognizing the Fundamental Laws of the Diné) and CO–72–03 (adopting amendments to 7 N.N.C. § 204 choice of law provisions) expand the *Belone* rule beyond the initial pleading requirement for asserting the application of *Diné bi beenahaz'áanii* in our Courts. Resolution CN–69–02 instructs our judges and justices to take notice of *Diné bi beenahaz'áanii* in their decisions, when applicable. Thus, the failure to raise *Diné bi beenahaz'áanii* in the initial pleading will not lead to exclusion of the claim. Importantly, we do not suggest that common law be raised with reckless abandon wherever and whenever it strikes one's fancy, nor that it be raised in dilatory fashion. We suggest that whenever common law is raised, and whether it is raised *sua sponte* or by a party, the parties should be given ample time and opportunity to address the issue." *Judy v. White*, No. SC–CV–35–02, slip op. at 17 (Nav. Sup. Ct. August 2, 2004).

§ 204. Diyin Dine'é Bitsą́ądę́ę' Beehaz'áanii—Diné Customary Law

The Diné Customary Law declares and teaches that:

A. It is the right and freedom of the people that there always be holistic education of the values and principles underlying the purpose of living in balance with all creation, walking in beauty and making a living; and

B. It is the right and freedom of the people that the sacred system of k'é, based upon the four clans of Kiiyaa'áanii, Todích'iínii, Honagháahnii and Hashtł'ishnii and all the descendant clans be taught and preserved; and

C. It is the right and freedom of the people that the sacred Diné language (nihiinéí') be taught and preserved; and

D. It is the right and freedom of the people that the sacred bonding in marriage and the unity of each family be protected; and

E. It is the right and freedom of the people that every child and every elder be respected, honored and protected with a healthy physical and mental environment, free from all abuse; and

F. It is the right and freedom of the people that our children are provided with education to absorb wisdom, self-knowledge, and knowledge to empower them to make a living and participate in the growth of the Navajo Nation.

History

CN–69–02, November 1, 2002.

Library References

Indians ⇐6.2, 32(4.1).
Westlaw Topic No. 209.

Annotations

1. Application

"As the test we announce today requires clear intent in the plain language or structure of a statute to override an exemption, we do not fill any omissions or interpret ambiguous language under *Diyin Nohookáá Dine' é Bi Beehaaz'áanii* (Navajo Common Law). Our general rules of statutory construction changed with Council passage of Resolution Nos. CN–69–02 (November 13, 2002) (Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Diné) and CO–72–03 (October 24, 2003) (Amending Title VII of the Code), which mandate that we interpret statutes consistent with Navajo Common Law. We have applied this mandate when the plain language of a statute does not cover a particular situation or is ambiguous, but have applied the plain language directly when it applies and clearly requires a certain outcome." *Tso v. Navajo Hous-*

Note 1

ing Authority, No. SC–CV–10–02, slip op. at 5–6 (Nav. Sup. Ct. August 26, 2004).

"Resolutions CN–69–02 (recognizing the Fundamental Laws of the Diné) and CO–72–03 (adopting amendments to 7 N.N.C. § 204 choice of law provisions) expand the *Belone* rule beyond the initial pleading requirement for asserting the application of *Diné bi beenahaz'áanii* in our Courts. Resolution CN–69–02 instructs our judges and justices to take notice of *Diné bi beenahaz'áanii* in their decisions, when applicable. Thus, the failure to raise *Diné bi beenahaz'áanii* in the initial pleading will not lead to exclusion of the claim. Importantly, we do not suggest that common law be raised with reckless abandon wherever and whenever it strikes one's fancy, nor that it be raised in dilatory fashion. We suggest that whenever common law is raised, and whether it is raised *sua sponte* or by a party, the parties should be given ample time and opportunity to address the issue." *Judy v. White*, No. SC–CV–35–02, slip op. at 17 (Nav. Sup. Ct. August 2, 2004).

§ 205. Nahasdzáán dóó Yádiłhił Bits'ą́ądę́ę' Beehaz'áanii—Diné Natural Law

Diné Natural Law declares and teaches that:

A. The four sacred elements of life, air, light/fire, water and earth/pollen in all their forms must be respected, honored and protected for they sustain life; and

B. The six sacred mountains, Sisnaajini, Tsoodził, Dook'o'ooslííd, Dibé Nitsaa, Dził Na'oodiłii, Dził Ch'ool'í'í, and all the attendant mountains must be respected, honored and protected for they, as leaders, are the foundation of the Navajo Nation; and

C. All creation, from Mother Earth and Father Sky to the animals, those who live in water, those who fly and plant life have their own laws and have rights and freedoms to exist; and

D. The Diné have the sacred obligation and duty to respect, preserve and protect all that was provided for we were designated as the steward for these relatives through our use of the sacred gifts of language and thinking; and

E. Mother Earth and Father Sky is part of us as the Diné and the Diné is part of Mother Earth and Father Sky; The Diné must treat this sacred bond with love and respect without exerting dominance for we do not own our mother or father; and

F. The rights and freedoms of the people to the use of the sacred elements of life as mentioned above and to the use of land, natural resources, sacred sites and other living beings must be accomplished through the proper protocol of respect and offering and these practices must be protected and preserved for they are the foundation of our spiritual ceremonies and the Diné life way; and

G. It is the duty and responsibility of the Diné to protect and preserve the beauty of the natural world for future generations.

History

CN–69–02, November 1, 2002.

Library References

Indians ⚭6.2.

Westlaw Topic No. 209.

Annotations

1. Application

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"Resolutions CN–69–02 (recognizing the Fundamental Laws of the Diné) and CO–72–03 (adopting amendments to 7 N.N.C. § 204 choice of law provisions) expand the *Belone* rule beyond the initial pleading requirement for asserting the application of *Diné bi beenahaz'áanii* in our Courts. Resolution CN–69–02 instructs our judges and justices to take notice of *Diné bi beenahaz'áanii* in their decisions, when applicable. Thus, the failure to raise *Diné bi beenahaz'áanii* in the initial pleading will not lead to exclusion of the claim. Importantly, we do not suggest that common law be raised with reckless abandon wherever and whenever it strikes one's fancy, nor that it be raised in dilatory fashion. We suggest that whenever common law is raised, and whether it is raised *sua sponte* or by a party, the parties should be given ample time and opportunity to address the issue." *Judy v. White*, No. SC–CV–35–02, slip op. at 17 (Nav. Sup. Ct. August 2, 2004).

§ 206. Diyin Nohookáá Diné Bi Beehaz'áanii—Diné Common Law

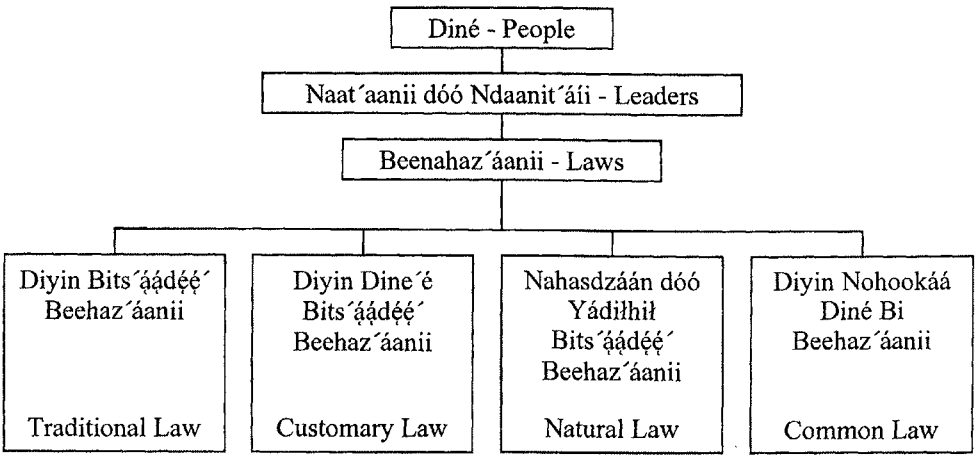
The Diné Common Law declares and teaches that:

A. The knowledge, wisdom, and practices of the people must be developed and exercised in harmony with the values and principles of the Diné Bi Beenahaz'áanii; and in turn, the written laws of the Navajo Nation must be developed and interpreted in harmony with Diné Common Law; and

B. The values and principles of Diné Common Law must be recognized, respected, honored and trusted as the motivational guidance for the people and their leaders in order to cope with the complexities of the changing world, the need to compete in business to make a living and the establishment and maintenance of decent standards of living; and

C. The values and principles of Diné Common Law must be used to harness and utilize the unlimited interwoven Diné knowledge, with our absorbed knowledge from other peoples. This knowledge is our tool in exercising and exhibiting self-assurance and self-reliance and in enjoying the beauty of happiness and harmony.

Diné Original Law Structure



History

CN-69-02, November 1, 2002.

Library References

Common Law ⇐2.1, 9.
Indians ⇐6.1.
Westlaw Topic Nos. 85, 209.

C.J.S. Common Law §§ 2 to 3, 5, 11 to 12, 22 to 24.

Annotations

1. Application

"As the test we announce today requires clear intent in the plain language or structure of a statute to override an exemption, we do not fill any omissions or interpret ambiguous language under *Diyin Nohookáá Dine' é Bi Beehaaz'áanii* (Navajo Common Law). Our general rules of statutory construction changed with Council passage of Resolution Nos. CN-69-02 (November 13, 2002) (Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Diné) and CO-72-03 (October 24, 2003) (Amending Title VII of the Code), which mandate that we interpret statutes consistent with Navajo Common Law. We have applied this mandate when the plain language of a statute does not cover a particular situation or is ambiguous, but have applied the plain language directly when it applies and clearly requires a certain outcome." *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 5-6 (Nav. Sup. Ct. August 26, 2004).

"Resolutions CN-69-02 (recognizing the Fundamental Laws of the Diné) and CO-72-03 (adopting amendments to 7 N.N.C. § 204 choice of law provisions) expand the *Belone* rule beyond the initial pleading requirement for asserting the application of *Diné bi beenahaz'áanii* in our Courts. Resolution CN-69-02 instructs our judges and justices to take notice of *Diné bi beenahaz'áanii* in their decisions, when applicable. Thus, the failure to raise *Diné bi beenahaz'áanii* in the initial pleading will not lead to exclusion of the claim. Importantly, we do not suggest that common law be raised with reckless abandon wherever and whenever it strikes one's fancy, nor that it be raised in dilatory fashion. We suggest that whenever common law is raised, and whether it is raised *sua sponte* or by a party, the parties should be given ample time and opportunity to address the issue." *Judy v. White*, No. SC-CV-35-02, slip op. at 17 (Nav. Sup. Ct. August 2, 2004).

Navajo Nation Law CLE

Section 6

Family Law Issues in Tribal Court

Guardianship for Adults

Emery McCabe, Tribal Court Advocate
Brenda Anderson, Tribal Court Advocate
DNA-Peoples Legal Services, Inc.

Undertaking Adult Guardianship Consideration

- June 12, 2014 the Navajo Nation passed the Adult Guardianship Act
- The purpose was to include adults with disabilities to receive court representation at every step in the guardianship process.
- Recognition by the Navajo Nation that adults with disabilities require laws to protect and safeguard very significant personal rights that they possess.
- A Guardianship over an Adult with disabilities should be the last resort and alternatives should be considered first.

Some Alternatives to Adult Guardianship
Durable Power of Attorney

- A person can appoint someone to manage finances or personal care decisions. This should be done before the onset of any mental incapacity.
- A person can execute a durable power of attorney. The person giving the power of attorney is known as the *principal* and the person appointed as the legal authority to act for the person is the *agent* or *attorney-in-fact*.
- The *durable* language indicate that the power will continue even if the principal becomes disabled or incapacitated in the future.

Alternatives……continued
Durable Power of Attorney

- Language used in the POA determines the agent or attorney-in-fact power. The POA can give the agent power over healthcare, financial affairs and decisions involving property and listed assets.
- Durable POA can take effect immediately (usually the case on Navajo Nation) or only when some future event takes place; usually the incapacity of the principal.
- Advantage: Don't require a court order, inexpensive, and revoked by the principal in writing without a court order at any time.

Alternatives……continued
Durable Power of Attorney

- On the Navajo Nation – best to check with Banks, credit unions or any financial institution and check if they have their own forms. Sometimes they will only recognize and accept their own forms.
- POA's can be abused and money and assets of the principal mismanaged. There is no protective statutory oversight on the Navajo Nation regulating the use of Power of Attorney. POA's that are mismanaged and abused, the losses are always impossible or difficult to recover.
- Also no regulation on who can act as an agent or attorney-in-fact.

Alternatives……continued
Power of Attorney for Health Care Decisions

- The Durable POA can include language for health care decisions. Most of the time they don't. Usually the POA's are separate, one for health care and the durable usually includes financial and asset language.
- Advance directives (living will). Instructs the physician to withhold or withdraw life-sustaining procedures in the event of a incurable or irreversible condition that will result in death.
- All POA's should be notarized, interpreted (Navajo Speakers) and witnesses to the document.

Other Alternatives
Representative Payee

- Social Security Administration
- Veterans Administration
- Department of Defense
- Railroad Retirement Board
- Office of Personal Management
- A guardianship is not needed to manage these funds. Representative payee's must use funds on behalf of the beneficiary.

Adult Guardianship
Court Process – Navajo Nation

- Petition for Guardianship
- Notice to Respondent with Petition attached
- Motion and Order for Appointment of Legal Counsel
- Motion and Order for Medical Evaluation (if necessary, otherwise use updated medical information attached to petition, if sufficient – you decide as the litigator – judgment call)
- Summons to relatives (litigator makes the call in consult with client)

Adult Guardianship Court Process…...continued

- Motion and Order for Temporary Guardianship.
- Motion and Order for Special Service of Process: Process server; special appointee; certified mail; affadavit
- Social Service and Guardian Ad Litem not required. Court has the discretion to appoint a GAL or order a Home Study. Not required by the Act.

Name: _____, Petitioner
Address: _____
_____
Phone: _____
Petitioner, Pro Se

IN THE FAMILY COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF _____, NAVAJO NATION (____)

IN THE MATTER OF:) Case No: _____
)
____, C# ____,)
Respondent,) **PETITION FOR GUARDIANSHIP**
And concerning,) **OF AN ADULT**
)
____, C# ____,)
Petitioner,)
_____)

I am the Petitioner in this case and I am requesting to be appointed the legal guardian of _____. This Petition will explain the facts and reasons for my request.

1. I am the Petitioner. My name is _____, C#_____ and I live in the community of _____ _____. My physical address is: _____ and my mailing address is _____.

2. The person I am seeking guardianship of is named: _____, his/her Census No. is: _____, his/her date of birth is: _____. His/her physical address is _____ and mailing address is __ _____.

3. The Respondent is related to me as: _____.

4. If my appointment as Guardian is authorized, the Respondent will live at: _____ _____.

5. If this Petition for guardianship is granted, the following people will live with the Respondent: _____ _____.

6. Pursuant to 9 N.N.C. §831, I must list names and mailing addresses for 1) Respondent's spouse but if Respondent does not have a spouse I must list an adult with whom the Respondent has resided with for at least six months prior to filing this Petition; 2) Respondent's adult children but if there are no adult children then I must list Respondent's parents or adult siblings; 3) if Respondent has no adult children, parents, or adult siblings then I must list at least one but no more than three of the adults nearest in kinship. Required names, relations, and addresses required:

Name	Relation to Respondent	Mailing Address
_____	_____	_____
_____	_____	_____
_____	_____	_____

7. The following people have been named as the Respondent's legal guardian or court appointed representative in the past:

Name	Mailing Address

8. The Respondent requests that the following individual be named as his/her guardian:

Name	Relation to Respondent	Mailing Address

9. Reason why the guardianship is necessary, including a description of Respondent's incapacity if alleged: _____

10. How long has the Respondent been disabled or incapacitated? _____

11. Is the Petitioner seeking partial or full guardianship? _____

12. Why is partial or full guardianship needed? _____

13. Please provide a list of the Respondent's property and estimated value, including insurance pension, income or receipts (attach Exhibits if necessary): _____

14. Exhibits: Attach any documents to this Petition that you think will help to explain the information in this Petition, and which may help the judge understand this situation better. For example: Respondent's medical statements, statements about the Respondent's condition, family member agreements, consent to guardianship, the Respondent's birth certificate, Certificate of Indian Blood, etc.

15. If the Respondent was born disabled, the Petitioner must attach a medical statement declaring the Respondent's medical condition. If the Respondent became disabled later in life, the Petitioner must attach a recent medical statement declaring the Respondent's medical condition. If the Respondent became disabled later in life and the Petitioner does not have a recent medical statement then the Petitioner must file the Motion for a Professional Evaluation.

Exhibit A: ____

Exhibit B: ____

Exhibit C: ____

Exhibit D: ____

Exhibit E: ____

16. Other: (anything else you think the judge needs to know or consider about the guardianship request): _____

_____

_____

17. If the Respondent is not already represented by legal counsel or a legal advocate, the Court must appoint a legal advocate. 9 N.N.C. §832(A). When a legal advocate is appointed by the Court, the Respondent or the Petitioner may be ordered to pay compensation for the Respondent's legal representation if they have sufficient resources. 9 N.N.C. §832(D). As the Petitioner you must fill out an Application for Legal Counsel and Indigency Assessment for the Respondent and attach it to this Petition.

I have reviewed the petition that I filled out and I declare that everything I include in it is true. I understand that if the Court finds out that any part of this petition was filed with the intent to harass another party, or that I intentionally wrote something that is not true, I will be held legally responsible for any damages or consequences that may result.

Respectfully submitted this _____ day of _____, 20__.

_____

Petitioner (print)

_____

Petitioner (signature)

HEALTH CARE SURROGATE AFFIDAVIT

This Affidavit is created in reference to Section 36-3231 of the Arizona Revised Statutes, Surrogate Decision Makers.

1. Name of patient: _____.
2. Patient's date of birth: _____.
3. My name: _____.
4. My date of birth: _____.
5. My Arizona driver's license number or other identification card number:
   _____.
6. My home address: _____.
7. My telephone number: _____.
8. I am the patient's: (check one)

   [ ] spouse; [ ] child; [ ] parent; [ ] domestic partner; [ ] brother or sister; or

   [ ] close friend (by checking the box for 'close friend,' I certify that I have special care and concern for the patient, that I am familiar with the patient's health care views and desires, and that I am willing and able to be involved with the patient's health care and to act in the patient's best interest.)
9. I am over eighteen (18) years of age and am competent to testify to the matters set forth in this Affidavit. The Affidavit is made on the basis of my personal knowledge.

WARNING: Do not sign this form if any of the statements above are incorrect.

10. I declare under penalty of perjury under the laws of the State of Arizona that the foregoing is true and correct.

_____
Signature of Surrogate

ACKNOWLEDGMENT

STATE OFARIZONA)
) SS:
COUNTY OF _____)

The foregoing Health Care Surrogate Affidavit was subscribed, sworn to and acknowledged before me by _____, this _____day of _____, 20____

_____
Notary Public

My Commission Expires: _____

Name: _____, Petitioner/Movant
Address: _____
_____
Phone: _____
Petitioner, Pro Se

IN THE FAMILY COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF _____, NAVAJO NATION (_____)

IN THE MATTER OF:)	Case No: _____
)	
_____, C# _____,)	
Respondent,)	**MOTION FOR IMMEDIATE TEMPORARY GUARDIANSHIP OF AN ADULT**
And concerning,)	
)	
_____, C# _____,)	
Petitioner,)	
_____)	

I am the Petitioner in this case and I have filed for permanent guardianship over the Respondent named in the Petition.

[ ] I am requesting [ ] I am not requesting that the Court grant me immediate temporary guardianship of: _____, DOB: _____, C#: _____, pending the outcome of the permanent petition for guardianship and not to exceed (6) months.

1. The Court has jurisdiction over the parties and subject matter pursuant to 7 N.N.C. § 253.
2. I am an enrolled member of the Navajo Nation and I reside at: _____.
3. The Respondent is _____ and he/she lives in the community of:
   _____.
4. The Respondent is related to me as: _____.
5. I have been taking care of the Respondent since: _____.
6. The reason I am requesting this immediate temporary guardianship is because:
   _____
   _____
   _____.
7. If this request for temporary guardianship is not granted, I am concerned the Respondent may: _____
   _____
   _____.

8. The Petitioner needs the order for temporary guardianship to authorize the appropriate medical care and to oversee the Respondent's financial matters until the final hearing on the Petition.
9. Other things the Court should consider: _____

_____

_____

_____

I have reviewed this motion that I filled out and I declare that everything I included in it is true. I understand that the Court will consider this request and may set a preliminary hearing and will mail me important documents about this case. As Petitioner, it is my responsibility to appear for the hearings and to completely understand what the Court is requiring of me. I understand that if the Court finds out that any part of this request was filled out with the intent to harass another party or that I intentionally placed false information in this motion, I will be held legally responsible for any damages or consequences that may result.

Respectfully submitted this _____ day of _____, 20___.

_____

Petitioner (print)

_____

Petitioner (signature)

I hereby certify a copy of this Motion was

☐ SERVED ALONG WITH A COPY OF THE PETITION

☐ MAILED

☐ HAND DELIVERED

to _____

_____

_____

_____

on the _____ day of _____, 20___.

By: _____

Petitioner

Name: _____, Petitioner/Movant
Address: _____
_____
Phone: _____
Petitioner, Pro Se

IN THE FAMILY COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF _____, NAVAJO NATION (_____)

IN THE MATTER OF:)	Case No: _____
)	
_____, C# _____,)	
Respondent,)	**MOTION FOR PROFESSIONAL EVALUATION**
And concerning,)	
)	
_____, C# _____,)	
Petitioner,)	
_____)	

I am the Petitioner in this case and I have filed for permanent guardianship over the Respondent named in the Petition. I am requesting that the Court issue an Order for a Professional Evaluation of: _____, DOB: _____, C#: _____:

1. The Court has jurisdiction over the parties and subject matter pursuant to 7 N.N.C. § 253.
2. I am an enrolled member of the Navajo Nation and I reside at: _____
_____.
3. The Respondent is related to me as: _____.
4. I filed a Petition for Guardianship of the Respondent because he/she is incapacitated.
5. Petitioner requests that a professional evaluation be completed to include a description of the nature, type, and extent of the Respondent's specific cognitive and functional limitations. A description of the mental, emotional and physical condition of the Respondent and his/her ability to function in the ordinary activities of daily life and, if appropriate, the Respondent's educational condition, adaptive behavior and social skills. A professional evaluation shall also address a prognosis for improvement and a recommendation as to the appropriate treatment

or habilitation plan.

6. [ ] The Respondent and I recommend that _____ completes the professional evaluation;

   [ ] The Respondent recommends that _____ completes the professional evaluation;

   [ ] The Petitioner recommends that _____ completes the professional evaluation;

WHEREFORE, the Petitioner prays this Court issue an Order for a Professional Evaluation.

Respectfully submitted this _____ day of _____, 20___.

_____
Petitioner (print)

_____
Petitioner (signature)

I hereby certify a copy of this Motion was
☐ SERVED ALONG WITH A COPY OF THE PETITION
☐ MAILED
☐ HAND DELIVERED
to _____
_____
_____
_____
on the _____ day of _____, 20___.

By: _____
Petitioner

IN THE FAMILY COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF _____, NAVAJO NATION (_____)

IN THE MATTER OF:)	Case No: _____
_____, C# _____,)	
Respondent,)	**APPLICATION FOR LEGAL COUNSEL**
And concerning,)	**AND INDIGENCY ASSESSMENT**
_____, C# _____,)	
Petitioner,)	
_____)	

As the Petitioner in this case, you must answer the following questions thoroughly so that the Court can decide whether the Respondent can help pay for his or her legal counsel who will be appointed to represent the Respondent.

I. RESPONDENT'S INFORMATION

Name: _____ Census No.: _____

Date of Birth: _____ Telephone: _____

Mailing Address: Physical Address:

_____ _____

_____ _____

Email: _____

II. PRESUMPTIVE ELIGIBILITY: PUBLIC ASSISTANCE

☐ The Respondent currently receives the following type of monthly public assistance provided by:

- ☐ SSI $_____ Social Security No.: _____
- ☐ Medicaid
- ☐ Social Security Retirement or Disability (OASDI) $_____
- ☐ USDA Commodity Foods: $_____
- ☐ TANF: $_____ ☐ Low-income Home Energy Assistance
- ☐ SNAP (Food Stamps) $_____ ☐ WIC $_____
- ☐ General Assistance $_____ ☐ National School Lunch Program

For each program you have checked, attach a copy of current award letter.

☐ The Respondent DOES NOT receive public assistance.

III. PRESUMPTIVE ELIGIBILITY: FEDERAL POVERTY GUIDELINES

Respondent's Household status: ☐ Lives alone; Lives with: ☐ Spouse ☐ Parents

☐ Minor children (Number:_____) ☐ Adult children (Number:_____)

Marital Status: ☐ Single ☐ Married ☐ Separated ☐ Cohabitating/common law married

How many other people does the Respondent support? _____ adults; _____ children

Is the Respondent employed/self-employed? ☐ Yes ☐ No

Is the Respondent's spouse employed/self-employed? ☐ Yes ☐ No

Income Source	**Respondent**	**Spouse/Household**	**Office Use Only**
Gross Monthly Pay/Salary	$	$	
Unemployment Benefits	$	$	
Scholarship	$	$	
Alimony	$	$	
Money from Family	$	$	
Cash earnings (e.g. craft sales, causal labor)	$	$	
Other Income: (Please specify)	$	$	
TOTAL MONTHLY INCOME:	$	$	

IV. NON-PRESUMPTIVE ELIGIBILITY

A. ASSET

Asset	Respondent	Spouse/Household	Office Use Only
Cash on Hand	**$**	**$**	
Checking Account	**$**	**$**	
Savings Account	**$**	**$**	
Tax Refunds	**$**	**$**	
Motor Vehicles (auto, trailers, boats, etc.) (first motor vehicle is exempt)	**$**	**$**	
Livestock (subsistence is exempt)	**$**	**$**	
Real Estate (residence is exempt)	**$**	**$**	
Building(s)	**$**	**$**	
Other (trade tools, medical equipment, religious paraphernalia are exempt):	**$**	**$**	
TOTAL ASSETS:	**$**	**$**	

B. MONTHLY EXPENSES

Expense	Respondent	Spouse/Household	Office Use Only
Food	**$**	**$**	
Rent or Mortgage for Housing	**$**	**$**	
Utilities	**$**	**$**	
Child Support/Alimony (court-ordered)	**$**	**$**	
Child Care Expenses	**$**	**$**	
Medical Expenses (out-of-pocket)	**$**	**$**	
Nursing Home Expenses	**$**	**$**	
Employment or Medical Transportation Expenses	**$**	**$**	
Other (please specify):	**$**	**$**	
TOTAL MONTHLY EXPENSES:	**$**	**$**	

OATH UNDER PENALTY OF PERJURY

I, _____, give my oath that I have truthfully given the information which appears in this statement. I have not knowingly concealed, or in any way misrepresented my financial resources.

I am aware that if I have made any false statement, misrepresentation, or concealment, I can be held in contempt of court and/or prosecuted for perjury and other offenses. I understand that the penalty for perjury is jail for up to one year, a fine of up to $5,000, or both. I also understand that I may be charged for the Respondent's Court appointed legal counsel.

I hereby authorize the release of all information relating to my assets and income, including public assistance, to the Navajo Nation Judicial Branch for verification of information on this form.

I make these representations under **PENALTY OF PER.JURY.**

_____ _____

Date Petitioner

IN THE FAMILY COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF _____, NAVAJO NATION (_____)

IN THE MATTER OF: _____, C# _____, Respondent, And concerning, _____, C# _____, Petitioner, _____	Case No: _____ **ORDER FOR A PROFESSIONAL EVALUATION OF RESPONDENT**

Having reviewed the Petition, the record, and being otherwise informed in the premises, the Court finds:

1. The Court has jurisdiction over this cause of action pursuant to 7 N.N.C. § 253(B), 9 N.N.C. § 801 and 9 N.N.C. § 814.

2. A Petition for the Appointment of a Guardian of an Adult was filed with the Court alleging the Respondent is incapacitated[1] and requires the appointment of a legal guardian.

3. A motion for a professional evaluation was made by the [ ] Petitioner; [ ] Respondent; [ ] Court, pursuant to 9 N.N.C. § 833(A).

4. The evaluation shall be completed by _____, as [ ] agreed by the Petitioner and Respondent; or [ ] as recommended by the Petitioner.

IT IS THEREFORE ORDERED that the Motion for a Professional Evaluation is granted.

IT IS FURTHER OERED that the Evaluation Report shall include, but not be limited to:

a. A description of the nature, type, and extent of the Respondent's specific cognitive and functional limitations.
b. A description of the mental, emotional and physical condition of the Respondent and his/her ability to function in the ordinary activities of daily life and, if appropriate, the Respondent's educational condition, adaptive behavior and social skills.
c. Address a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan.
d. The date of any assessment or examination upon which the report is based.

IT IS ORDERED that the Professional Evaluation Report shall be filed with the Court fifteen days before the final hearing on the Petition.

SO ORDERED this _____ day of _____, 20___.

_____
JUDGE, Family Court of the Navajo Nation

[1] For the purposes of this action, "Incapacity" as defined at 9 N.N.C. § 812(I), means the extent which the current functional ability of an adult individual to sufficiently understand, make, communicate, and act, *Diné k'ehgo nitsáhákees*, is interrupted as a result of mental illness, cognitive impairment, physical illness, disability or chronic use of drugs (legal or illegal) or alcohol and to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate supports and accommodations.

IN THE FAMILY COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF _____, NAVAJO NATION (_____)

IN THE MATTER OF: _____, C# _____, Respondent, And concerning, _____, C# _____, Petitioner, _____	Case No: _____ **ORDER APPOINTING LEGAL COUNSEL FOR RESPONDENT**

This matter came before this Court on a hearing on a Petition for Appointment of a Guardian of an Adult and having considered the law and being otherwise informed in the premises, this Court finds:

1. The Court has jurisdiction over this cause of action pursuant to 7 N.N.C. § 253(B), 9 N.N.C. § 801 and 9 N.N.C. § 814.

2. A Petition for Appointment of a Guardian of an Adult was filed with the Court alleging the Respondent requires the appointment of a legal guardian.

3. Pursuant to 9 N.N.C. § 832(A), Appointment of Counsel, if prior to a hearing on a petition alleging the Respondent is incapacitated or if at any point in the court of a proceeding, the Respondent is not represented by counsel, the Court must appoint a legal advocate as provided in this section.

4. In the Petition for Adult Guardianship, the Petitioner has stated:

[ ] The Petitioner can contribute $_____ to compensate the Court appointed legal Counsel for the Respondent;

[ ] The Petitioner does not have adequate financial resources to pay any portion of the Respondent's Court appointed legal counsel;

[ ] The Petitioner only has enough financial resources to pay for their own legal counsel fees.

5. The Court will determine whether or not the Respondent is able to financially contribute to their own defense at a later time.

IT IS ORDERED that the:

[ ] Petitioner shall pay for the court appointed legal counsel;

[ ] Petitioner shall contribute $_____ toward the payment of the court appointed legal Counsel;

[ ] Court appointed legal counsel for the Respondent shall be on a pro bono basis or until further Order of the Court.

Based on the foregoing, **IT IS THEREFORE ORDERED** that _____ shall be appointed as a legal counsel for _____.

IT IS ORDERED that the Clerk of the Court shall immediately provide appointed Counsel with copies of all documents and pleadings on file with the Court.

SO ORDERED this _____ day of _____, 20___.

_____
JUDGE, Family Court of the Navajo Nation

IN THE FAMILY COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF _____, NAVAJO NATION (_____)

IN THE MATTER OF: _____, C# _____, Respondent, And concerning, _____, C# _____, Petitioner, _____	Case No: _____ **ORDER APPOINTING GUARDIAN *AD LITEM***

This matter came before this Court on a hearing on a Petition for Appointment of a Guardian of an Adult and having considered the law and being otherwise informed in the premises, this Court finds:

1. The Court has jurisdiction over this cause of action pursuant to 7 N.N.C. § 253(B), 9 N.N.C. § 801 and 9 N.N.C. § 814.

2. A Petition for Appointment of a Guardian of an Adult was filed with the Court alleging the Respondent requires the appointment of a legal guardian.

3. When the Court recognizes a conflict may arise or exist between the ethical obligations of the Respondent's Court appointed legal advocate and with what is in the best interest of the Respondent the appointment of a Guardian Ad Litem is appropriate. A Guardian Ad Litem shall provide the Court with an objective view of the case and make any necessary recommendations in the best interest of the Respondent.

4. Pursuant to 9 N.N.C. § 832(B), Appointment of Guardian *Ad Litem*, at any time subsequent to the filing of the petition the Court may appoint a Guardian Ad Litem to assist the Court in making a determination on any issues regarding the petition.

Based on the foregoing, **IT IS THEREFORE ORDERED** that _____ shall be appointed as a guardian ad litem for _____.

IT IS ORDERED that the Clerk of the Court shall immediately provide appointed Counsel with copies of all documents and pleadings on file with the Court.

SO ORDERED this _____ day of _____, 20___.

_____
JUDGE, Family Court of the Navajo Nation

ADVANCE MEDICAL DIRECTIVE

I, _____, hereby execute the following document to reflect my wishes should I be unable to make or communicate decisions regarding my health care. The fact that I have left blanks or crossed out some sections does not affect the validity of this Directive in any way. I intend that all completed sections be followed.

(1) END-OF-LIFE DECISIONS: If I am unable to make or communicate decisions regarding my health care, and IF (**initial** if applicable:) [ ] I have an incurable or irreversible condition that will result in my death within a relatively short time, OR [ ] I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, OR [ ] the likely risks and burdens of treatment would outweigh the expected benefits, THEN I direct that my health-care providers and others involved in my care provide, withhold or withdraw treatment in accordance with the choice I have **initialed** below in one of the following three boxes:

[ ] I CHOOSE NOT to prolong life. I do not want my life to be prolonged.

[ ] I CHOOSE to prolong life. I want my life to be prolonged as long as possible within the limits of generally accepted health-care standards.

[ ] I CHOOSE to let my agent decide. My agent under my power of attorney for health care may make life-sustaining treatment decisions for me.

(2) ARTIFICIAL NUTRITION AND HYDRATION: If I have chosen above NOT to prolong life, I also specify by marking my **initials** below:

[ ] I DO NOT want artificial nutrition OR
[ ] I DO want artificial nutrition.

[ ] I DO NOT want artificial hydration unless required for my comfort OR
[ ] I DO want artificial hydration.

(3) RELIEF FROM PAIN: Regardless of the choices I have made in this form and except as I state in the following space, I direct that the best medical care possible to keep me clean, comfortable and free of pain or discomfort be provided at all times so that my dignity is maintained, even if this care hastens my death:

(4) ANATOMICAL GIFT DESIGNATION: Upon my death I specify as **initialed** below whether I choose to make an anatomical gift of all or some of my organs or tissue:

[ ] I CHOOSE to make an anatomical gift of all of my organs or tissue to be determined by medical suitability at the time of death, and artificial support may be maintained long enough for organs to be removed. [Specify here, if you have specific desires as to recipient or use:]

[ ] I CHOOSE to make a partial anatomical gift of some of my organs and tissue as specified below, and artificial support may be maintained long enough for organs to be removed. [Specify here:]

[ ] I REFUSE to make an anatomical gift of any of my organs or tissue.

[ ] I CHOOSE to let my agent decide.

(5) AUTOPSY: Upon my death, if permitted by law, I specify as **initialed** below whether or not I consent to an autopsy.

[ ] I CONSENT to an autopsy.

[ ] I DO NOT CONSENT to an autopsy.

[ ] I CHOOSE to let my agent decide.

(6) FUNERAL AND BURIAL DISPOSITION: Upon my death, I specify as initialed below my wishes in regard to my funeral and burial disposition.

[ ] I WISH TO BE BURIED.

I would like to be buried in _____.

[ ] I WISH TO BE CREMATED.

I would like my ashes to be _____.

[ ] I CHOOSE to let my agent decide.

(7) OTHER WISHES: I direct that: (Add additional sheets if needed.)

(8) PRIMARY PHYSICIAN: I designate the following physician as my primary physician.

_____
(name of physician)

_____
(address) (city) (state) (zip code)

_____
(phone)

If the physician I have designated above is not willing, able or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

_____
(name of physician)

_____
(address) (city) (state) (zip code)

_____
(phone)

(9) EFFECT OF COPY: A copy of this form has the same effect as the original.

(10) REVOCATION: I understand that I may revoke this Advance Health Care Directive at any time. If I revoke it, I should promptly notify my supervising health-care provider, agent (if applicable), and any health-care institution where I am receiving care and any others to whom I have given copies. I understand that I may revoke this form either by a signed writing or by personally informing the supervising health-care provider.

(11) NOTARIZED SIGNATURE AND OPTIONAL WITNESSES: My signature must be notarized. Witnesses are not required. Neither the notary nor the witness may be (a) designated as an agent in this document or (b) directly involved in the provision of health care to me at the time of execution. If witnesses are used, there must be two.

_____ _____

(date) (signature)

_____

(print name)

_____

(address) (city) (state) (zip code)

_____

(home telephone) (work telephone)

STATE OF _____)
) ss.
COUNTY OF _____)

Subscribed and sworn to before me this _____ day of_____, _____.

_____

Notary Public

My Commission Expires:

_____

Witnesses (optional): We affirm that the above-signed notary was present when this document was executed and that the individual executing this document appeared to be of sound mind and free from duress at the time of signing.

_____	_____
(date)	(date)
_____	_____
(signature)	(signature)
_____	_____
(print name)	(print name)
_____	_____
(address)	(address)
_____	_____
(city, state, and zip code)	(city, state, and zip code)

POWER OF ATTORNEY FOR HEALTH CARE

(1) DESIGNATION OF AGENT: I, _____, designate the following individual as my agent to make health care decisions for me if I am unable to make or communicate health care decisions:

_____

(name of individual you choose as agent)

_____

(address) (city) (state) (zip code)

_____

(home telephone) (work telephone)

If I revoke my agent's authority or if my agent is not willing, able or reasonably available to make a health care decision for me, I designate as my first alternate agent (optional):

_____

(name of individual you choose as first alternative agent)

_____

(address) (city) (state) (zip code)

_____

(home telephone) (work telephone)

If I revoke the authority of my agent and first alternate agent or if neither is willing, able or reasonably available to make a health care decision for me, I designate as my second alternate agent (optional):

_____

(name of individual you choose as second alternative agent)

_____

(address) (city) (state) (zip code)

_____

(home telephone) (work telephone)

(2) AGENT'S AUTHORITY: While I am unable to make or communicate health care decisions, my agent is authorized to obtain and review medical records, reports and information about me and to make all health care decisions for me, including decisions to provide, withhold or withdraw artificial nutrition, hydration and all other forms of health care to keep me alive, except as noted herein. My agent's authority is limited as follows:

(a) (Check if applicable:) I have [ ] / I have not [ ] completed and attached an advance medical directive for purposes of providing specific direction to my agent in situations that may occur during any period when I am unable to make or communicate health care decisions or after my death. My agent is directed to implement those choices I have indicated in the advance medical directive.

(b) Other limitations on my agent's authority:

_____

_____

_____

(3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's authority becomes effective (**initial** if applicable):

[ ] when my primary physician and one other qualified health-care professional determine that I am unable to make my own health care decisions.

[ ] immediately.

(4) AGENT'S OBLIGATION: My agent shall make health-care decisions for me in accordance with my wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health-care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

(5) NOMINATION OF GUARDIAN: If a guardian of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able or reasonably available to act as guardian, I nominate the alternate agents whom I have named, in the order designated.

(6) EFFECT OF COPY: A copy of this form has the same effect as the original.

(7) REVOCATION: This Power of Attorney for Health Care is revocable by me at any time. If I revoke it, I should promptly notify my supervising health-care provider, my agent, and any health-care institution where I am receiving care and any others to whom I have given copies. I understand that I may revoke this form either by a signed writing or by personally informing the supervising health-care provider.

(8) NOTARIZED SIGNATURE AND OPTIONAL WITNESSES: My signature must be notarized. Witnesses are not required. Neither the notary nor the witness may be (a) designated as an agent in this document or (b) directly involved in the provision of health care to me at the time of execution. If witnesses are used, there must be two.

_____ _____

(date) (signature)

_____

(print name)

_____

(address) (city) (state) (zip code)

_____

(home telephone) (work telephone)

STATE OF _____)
) ss.
COUNTY OF _____)

Subscribed and sworn to before me this _____ day of_____, _____.

_____

Notary Public

My Commission Expires:

_____

Witnesses (optional): We affirm that the above-signed notary was present when this document was executed and that the individual executing this document appeared to be of sound mind and free from duress at the time of signing.

_____	_____
(date)	(date)
_____	_____
(signature)	(signature)
_____	_____
(print name)	(print name)
_____	_____
(address)	(address)
_____	_____
(city, state, and zip code)	(city, state, and zip code)

CMY-30-14

RESOLUTION OF THE
NAVAJO NATION COUNCIL

22nd NAVAJO NATION COUNCIL -- Fourth Year, 2014

AN ACTION

RELATING TO HEALTH, EDUCATION AND HUMAN SERVICES, NAABIK'ÍYÁTI' AND THE NAVAJO NATION COUNCIL; APPROVING AND ENACTING THE *NAVAJO ADULT GUARDIANSHIP ACT OF 2014* AND AMENDING 9 N.N.C. § 801 *ET SEQ*.

BE IT ENACTED:

Section One. Enacting the *Navajo Adult Guardianship Act of 2014*

The Navajo Nation hereby approves and enacts the *Navajo Adult Guardianship Act of 2014*, and accordingly amends 9 N.N.C. § 801 *et seq*. as follows:

Chapter 9. Guardians <u>of Minors</u>

§ 801. Petition for appointment

Any person may petition to the Courts of the Navajo Nation for the appointment of a guardian of the person or estate of any minor ~~or insane Navajo or other Navajo mentally incompetent to manage his property~~.

§ 802. Investigation of petition

The petition for the appointment of a guardian must be referred by the Court to a Navajo Service social worker for investigation, study and report back to the Court.

§ 803. Appointment

If, after a hearing upon a petition for the appointment of a guardian, it appears to the Court that the ~~person~~ <u>minor</u> is incapable of taking care of himself ~~and managing his property~~, the Court must appoint a guardian of his/her person and estate, a copy of which must be filed at the Agency.

§ 804. Responsibility

The guardian appointed by the Court has the care and custody of the person of his/her ward, and the care and management of his/her estate until such guardian is legally discharged.

§ 805. Faithful execution of duties; bond

The guardian must meet all requirements as may be described by the court for the faithful execution of his/her duties, including furnishing bond, if deemed necessary by the court.

Navajo Adult Guardianship Act of 2014

Subchapter 1. General Provisions

§ 810. Short Title

This Act must be known as the *Navajo Adult Guardianship Act of 2014*.

§ 811. Purpose and Findings

A. ~~There is a high regard for individual liberty on the Navajo Nation, as reflected in the expression, "*T'aabi boholniih*" roughly translated as "It is up to the individual." This *bitsé siléí* requires that i~~Individuals with disabilities be allowed a maximum degree of independence and be included as much as possible in decision-making about important aspects of their life, such as where they will live, their health care or their finances, and who may speak or act on their behalf.

B. Due to a disability or illness, an individual's ability to think and plan, *nitsáhakees, nahat'á*, may become interrupted and the individual may need assistance in daily activities and decision making. If an individual's thought process, *Diné k'éhgo nitsáhákees*, is interrupted and they need help, a balance must be found between providing assistance and respecting the individual's autonomy. It must not be forgotten that in Diné teachings, a human being is more than their limitation. As human beings, individuals with disabilities have hopes and dreams to live a life of fulfillment into old age. ~~*sa'ah naagháí bik'eh hózhoón niidlí.*~~

C. Diné place ~~a~~ great emphasis on the responsibilities to one another under *k'é*, and the importance of meeting those responsibilities. The fulfillment of *k'é* provides an

opportunity for a blessing of self-awareness and compassion and requires preparation in the *Hózhoji* consistent with the commitment and fulfillment of a sacred duty.

§ 812. Definitions

The following definitions are applicable to this subchapter:

A. "Adult" means a person or individual over the age of eighteen (18) years old.

B. "Caregiver" means:

1. A person who is required by Navajo statutory or common law to provide care, services or resources; or

2. A person who has undertaken to provide care, services or resources.

C. "Court" means the Courts of the Navajo Nation.

D. "Court Appointed Representative" means a person who is selected by an adult individual and appointed by the Court to assist the individual or speak or act on his/her behalf without any determination of incapacity necessary if other entities question the individual's capacity.

~~E. *Diné k'éhgo nitsáhákees* means the Diné thought process, which is the circle of *nitsáhakees* (thinking), *nahat'á* (planning), *iiná* (doing) and *sihasin* (the result) and part of the Navajo Concept of Holistic Wellness, *sa'ah naaghéí bik'eh hózhoón niidlí.*~~

~~F.~~ E. "Evaluation" means a professional assessment of an individual seeking a court appointed representative or for whom a guardianship is sought, consisting of the following:

1. The individual's ability to receive and evaluate information effectively or communicate decisions, including consideration of necessary accommodations and supports;

2. The impact of any impairment of these skills on the capacity of the individual to meet the essential requirements for his/her physical health or safety, or to manage his/her financial resources; and

3. The services necessary to provide for the individual;

~~G.~~ F. "Family" includes parents, spouse, children, grandchildren, grandparents, in-laws, siblings, aunts, uncles, nieces, nephews, first, second, and third cousins, or as defined by Navajo custom.

~~H.~~ G. "Good Faith" means a honest belief or purpose and the lack of intent to hurt, injure, exploit or defraud.

~~I.~~ H. "Guardian" means a person appointed by the Court having the duty and authority to make decisions on the care and control of an incapacitated person or his/her property or assets and ensure that the person is not abused or neglected. The term includes a limited, emergency, and temporary substitute guardian but not a guardian *ad litem*. Any person being considered as a guardian is subject to a background check. Those convicted of felony neglect, abuse, sexual crimes, financial exploitation, or drug or alcohol-related crimes must not be appointed. ~~Any person who has been convicted of a felony must not be appointed as a guardian for any incapacitated or partially incapacitated person regardless of any preference or priority.~~

~~J.~~ I. "Incapacity" means the extent which the current functional ability of an adult individual to sufficiently understand, make, communicate, and act, *Diné k'éhgo* nitsáhákees, is interrupted as a result of mental illness, cognitive impairment, physical illness, disability or chronic use of drugs (legal or illegal) or alcohol. Incapacity may vary in degree and duration or as determined by the Court.

~~K.~~ J. "Incapacitated Person" means an adult individual whom the Court has determined is unable to sufficiently understand, make, communicate and act on decisions, ~~*Diné k'éhgo nitsáhákees,*~~ as a result of mental illness, physical illness, disability or chronic use of drugs (legal or illegal) or alcohol and to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate supports and accommodations.

~~L.~~ K. "Institution" means any facility or setting in which paid caregivers serve more than three (3) paying clients.

~~M.~~ L. "Least Restrictive Alternative" is that environment that is most like the incapacitated person's home setting and that is capable of supporting the individual's physical, mental and emotional health.

~~N.~~ M. "Legal Advocate" means a member of the Navajo Nation Bar Association or other individual authorized to practice before the Navajo Courts.

~~O.~~ N. "Legal Representative" includes a court appointed representative, representative payee or a guardian acting for a respondent in the Navajo Nation or elsewhere, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, and an agent designated under a power of attorney, whether for health care or property, in which the respondent is identified as the principal.

~~P.~~ O. "Letters" includes letters of court appointed representative and guardianship.

~~Q.~~ P. "Parent" includes a biological or adoptive parent, or where legal paternity has been established and whose parental rights have not been terminated.

~~R.~~ Q. "Partially Incapacitated Person" means an adult individual whose thought process ~~*Diné k'éhgo nitsáhákees,*~~ is interrupted and the Court has determined that without assistance of a Limited Guardian the individual is unable to:

a. Meet the essential requirements for his/her physical health or safety; or

b. Manage all of his/her financial resources or to engage in all of the activities necessary for the effective management of his/her financial resources.

A finding that an individual is a Partially Incapacitated Person must not constitute a finding of legal incompetence. A Partially Incapacitated Person must be legally competent in all areas other than the area or areas specified by the Court. Such Person must retain all legal rights and abilities other than those expressly limited or curtailed by the Court.

~~S.~~ R. "Person" means an individual. ~~, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.~~

~~T.~~ S. "Protected Person" means an adult individual for whom a court appointed representative has been appointed or other order has been made.

~~U.~~ T. "Respondent" means an adult individual for whom the appointment of a guardian or protective order is sought.

~~V.~~ U. "Ward" means an adult individual for whom a guardian has been appointed.

§ 813. Temporary Delegation of Power by Guardian

A guardian of an incapacitated person, by power of attorney, may delegate to another person, for a period not exceeding six (6) months, any power regarding care, custody, or property of the ward, except the power to consent to marriage or adoption.

§ 814. Subject Matter Jurisdiction

This Act applies to and the Court has jurisdiction over proceedings arising under this Act for enrolled members of the Navajo Nation or those eligible for enrollment.

§ 815. Referral to Peacemaker Program

~~With the agreement of all parties,~~ ~~t~~The Court may refer any matter under this Chapter to the Peacemaker Program~~,~~. ~~unless it makes a determination that a referral to the Peacemaker Program is infeasible, inappropriate or futile.~~ Prior to a referral, the Court should verify that the adult who is subject to a guardianship proceeding understands the Peacemaker Program and its role. Upon referral, the Peacemaker Program will attempt to resolve conflicts between the parties involved using traditional methods and in accordance with Peacemaker Program rules.

§ 816. Comity and Recognition of Orders from Other Jurisdictions

A. Any order issued pursuant to this Act must be effective throughout the Navajo Nation.

B. A Navajo Nation Court must issue an order recognizing a foreign order and according it comity if the following findings are made:

1. The foreign court had jurisdiction over the parties and subject matter;

2. Due process was provided to all interested persons participating in the foreign court proceedings; and

3. The foreign court proceeding did not violate the public policies, customs, or common law of the Navajo Nation.

C. Once recognized, an order must be enforced as if it were an order of a Court of the Navajo Nation.

§ 817. Applicable Rules

Except as otherwise provided in this Act, the Navajo Rules of Civil Procedure govern proceedings under this Act.

§ 818. Letters of Office

A. A court appointed representative or guardian must be authorized to fulfill their appointed role upon the Court's issuance of the appropriate letter of office following fulfillment of the conditions below.

B. Upon the court appointed representative's filing of an acceptance of office, the Court must issue appropriate letters of a court appointed representative.

C. Upon the guardian's filing of an acceptance of office, the Court must issue appropriate letters of guardianship. Letters of guardianship must indicate whether the guardian appointed by the court was nominated by the respondent, a parent, or the spouse.

D. Any limitation on the powers of a court appointed representative or a guardian must be endorsed on the letter of office.

§ 819. Acceptance of Appointment

A. An acceptance of appointment by a court appointed representative or guardian must be in writing and include recognition of the commitment and fulfillment of the sacred duty under *Hózhoji*.

B. By accepting appointment, a court appointed representative or guardian submits personally to the jurisdiction of the Court in any proceeding relating to the representation or guardianship.

§ 820. Termination or Reappointment

A. The appointment of a court appointed representative or guardian terminates upon the death, resignation, or removal of the representative or guardian or upon the termination of the court appointed representation or guardianship. A resignation of a court appointed representative or guardian is effective when approved by the Court. Termination of the appointment of a court appointed representative or guardian does not affect the liability for previous acts or the obligation to account for money and other assets of the ward or protected person.

B. A ward, protected person, or person interested in the welfare of a ward or protected person may petition for removal of a court appointed representative or guardian on the ground that removal would be in the best interest of the ward or protected person or for other good cause. A petition for removal may include a request for appointment of a successor court appointed representative or guardian.

C. A court appointed representative or guardian may petition for permission to resign. A petition for permission to resign may include a request for appointment of a successor court appointed representative or guardian.

D. Except as otherwise ordered by the Court for good cause, before terminating a guardianship, the Court must follow the same procedures to safeguard the rights of the ward or protected person that apply to the original petition.

Subchapter 2. Court Appointed Representative

§ 821. Appointment and Status of Court Appointed Representative

A. Any adult individual who may be perceived as an incapacitated person or who is named as a respondent in a guardianship proceeding, may request the Court to appoint a court appointed representative to assist the individual, and to speak or act on the person's behalf on specific issues, without the necessity of determining whether the individual is legally incapacitated. Court appointed representation is in effect until the individual requests the Court to void the order or name a replacement.

B. A court appointed representative is not similar to a guardian in that the representative does not substitute his/her decision or judgment in place of the protected person's as long as the protected person is able to make and communicate choices and decisions.

§ 822. Petition

A. The petition for a court appointed representative must include an affirmation of the following:

1. The petitioner's name, age, principal residence, current mailing address and physical location.

2. The name and address of the petitioner's caregivers and family, including all of the following;

a. Spouse, or if the petitioner has none, an adult with whom the petitioner has resided for more than six months before the filing of the petition;

b. Adult children or, if the petitioner has none, the petitioner's parents and adult brothers and sisters, of if the petitioner has none, at least one and not more than three of the adults nearest in kinship to the petitioner who can be found with reasonably diligent efforts; and

c. The name and address of any person presently assisting the petitioner.

3. The name and address of any legal representative of the petitioner.

4. The name and address of the person nominated by the petitioner to be recognized as the court appointed representative.

5. The reason why the court appointed representative is necessary.

6. The issues on which the court appointed representative will have the authority to assist the petitioner or to speak for the petitioner.

7. A general statement of the petitioner's property with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts.

8. The affirmation of the anticipated court appointed representative that he/she is willing to act on the petitioner's behalf as designated in the petition.

§ 823. Appointment of Counsel and Guardian Ad Litem

A. If prior to a hearing on a petition for a court appointed representative or if at any point in the course of a proceeding, the petitioner is not represented by counsel, the Court may appoint a legal advocate as provided in this section.

B. The Court may also at any time subsequent to the filing of the petition appoint a Guardian *Ad Litem* to assist the Court in making a determination on any issues regarding the petition.

C. If a legal advocate is appointed, the Court must hold a hearing on a petition as soon as possible. The Court may delay the hearing on a petition only for the period of time necessary for the legal advocate to prepare the case for hearing but in no case less than thirty (30) days after such appointment.

D. A legal advocate appointed pursuant to this section must contact the petitioner promptly after receiving notification of his/her appointment. A legal advocate appointed pursuant to the provision of this section may be compensated by order of the Court if the petitioner has sufficient resources.

§ 824. Confidentiality of Records

The written report of a Guardian *Ad Litem* and any professional evaluation are confidential and must be sealed upon filing, but are available to the Court, the petitioner for the purposes of this proceeding, and other persons for such purposes as the Court may order for good cause.

§ 825. Notice

In a proceeding to establish a court appointed representative, a copy of the petition and notice of the hearing must be given to the persons listed in the petition. Failure to give notice under this

subsection may preclude the appointment of a court appointed representative or the making of a protective order.

§ 826. Presence and Rights at Hearing

A. Unless excused by the Court for good cause, the petitioner and the anticipated court appointed representative must attend the hearing. The Court may request the petitioner to present evidence to establish the necessity of appointing a court appointed representative. When the Court requires the presentation of such evidence, the petitioner and the court appointed representative must have the right to subpoena witnesses and documents; examine witnesses, including any court-appointed evaluator, and otherwise participate in the hearing. The hearing may be held in a location convenient to the petitioner and may be closed upon the request of the petitioner and a showing of good cause.

B. Any person may request permission to participate in the proceeding. The Court may grant the request, with or without hearing, upon determining that the best interest of the petitioner will be served. The Court may attach appropriate conditions to the participation.

§ 827. Findings; Order of Appointment

A. The Court may:

1 Appoint a court appointed representative for a petitioner if it finds by preponderance of the evidence that:

a. The petitioner may be perceived as an incapacitated person; and

b. The petitioner's identified needs cannot be met by less restrictive means including use of a durable power of attorney or appropriate technological assistance; and

c. The Court finds that the appointment of the petitioner's selected court appointed representative is in the petitioner's best interest.

2. Deny the petition, if the Court finds the requested court appointed representative has a conflict of interest with the petitioner, or otherwise cannot adequately protect the interest of the petitioner.

3. With appropriate findings, enter any other appropriate order or dismiss the proceeding.

B. The Court, whenever feasible, must grant to a court appointed representative only those powers requested by the petitioner, necessitated by the petitioner's limitations and demonstrated needs, and make appointive and other orders that will encourage the development of the petitioner's maximum self-reliance and independence.

C. Based on the Court's finding, the Court may determine if a review hearing is necessary to consider any future change in circumstances of the petitioner. Regardless of the Court's findings regarding a review, any person interested in the welfare of petitioner may at any time request a review of the court appointed representative order and supporting findings.

D. Within fourteen (14) days after an appointment, a court appointed representative must send or deliver to the petitioner and to all other persons given notice of the hearing on the petition a copy of the appointment of court appointed representative, together with a notice of the right to request termination or modification.

§ 828. Duties and Powers of Court Appointed Representative

A. Within the limitations imposed by the court order, a court appointed representative must perform diligently and in good faith, and speak and act on behalf of the protected person regarding the protected person's support, care, education, health, and welfare. A court appointed representative must exercise authority only as necessitated by the other's perceptions of the protected person's assumed incapacity and will clarify for others the protected person's decisions and choices. The court appointed representative must consider the expressed desires and personal values of the protected person to the extent known and may consult with other family members and caregivers to the extent appropriate and possible in respect, harmony and balance as required by *k'é*. The court-appointed representative at all times must act in the

protected person's best interest and exercise reasonable care, diligence and prudence.

B. To the extent necessary, a court appointed representative must:

1. Become or remain personally acquainted with the petitioner and maintain sufficient contact with the petitioner to know of the petitioner's decisions, choices and preferences;

2. Assure that the petitioner has a domicile in the least restrictive, most normal setting consistent with the requirements for his/her health or safety;

3. Take reasonable care of the petitioner's personal effects and bring protective proceedings if necessary to protect the property of the petitioner;

4. Treat family members and caregivers with respect and consult with them as appropriate and possible;

5. Expend money of the petitioner for the petitioner's current needs for support, care, education, health, and welfare;

6. Conserve any excess money of the petitioner for the petitioner's future needs, but if a conservator had been appointed for the estate of the petitioner, the court appointed representative must pay the money to the conservator, at least quarterly, to be conserved for the petitioner's future needs. The court appointed representative and the conservator must work together to address the petitioner's need and to conserve the petitioner's resources; and

7. Inform the Court of any change in the protected person's custodial dwelling or address.

§ 829. Rights and Immunities of Court Appointed Representative; Limitations

A. At the Court's discretion, a court appointed representative may be ordered to receive reasonable compensation for services as a court appointed representative and to reimbursement for room, board, and clothing provided to the petitioner.

B. A court appointed representative is not liable to a third person for acts of the petitioner solely by reason of the relationship. A court appointed representative who exercises reasonable care in conveying the petitioner's choice of a third person providing medical or other care, treatment, or service for the petitioner is not liable for injury to the petitioner resulting from the wrongful conduct of the third party.

C. A court appointed representative, without authorization of the court, may not revoke a power of attorney for health care of which the petitioner is the principal. If a power of attorney for health care is in effect, absent an order of the Court to the contrary, a health-care decision of the agent takes precedence over that of a court appointed representative.

D. A court appointed representative may not initiate the commitment of a petitioner to an institution.

Subchapter 3. Guardianship of Incapacitated Person

§ 830. Appointment and Status of Guardian

A. A person becomes a guardian of an incapacitated person upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or ward.

B. The procedures for guardianship set forth in this section must also apply to guardianship of adult individuals under the Navajo Nation Health Care Commitment Act.

§ 831. Filing a Petition

A. Any person interested in the individual's welfare may petition for a determination of incapacity, in whole or in part, and for the appointment of a limited or unlimited guardian for the individual, who must be the respondent in the petition.

B. The petition must set forth the petitioner's name, residence, current mailing address and physical location, relationship to the respondent, and interest in the appointment, and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

1. The respondent's name, age, principal residence, current mailing address and physical location, and, if different, the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made;

2. The name and address of the respondent's caregivers and family, including all of the following:

a. Spouse, or if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; ~~and~~

b. Adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters, or if the respondent has none, at least one and not more than three of the adults nearest in kinship to the respondent who can be found with reasonably diligent efforts; and

c. The name and address of any person presently responsible for or having custody of the respondent.

3. The name and address of any legal representative of the respondent, including a court appointed representative;

4. The name and address of any person nominated as guardian by the respondent;

5. The name and address of any proposed guardian other than the guardian nominated by the respondent and the reason why the proposed guardian should be selected;

6. The reason why guardianship is necessary, including a brief description of the nature and extent of the respondent's alleged incapacity;

7. If an unlimited guardianship is requested, the reason why limited guardianship is inappropriate and, if a limited guardianship is requested, the powers to be granted to the limited guardian; and

8. A general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts.

§ 832. Appointment of Counsel and Guardian ad Litem

A. If prior to a hearing on a petition alleging the respondent is incapacitated or if at any point in the course of a proceeding, the respondent is not represented by counsel, the Court must appoint a legal advocate as provided in this section.

B. The Court may also at any time subsequent to the filing of the petition appoint a Guardian *Ad Litem* to assist the Court in making a determination on any issues regarding the petition.

C. If a legal advocate is appointed, the Court must delay the hearing on a petition only for the period of time necessary for the legal advocate to prepare the case for hearing but in no event less than thirty (30) days after such appointment.

D. A legal advocate appointed pursuant to this section must contact the respondent promptly after receiving notification of his/her appointment. A legal advocate appointed pursuant to the provision of this section may be compensated by order of the Court if either the petitioner or respondent has sufficient resources.

§ 833. Professional Evaluation

A. After the filing of the petition, the Court may, on its own motion or at the request of any party to the proceeding, order a professional evaluation of the respondent. The Court must order the evaluation if the respondent so demands. If possible the petitioner and respondent must consult and agree on who must conduct the evaluation. If such an agreement is reached, the Court must include the agreed upon evaluator in the order.

B. The evaluation report must include, but not be limited to:

1. A description of the nature, type, and extent of the respondent's specific cognitive and functional limitations;

2. A description of the mental, emotional and physical condition of the respondent, his/her ability to function in the ordinary activities of daily life and, if appropriate, the respondent's educational background, adaptive behavior and social skills.

3. A prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and

4. The date of any assessment or examination upon which the report is based.

§ 834. Confidentiality of Records

The written report of a Guardian *Ad Litem* and any professional evaluation are confidential and must be sealed upon filing, but are available to the Court, the respondent for any purpose, the petitioner for the purposes of this proceeding, and other persons for such purposes as the Court may order for good cause.

§ 835. Notice

A. A copy of the petition for guardianship and notice of the hearing on the petition must be served personally on the respondent. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and include a description of the nature, purpose, and consequences of an appointment. Failure to serve the respondent with a notice substantially complying with this subsection precludes the court from granting the petition.

B. In a proceeding to establish a guardianship, notice of the hearing must be given to the persons listed in the petition. Failure to give notice under this subsection ~~does not~~ shall preclude the appointment of a guardian. ~~or the making of a protective order.~~

C. If any order is sought after a guardian is appointed, any notice of hearing on the order together with a copy of the motion, must be given to the respondent, the guardian, and any other person the court directs.

D. A guardian must give notice of the filing of the guardian's report, together with a copy of the report, to the ward and any other person the Court directs. The notice must be delivered or sent within fourteen (14) days after the filing of the report.

§ 836. Presence and Rights at Hearing

A. Unless excused by the Court for good cause, the proposed guardian must attend the hearing. The respondent must attend and participate in the hearing, unless excused by the Court for good cause and represented by counsel. The respondent may present evidence and subpoena witnesses and documents; examine witnesses, including any court-appointed evaluator, and otherwise participate in the hearing. The hearing may be held in a location convenient to the respondent and may be closed upon the request of the respondent and a showing of good cause.

B. Any person may request permission to participate in the proceeding. The Court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The Court may attach appropriate conditions to the participation.

§ 837. Emergency Guardian

A. If the Court finds that compliance with the procedures of this article will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the Court, on petition by a person interested in the respondents' welfare, may appoint an emergency guardian whose authority may not exceed sixty (60) days and who may exercise only the powers specified in the order, which should be limited to those necessary to address the substantial harm. Immediately upon receipt of the petition for an emergency guardianship, the Court must appoint a legal advocate to represent the respondent in the proceeding. Except as otherwise provided in subsection (B), reasonable notice of the time and place of a hearing on the petition must be given to the respondent and any other persons as the court directs.

B. An emergency guardian may be appointed without notice to the respondent and the respondent's legal advocate only if the court finds from affidavit or testimony that the respondent will be substantially harmed if the emergency guardian is not appointed before a hearing on the appointment can be held. If the court appoints an emergency guardian without notice to the respondent, the respondent must be given notice of the appointment within forty-eight (48) hours after the appointment. The Court must hold a

hearing on the appropriateness of the appointment within five (5) days after the appointment.

C. Appointment of an emergency guardian, with or without notice, is not a determination of the respondent's incapacity.

D. The Court may remove an emergency guardian at any time. An emergency guardian must make any report the court requires. In other respects, the provisions of this Act concerning guardians apply to an emergency guardian.

§ 838. Priority of Appointment of the Guardian

A. Subject to subsection (C), the Court in appointing a guardian must consider persons otherwise qualified in the following order of priority;

1. A person, other than a temporary or emergency guardian, currently acting for the respondent;

2. A person nominated as guardian by the respondent, including the respondent's court appointed representative or most recent selection of an agent made in a properly executed durable power of attorney or a durable power of attorney for health care; and

3. A family member chosen by family concurrence;

4. A non-family member chosen by family concurrence;

~~3.~~ 5.A caregiver ~~or family member~~ of the respondent.

B. With respect to persons having equal priority, the Court must select the one it considers best qualified. In determining the best qualified person, the Court may consider any background information showing criminal charges, allegations of domestic violence, abuse or neglect of another, or other relevant information. The Court, acting in the best interest of the respondent, may decline with specific findings to appoint a person having priority and appoint a person having a lower priority or no priority.

C. An owner, operator, or employee of an institution or program at which the respondent is receiving care may not be appointed as guardian.

§ 839. Findings; Order of Appointment

A. The Court may:

1. Convert the proceedings to a Court Appointed Representative matter and appoint a Court Appointed Representative as agreed to by the parties;

2. Appoint a limited or unlimited guardian for a respondent only if it finds by clear and convincing evidence that:

a. The respondent is an incapacitated person; and

b. The respondent's identified needs cannot be met by less restrictive means, including use of appropriate technological assistance.

c. The respondent's family has no well-founded objection based on the respondent's best interests.

3. With appropriate findings, enter any other appropriate order or dismiss the proceeding.

B. The Court, whenever feasible, must grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence.

C. Based on the court's finding, the Court may determine when a review hearing is necessary to consider any change in circumstances of the ward or the guardian. Regardless of the court's findings regarding a review, any person given notice of the hearing may at any time request a review of the guardianship order and supporting findings.

D. Within fourteen (14) days after an appointment, a guardian must send or deliver to the ward and to all other persons given notice of the hearing on the petition a copy of the order of appointment, together with a notice of the right to request termination or modification.

§ 840. Temporary Substitute Guardian

A. After being notified by a pleading consistent with the Navajo Rules of Civil Procedure, if the Court finds that a guardian is not effectively performing his/her duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian for the ward for a specified period not exceeding six (6) months. Prior to the appointment of the temporary substitute guardian, the Court must attempt to ascertain the ward's position, either through written affidavit or testimony, on whether such an appointment is necessary. Except as otherwise ordered by the Court, a temporary substitute guardian so appointed has the powers set forth in the order of appointment of the guardian he/she is replacing. The authority of any unlimited or limited guardian previously appointed by the Court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward or the affected guardian, the Court, within five (5) days after the appointment, must inform the ward or guardian of the substitution.

B. The Court may remove a temporary substitute guardian at any time. A temporary substitute guardian must make any report the Court requires. In other respects, the provisions of this Act concerning guardians apply to a temporary substitute guardian.

§ 841. Duties and Responsibilities of Guardian

A. Except as otherwise limited by the Court, a guardian must perform diligently and in good faith, and make decisions regarding the ward's support, care, education, health, and welfare. A guardian must exercise authority only as necessitated by the ward's limitations and, to the extent possible, must encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian in making decisions, must consider the expressed desires and personal values of the ward to the extent known to the guardian and must consult with other family members and caregivers to the extent appropriate and possible in respect, harmony and balance as required by *k'é*. A guardian at all times must act in the ward's best interest and exercise reasonable care, diligence, and prudence.

B. A guardian must:

1. Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

2. Assure that the ward has a domicile in the least restrictive, most normal setting consistent with the requirements for his/her health or safety;

3. Take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect the property of the ward;

4. Expend money of the ward for the ward's current needs for support, care, education, health, and welfare. These funds may be those received on the ward's behalf, but should be supplemented when necessary by the guardian's funds or those of other caregivers;

5. Treat family members and caregivers with respect and consult with them as appropriate and possible;

6. Conserve any excess money of the ward for the ward's future needs; ~~but~~

7. If a conservator had been appointed for the estate of the ward, the guardian must pay the money to the conservator, at least quarterly, to be conserved for the ward's future needs. The guardian and the conservator must work together to address the ward's need and to conserve the ward's resources;

8. Immediately notify the court if the ward's condition has changed so that the ward is capable of exercising rights previously removed; and

9. Inform the court of any change in the ward's custodial dwelling or address

C. The above list in subsection (B) is not exhaustive. The duties and responsibilities of the guardian must be interpreted consistent *with Diné bi beenahaz'áanii.*

§ 842. Powers of Guardian

A. Except as otherwise limited by the court, a guardian is charged with the custody of the ward, and must look to the support, health and education of the ward. Except as provided, the guardian may establish the ward's domicile at any place within the exterior boundaries of the Navajo Nation, but not elsewhere, without permission of the Court and any change of domicile must be reported to the court.

B. As appropriate, the guardian may delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

§ 843. Rights and Immunities of Guardian; Limitations

A. At the Court's discretion, a guardian may receive reasonable compensation for services as guardian and a guardian may receive reimbursement for room, board, and clothing provided to the ward.

B. A guardian is not liable to a third person for acts of the ward solely by reason of the relationship. A guardian who exercises reasonable care in choosing a third person providing medical or other care, treatment, or service for the ward is not liable for injury to the ward resulting from the wrongful conduct of the third party.

C. A guardian, without authorization of the Court, may not revoke a health care directive of which the ward is the principal. If a health care directive is in effect, absent an order of the Court to the contrary, a health-care decision of the agent takes precedence over that of a guardian.

D. A guardian may have the freedom of choice between a home-based living environment, a community group home environment, or an institution/facility care environment (according to the U.S. Supreme Court Olmstead decision in 1999 in which all three are acceptable)". ~~not initiate the commitment of a ward to an institution except in accordance with the Navajo Nation Health Commitment Code.~~

§ 844. Guardianship Plans; Reports; Monitoring of Guardianship

A. If not filed with the petition or submitted to the Court at the time of the hearing, within ten (10) days after his/her appointment the guardian must file with the Court, for its approval, a proposed plan for the care and treatment of the ward and must submit subsequent or modified plans as required by this

Act. The Court may approve a plan acceptable to the Court without notice or hearing or may, as necessary, order the modification of the plan at the initial review hearing.

B. The proposed guardianship plan and any subsequent guardianship plan for the care and treatment of the ward must state:

1. The services which are necessary to meet the essential requirements for the physical health or safety of the ward taking into account the contents and recommendations of any evaluations or reports made with respect to the ward;

2. The means for obtaining those services;

3. Account for the ward's money and other assets in the guardian's possession or subject to the guardian's control and provide any information available on the money or other assets not in the guardian's control.

4. The manner in which the guardian, the ward, the family, and the conservator will exercise and share decision-making authority.

5. Such other services necessary to assist in fulfilling the needs of the ward, the terms of the most recent order applying to the guardian and the duties of the guardian.

C. The Court may appoint a Guardian *Ad Litem* or other individual to review a report, interview the ward or guardian, and make any other investigation the court directs.

D. The court must establish a system for monitoring guardianships, including the filing and review of annual reports. At a minimum, the guardian must file with the Court an annual report for the first three years following the imposition of the guardianship. After the third year, the Court may order periodic reviews as necessary or upon the request of any interested person.

§ 845. Severability

Should any provision of this Act be determined invalid by the Courts of the Navajo Nation, those provisions of the Act which are not determined invalid must remain the law of the Navajo Nation.

Section Two. Monitoring of the Court Appointed Representative and Guardianship Process

On an annual basis, a Navajo based organization concerned with the rights of people with disabilities shall have access to non-confidential information from the Navajo Judiciary and Navajo Divisions to assess the process for appointing Court Appointed Representatives and Guardians as defined in this Code. The information shall be provided within thirty days of receiving a written request. Four years after the passage of this Code, the organization receiving the requested information will report to the Navajo Nation Council on the Code's effectiveness.

Section ~~Two~~ Three. Effective Date

The amendments enacted herein must be effective pursuant to 2 N.N.C. §221(B).

Section ~~Three~~ Four. Codification

The provisions of the Act which amend or adopt new sections of the Navajo Nation Code must be codified by the Office of Legislative Counsel. The Office of Legislative Counsel must incorporate such amended provisions in the next codification of the Navajo Nation Code.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that the same was passed by a vote of 13 favor and 0 opposed, this 30th day of May 2014.

LoRenzo Bates, Pro Tem Speaker
Navajo Nation Council

6-9-14
Date

Motion: Honorable Elmer P. Begay
Second: Honorable Jonathan Nez

ACTION BY THE NAVAJO NATION PRESIDENT:

1. I hereby sign into law the foregoing legislation, pursuant to 2 N.N.C. §1005 (C)(10), on this _____ day of JUN 12 2014 2014.

Ben Shelly, President
Navajo Nation

2. I hereby veto the foregoing legislation, pursuant to 2 N.N.C. §1005 (C) (11), this _____ day of _____ 2014 for the reason(s) expressed in the attached letter to the Speaker.

Ben Shelly, President
Navajo Nation

Navajo Nation Law CLE

Section 7

Navajo Consumer Law

CURRENT ISSUES IN NAVAJO CONSUMER LAW

October 20, 2017

Veronika Fabian
Choi & Fabian, PLC

NAVAJO REPOSSESSION LAW

Violation of Navajo Code

- 7 N.N.C. §§ 621-624.
- Requires Contemporaneous Written and Informed Consent. 7 N.N.C. § 621.
- Or Tribal Court Order. 7 N.N.C. § 621.
- Only applies to consumer goods.

Purpose of Navajo Repossession Law

- The purpose of the statute before us was said to be "to prevent violence and breach of the peace in the repossession of personal property of **Navajo** Indians from land subject to the jurisdiction of the **Navajo** Tribe . . . . "

Consent Must Be At Time of Repossession

- Violation of Navajo Nation Consumer Protection Act to obtain consent at time of sale. *Russell v. Donaldson*, 3 Nav. R. 209 (Window Rock Dist. Ct. 1982).
- *Amigo Chevrolet, Inc. v. Lee*, No. A-CV-32-87) (Nav. Sup. Ct. 1987).

Navajo Nation Consumer Protection Act

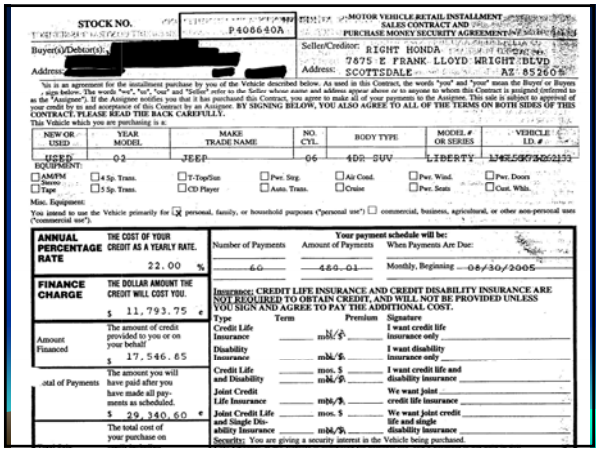
- Unfair and deceptive practice to require consent to repossession at time of contract. 5 N.N.C. § 1103(D)(20).

STATE LAW

- Provides much less protection.
- Must not “breach the peace.” A.R.S. § 57-9609(B)(2).

Damages

- Actual damages. 7 N.N.C. § 623(A).
- Statutory damages of finance charge plus ten percent of the cash price. 7 N.N.C. § 623(B).
- Plus $5,000.00 in liquidated damages as restitution. 7 N.N.C. § 622(B).
- Punitive damages – where willful fraudulent or unconscionable. 7 N.N.C. § 623(D).



STOCK NO. P406640A

MOTOR VEHICLE RETAIL INSTALLMENT SALES CONTRACT AND PURCHASE MONEY SECURITY AGREEMENT

Buyer(s)/Debtor(s): [redacted]

Address: [redacted]

Seller/Creditor: RIGHT HONDA

Address: 7675 E FRANK LLOYD WRIGHT BLVD SCOTTSDALE AZ 852605

This is an agreement for the installment purchase by you of the Vehicle described below. As used in this Contract, the words "you" and "your" mean the Buyer or Buyers who sign below. The words "we", "us", "our" and "Seller" refer to the Seller whose name and address appear above or to anyone to whom this Contract is assigned (referred to as the "Assignee"). If the Assignee notifies you that it has purchased this Contract, you agree to make all of your payments to the Assignee. This sale is subject to approval of your credit by us and acceptance of this Contract by an Assignee. BY SIGNING BELOW, YOU ALSO AGREE TO ALL OF THE TERMS ON BOTH SIDES OF THIS CONTRACT. PLEASE READ THE BACK CAREFULLY.

This Vehicle which you are purchasing is a:

NEW OR USED	YEAR MODEL	MAKE TRADE NAME	NO. CYL.	BODY TYPE	MODEL # OR SERIES	VEHICLE I.D. #
USED	02	JEEP	06	4DR SUV	LIBERTY	[redacted]

EQUIPMENT:

☐ AM/FM Stereo ☐ Tape ☐ 4 Sp. Trans. ☐ 5 Sp. Trans. ☐ T-Top/Sun ☐ CD Player ☐ Pwr. Stg. ☐ Auto. Trans. ☐ Air Cond. ☐ Cruise ☐ Pwr. Wind. ☐ Pwr. Seats ☐ Pwr. Doors ☐ Cust. Whls.

Misc. Equipment:

You intend to use the Vehicle primarily for ☒ personal, family, or household purposes ("personal use") ☐ commercial, business, agricultural, or other non-personal uses ("commercial use").

ANNUAL PERCENTAGE RATE	THE COST OF YOUR CREDIT AS A YEARLY RATE.	22.00 %
FINANCE CHARGE	THE DOLLAR AMOUNT THE CREDIT WILL COST YOU.	$ 11,793.75 e
Amount Financed	The amount of credit provided to you or on your behalf	$ 17,546.85
Total of Payments	The amount you will have paid after you have made all payments as scheduled.	$ 29,340.60 e
	The total cost of your purchase on	

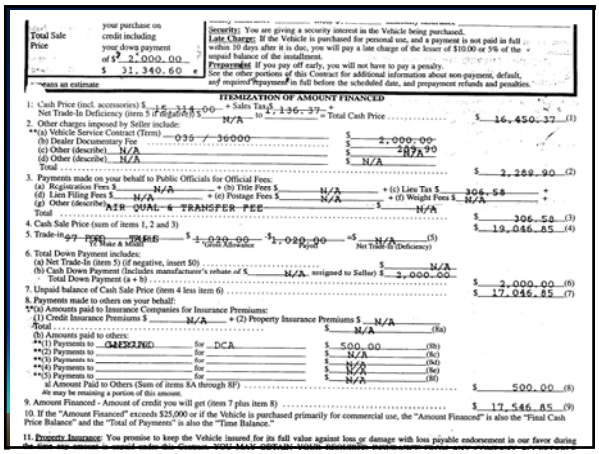
Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due:
60	480.01	Monthly, Beginning 08/30/2005

Insurance: CREDIT LIFE INSURANCE AND CREDIT DISABILITY INSURANCE ARE NOT REQUIRED TO OBTAIN CREDIT, AND WILL NOT BE PROVIDED UNLESS YOU SIGN AND AGREE TO PAY THE ADDITIONAL COST.

Type	Term	Premium	Signature
Credit Life Insurance	_____ mos.	N/C $	I want credit life insurance only
Disability Insurance	_____ mos.	N/C $	I want disability insurance only
Credit Life and Disability	_____ mos.	$	I want credit life and disability insurance
Joint Credit Life Insurance	_____ mos.	$	We want joint credit life insurance
Joint Credit Life and Single Disability Insurance	_____ mos.	$	We want joint credit life and single disability insurance

Security: You are giving a security interest in the Vehicle being purchased.



Total Sale Price
your purchase on credit including your down payment of $ 2,000.00
$ 31,340.60 e
e means an estimate

Security: You are giving a security interest in the Vehicle being purchased.
Late Charge: If the Vehicle is purchased for personal use, and a payment is not paid in full within 10 days after it is due, you will pay a late charge of the lesser of $10.00 or 5% of the unpaid balance of the installment.
Prepayment: If you pay off early, you will not have to pay a penalty.
See the other portions of this Contract for additional information about non-payment, default, and required repayment in full before the scheduled date, and prepayment refunds and penalties.

ITEMIZATION OF AMOUNT FINANCED

1. Cash Price (incl. accessories) $ 16,313.00 + Sales Tax $ 2,136.37 + Net Trade-In Deficiency (item 5 if negative) $ N/A to ____ = Total Cash Price $ 16,450.37 (1)
2. Other charges imposed by Seller include:
**(a) Vehicle Service Contract (Term) 036 / 36000 $ 2,000.00
(b) Dealer Documentary Fee $ 287.90
(c) Other (describe) N/A $
(d) Other (describe) N/A $ N/A
Total $ 2,289.90 (2)
3. Payments made on your behalf to Public Officials for Official Fees:
(a) Registration Fees $ N/A + (b) Title Fees $ N/A + (c) Lieu Tax $ 306.58 +
(d) Lien Filing Fees $ N/A + (e) Postage Fees $ N/A + (f) Weight Fees $ N/A +
(g) Other (describe) AIR QUAL & TRANSFER FEE $ N/A
Total $ 306.58 (3)
4. Cash Sale Price (sum of items 1, 2 and 3) $ 19,046.85 (4)
5. Trade-in 97 FORD (If Make & Model) FX4S $ 1,020.00 (Gross Allowance) - $ 1,020.00 (Payoff) = $ N/A (Net Trade-In (Deficiency)) (5)
6. Total Down Payment includes:
(a) Net Trade-In (item 5) (if negative, insert $0) $ N/A
(b) Cash Down Payment (Includes manufacturer's rebate of $ N/A, assigned to Seller) $ 2,000.00
Total Down Payment (a + b) $ 2,000.00 (6)
7. Unpaid balance of Cash Sale Price (item 4 less item 6) $ 17,046.85 (7)
8. Payments made to others on your behalf:
**(a) Amounts paid to Insurance Companies for Insurance Premiums:
(1) Credit Insurance Premiums $ N/A + (2) Property Insurance Premiums $ N/A
Total $ N/A (8a)
(b) Amounts paid to others:
**(1) Payments to CHEVRON for DCA $ 500.00 (8b)
**(2) Payments to ____ for ____ $ N/A (8c)
**(3) Payments to ____ for ____ $ N/A (8d)
**(4) Payments to ____ for ____ $ N/A (8e)
**(5) Payments to ____ for ____ $ N/A (8f)
a) Amount Paid to Others (Sum of items 8A through 8F) $ 500.00 (8)
We may be retaining a portion of this amount.
9. Amount Financed - Amount of credit you will get (item 7 plus item 8) $ 17,546.85 (9)
10. If the "Amount Financed" exceeds $25,000 or if the Vehicle is purchased primarily for commercial use, the "Amount Financed" is also the "Final Cash Price Balance" and the "Total of Payments" is also the "Time Balance."
11. Property Insurance: You promise to keep the Vehicle insured for its full value against loss or damage with loss payable endorsement in our favor during

ELECTRONIC REPOSSESSIONS

Reports of Problems

- Not in default.
- Stranded in remote places.
- No cell phone service.
- No public transportation.

BEGAY ET AL. V. CREDIT ACCEPTANCE CORPORATION, No. CH-CV-76-12

- Credit Acceptance Corporation required that starter interrupter devices ("SIDs") and GPS system installed in all vehicles it financed.
- If consumer defaults, then CAC can remotely disable vehicle from starting.

Does this Violate Navajo Repossession Law?

- Without removal a secured party may, in accordance with applicable Navajo law, render equipment unusable, and may dispose of collateral on the debtor's premises under § 9-504.

CAC'S ARBITRATION CLAUSE

- A written agreement to submit any existing or future controversy to arbitration is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of the contract.

7 N.N.C. 1103 ; 9 USCS § 2;

Navajo Case Law Addressing Arbitration

- *Greentree Servicing, LLC v. Duncan*, No. SC – CV46-05 (2008).
- *Black v. Singleton's Mobile Home Sales, Inc.*, No. SR-CV-383-09-CV.

CLASS ACTION SETTLEMENT

- Each consumer got $900.00, either in the form of cash or credit or combination of both depending on the balance of their loan.
- Money has been distributed.
- *Cy pres* to DNA for consumer work.

YO-YO SALES

What is it?

- Consumer purchases a vehicle at car dealership. Signs contract and is told that he has been financed. About one week later car dealership calls and tells him that his financing has not gone through and he has to return the vehicle or sign a new contract (generally with higher interest rate, or more of downpayment).

What gives dealer's the ability to do this?

11. GENERAL: This Contract shall be governed by the laws of the State of Arizona. Any provisions found to be invalid shall not invalidate the remainder hereof. Waiver of any default shall not constitute waiver of any subsequent default. All words used herein shall be construed to be of such gender and number as the circumstances require and all references herein to you shall include all other persons primarily or secondarily liable hereunder. This Contract shall be binding upon the heirs, personal representatives, successors and assigns and shall inure to the benefit of our successors and assigns. This Contract constitutes the entire agreement between us and may not be altered or amended unless made in writing and duly executed by us.

12. SELLER'S RIGHTS IN ABSENCE OF CREDIT APPROVAL: (a) You agree to furnish us any documentation necessary to verify information contained in the credit application. (b) You acknowledge that it may take a few days for us to verify your credit and assign this Contract. In consideration of our agreeing to deliver the Vehicle, you agree that if we are unable to assign the contract to any one of the financial institutions with whom we regularly do business pursuant to terms of assignment acceptable to us, we may cancel this Contract. (c) In the event we cancel this Contract, we shall give you notice of the cancellation. Upon receipt of such notice, you shall immediately return the Vehicle to us in the same condition as when sold, reasonable wear and tear excepted, and this Contract shall then be deemed cancelled. We agree, upon cancellation of this Contract to restore to you all consideration we received in connection with this Contract, including any trade-in vehicle. (d) In the event the Vehicle is not immediately returned to us upon notice of our cancellation of this Contract, you agree to pay and shall be liable to us for all expenses incurred by us in obtaining possession of the Vehicle, including attorney's fees, and we shall have the right to repossess the Vehicle with free right of entry wherever the Vehicle may be found. (e) While the Vehicle is in your possession, all terms of this Contract, including those relating to use of the Vehicle and insurance for the Vehicle, shall be in full force and all risk of loss or damage to the Vehicle shall be assumed by you, you shall pay all reasonable repair costs related to any damage sustained by the Vehicle while in your possession or control of and until the Vehicle is returned to us.

SELLER'S ASSIGNMENT AND WARRANTY

For value received, Seller hereby sells, assigns and transfers to Assignee, all rights, title and interest in and to this Contract, the Vehicle and equipment therein described and all monies due and to become due thereunder. Seller warrants that the signature of the Buyer(s) herein are genuine, that Seller holds title to the Vehicle, that the cash downpayment shown has actually been received by Seller and no part thereof was loaned to Buyer(s) by or through Seller, that the Vehicle is free from any liens and/or encumbrances except the lien of the security interest created by this Contract, that the Vehicle has been delivered into the possession of the Buyer(s), that Buyer(s) was of legal age and competent to execute this Contract on the date hereof, that the Vehicle Has not salvaged, and that, if this transaction is subject to regulation by any state or federal law or regulation, including, but not limited to, the Federal Truth in Lending Act, Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, or Equal Credit Opportunity Act, the transaction was consummated in strict compliance with such law(s) and any regulations promulgated pursuant thereto and that before offering to sell this Contract to Assignee, any period, wherein Buyer(s) had the right to rescind such transaction, had expired and such Buyer(s) had not rescinded the transaction, that this contract and the debt evidenced thereby is not, and will not be subject to any claims, disputes, complaints, offsets, counterclaims or defenses of any kind during the time the said debt remains unpaid, and that Seller has taken all action necessary to perfect a first lien purchase money security interest in Seller or its Assignee.

Seller unconditionally guarantees to Assignee the full and immediate payment and performance of this Contract with respect to which any one or [illegible] of the foregoing warranties or representations is breached or false and hereby agrees to repurchase this Contract upon the occurrence of any such breach of warranty or false representation immediately, upon demand by Assignee, for a cash amount equal to the net unpaid balance of the Contract by direct cash payment from Seller to Assignee and not by recourse to or adjustment in any dealer reserve or other such accounts. Seller further hereby agrees to indemnify and hold Assignee harmless from all loss, claims, damages, costs, expenses and attorneys' fees incurred or sustained by Assignee resulting from or arising out of such obligations under this Contract determined to be due to any claim or defense Buyer(s) may now or in the future have against Seller relating to the transaction herein described. If the Assignee's and/or Seller's rights and duties hereunder is referred to an attorney for interpretation or enforcement, the prevailing party shall be entitled to receive and collect from the losing party all court costs and expenses incurred plus reasonable attorneys' fees.

Seller waives all demand and notices of default and consents that, without notice to the Seller, Assignee may extend the time of payments, or compound or release by operation of law or otherwise any rights against Buyer(s) or any other obligor. Assignee shall not be bound to take any steps necessary to preserve any rights in this Contract or any accompanying agreements or documents against prior parties, which Seller hereby agrees to do.

No harm, no foul?

- Mileage charges.
- Sale of trade-in.
- De-horsing.

Does the Repossession Violate Navajo Law?

THE PARKING LOT SALE

- Dealer walks around Bashas' parking lot and convinces someone to complete a credit application.
- A few days later, consumer gets call from dealer saying that he is delivering vehicle to him on the rez.
- Signs contract in Bashas' parking lot, dealer takes consumer's "trade-in."

PROBLEMS

- Too expensive.
- Consumer can't afford it.
- Consumer doesn't really want it.
- "Trade-in" not actually a trade-in.

NAVAJO NATION CONSUMER PROTECTION ACT

- 5 N.N.C. §§1101-1161.
- Enacted in 1999.
- Prohibits Unfair and Deceptive Trade Practices. 5 N.N.C. § 1103(D).
- Prohibits Unconscionable Trade Practices. 5 N.N.C. § 1103(E).

RIGHT TO CANCEL Door-to-Door Sale

- NNCPA requires that the dealer give three-day right to cancel in all door-to-door sales 5 NNC § 1109(A).
- If no right to cancel is given, then consumer's right to cancel is extended. 5 N.N.C. § 1109(B).

Why is this a door-to-door sale?

- Dealer solicits sale and buyer's agreement or offer to purchase is made at place other than the primary place of business of the seller. 5 NNC § 1109(C)(3).
- What if consumer goes to dealership and then dealer delivers car to rez and contract is signed on rez?

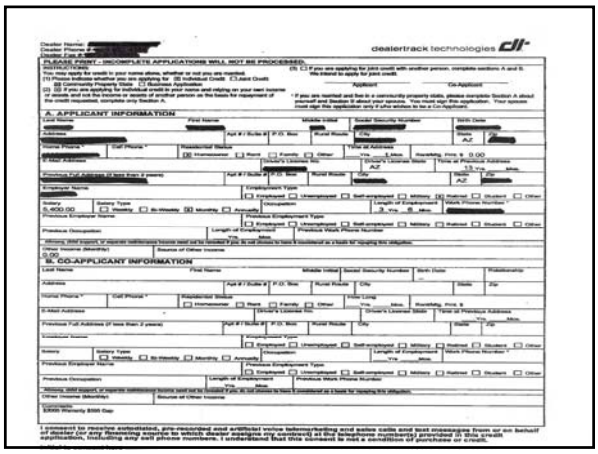
Conversion

Right to Cancel For Used Cars

- Motor Vehicle Consumer Protection Act.
- 7 N.N.C. §§1158-1160.
- Dealer must give ten-day right to cancel.
- Dealer may charge thirty cents per mile.

Improvident Extension of Credit

- Unconscionable trade practice under NNCPA. 5 N.N.C. 1103(E)(5).



dealertrack technologies

PLEASE PRINT - INCOMPLETE APPLICATIONS WILL NOT BE PROCESSED.

A. APPLICANT INFORMATION

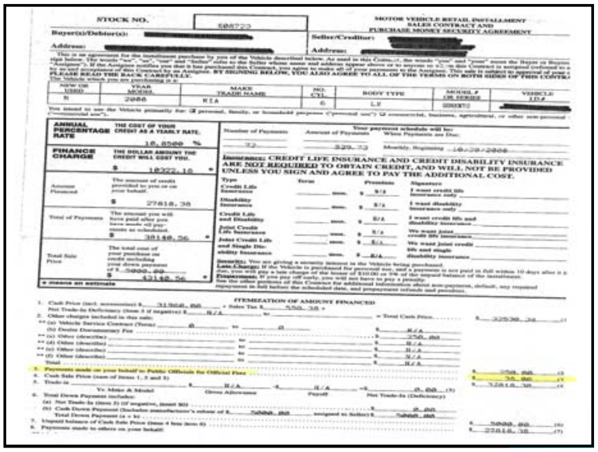
B. CO-APPLICANT INFORMATION

Finance Charge Limitations

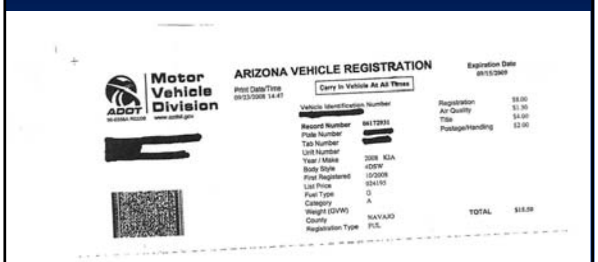
- 5 N.N.C. § 1153-1156.
- Limitation on interest rate. 5 N.N.C. § 1155.
- Private remedies. 5 N.N.C. § 1156.
  - Complete defense
  - Statutory damages

Overcharge of MVD Fees

- Deceptive Practice Under 5 N.N.C. 1103(D).



Actual Amounts Paid



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Begay-legal research

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO

CARRIE BLACK, Plaintiff, vs. SINGLETON'S MOBILE HOME SALES, INC., and SHERMAN SINGLETON, Defendants.	**NO. SR-CV-383-09-CV** **ORDER DENYING MOTION TO COMPEL ARBITRATION**

This matter came before the Court upon Defendants' Motion to Compel Arbitration. A hearing on the motion was held on July 12, 2011. Plaintiff, Carrie Black, and her counsel, Matt VanWormer, were present in person. Counsel for Defendants, F.D. Moeller, was present with Defendant Sherman Singleton. At the Court's request, both parties submitted briefs on the enforceability of the arbitration provision. The Court has reviewed the record, the parties' testimony and the briefs, and now FINDS:

This cause of action concerns claims arising from a mobile home that capsized in the wind, involving contracts for the purchase, financing, and installation of the mobile home. Defendants filed a Motion to Compel Arbitration, arguing that an Arbitration Provision signed by the parties requires the Plaintiff to submit her claims to arbitration and precludes her from pursuing this action in court.

The contract for the sale and financing of the mobile home, dated May 21, 2007, is between Jonathan E. Miller and Carrie M. Black, Buyers, and Singleton's Mobile Home Sales, Seller. The contract is a standardized form entitled Consumer Paper Retail Installment Contract Security Agreement, but the Court will refer to it as the contract.

Under the contract, the buyers purchased a 1972 single-wide mobile home for $11,200. The buyers paid $1,500 down, and financed the remaining $9,700, plus $2000 for insurance, for ten years at 17.9% interest. The second page of the contract contains provisions for the seller's assignment or grant of its security interest in the contract to General Electric Credit Corporation if a certain box on the first page is checked. The designated box is not checked; therefore, Singleton's Mobile Home Sales retains the security interest in the mobile home.

The Arbitration Provision is a single-page document separate from the retail installment contract. It is signed by Sherman Singleton (owner), as Seller, and the Plaintiff and Jonathan Miller, her co-buyer. The relevant portions of the Arbitration Provision read:

> 1. The parties to the Retail Installment Contract agree that any and all controversies or claims arising out of, or in any way relating to, the Retail Installment Contract or the negotiation, purchase, financing, installation, ownership, occupancy, habitation, manufacture, warranties (express or implied), repair or sale/disposition of the home which is the subject of the Retail Installment Contract, whether those claims arise from or concern contract, warranty, statutory, property, or common law, including any claim concerning the validity or enforceability of the Retail Installment Contract or related documentation, will be settled solely by means of final and binding arbitration before the American Arbitration Association (AAA) in accordance with the rules and procedures of the AAA. Judgement [sic] on the arbitration award may be entered in any court having jurisdiction.
>
> 2. . . .
>
> 3. The parties to the Retail Installment Contract recognize that the transaction underlying the sale of the manufactured home involves third parties who are not signatories to the Retail Installment Contract, including the manufacturer of the home and the lender which finances the purchase. To effectuate the parties' intent in paragraph one above that "any and all controversies or claims" be settled by binding arbitration, the parties further agree as follows:

a. This Arbitration Provision inures to the benefit of, and is intended to be for the benefit of, the manufacturer of the home which is the subject of the Retail Installment Contract as fully as if the manufacturer were a signatory to the Arbitration Provision.

b. This Arbitration Provision inures to the benefit of, and is intended to be for the benefit of, any lender or mortgagee (or assigns) which provides financing for the purchase of the home which is the subject of the Retail Installment Contract, at the sole discretion of that lender or mortgagee. Nothing in this contract requires a lender or mortgagee to invoke this Arbitration Provision, and the lender or mortgagee may do so only if they agree to final and binding determination made by the arbitration process.

4. THE PARTIES UNDERSTAND THEY HAVE THE RIGHT TO HAVE ANY DISPUTES BETWEEN THEM DECIDED IN COURT, BUT THEY CHOOSE INSTEAD TO HAVE ANY SUCH DISPUTES DECIDED BY ARBITRATION IN ORDER TO AVOID THE DELAY, BURDEN, EXPENSE AND UNCERTAINTY OF THE JUDICIAL PROCESS. THE PARTIES FURTHER UNDERSTAND THAT BY AGREEING TO ARBITRATE, THEY KNOWINGLY AND VOLUNTARILY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL AND OTHER RIGHTS AFFORDED BY THE JUDICIAL PROCESS.

5. The parties agree that any arbitration proceedings commenced in accordance with this Arbitration Provision will be held in San Juan County, New Mexico.

(Emphasis in original.)

The issue presented in Defendants' Motion to Compel Arbitration is whether the Arbitration Provision should be enforced to bar the Plaintiff's contract claims in this action. In support of their argument that the Arbitration Provision should be enforced, the Defendants point out that arbitration serves important purposes, that arbitration clauses *per se* do not violate public policy, and that each arbitration clause must be considered individually. The Court generally agrees with each of these points. The Court recognizes that there may be advantages to arbitration. Litigation is a poor way to resolve controversies. It is expensive, time-consuming, and tends to engender ill will which jeopardizes continuing business and personal relationships. Where both parties to a

contract are concerned with speedy, economical conflict resolution and harmonious business relations, they will often prefer arbitration to litigation, and incorporate this preference in their contracts. Indeed, the Navajo Nation Council has encouraged arbitration through its passage of the Navajo Nation Arbitration Act, 7 N.N.C. § 1101 et seq. (2004), which provides for court enforcement of arbitration agreements, § 1102, and court review of arbitration awards, §§ 1114-1118. The courts have likewise upheld the arbitration process. *Peabody Western Coal Co. v. Navajo Nation Labor Commission*, 8 Nav. R. 313, 320 (Nav. Sup. Ct. 2003) (arbitration decision under collective bargaining agreement bars a Labor Commission proceeding under NPEA); *Rough Rock Community School v. Navajo Nation*, 7 Nav. R. 313, 318-19 (Nav. Sup. Ct. 1998) (rules and procedures for arbitration must be followed, and arbitration process should not be confused with mediation). In situations where there are two sophisticated parties, for example, and where a written arbitration clause was bargained for and was intended by both parties to provide an effective alternative to litigation, the courts will likely require both parties to proceed to arbitration.

While encouraging arbitration, the Arbitration Act also recognizes that some arbitration agreements may be unenforceable. "A written agreement to submit any existing or future controversy to arbitration is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of the contract." 7 N.N. C. § 1103. One of the grounds for revocation of a contract is unconscionability. *See* Navajo Uniform Commercial Code, 5A N.N.C. § 2-302 (2005) (court can refuse to enforce contract in whole or in part if it determines it is unconscionable). The doctrine of unconscionability applies to arbitration agreements in the same way it applies to other

contracts, and an unconscionable arbitration agreement will not be enforced. *Green Tree Servicing v. Duncan*, No. SC-CV-46-05, slip op. at 7-13 (Nav. Sup. Ct. August 18, 2008).

As the Defendants argue, it is generally presumed that an arbitration provision in a written contract was bargained for and that the arbitration was intended to be the exclusive means of resolving disputes arising under the contract. However, where, as here, a party alleges that the arbitration provision was unconscionable, the question of whether the arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract. Unconscionability is determined at the time the contract was made. Therefore, in accordance with 5A N.N.C. § 2-302(B), a hearing was held and the parties presented evidence as to the commercial setting surrounding the signing of the Arbitration Provision, its purpose and effect.

At the hearing, the Plaintiff testified that she and her co-buyer did sign the Arbitration Provision along with other documents to purchase the mobile home, over the course of one to two hours. She did not remember whether or not the Arbitration Provision had been explained to her, and did not remember whether or not there was any discussion about it. The Plaintiff testified that she had never heard of arbitration before and did not know what arbitration is, but understands that the effect of the Arbitration Provision's highlighted paragraph 4 is to require both parties to arbitrate their disputes. The Plaintiff was a high school graduate at the time of the purchase, and her co-buyer had not completed high school. Defendant Sherman Singleton testified that he has been in business in Farmington for over fifty years and has sold thousands of mobile homes. He has a high school education plus three years of college. Mr. Singleton did not remember

who drafted the Arbitration Provision, but said he uses it in all of his contracts. He did not remember this specific sale, but testified that if buyers did not understand something, he would have explained it until they understood. Mr. Singleton stated that he saw no reason to negotiate over the Arbitration Provision with any buyers, but probably would not complete a sale if the buyers did not sign it. He stated that the relative rights of the buyer and the seller in the Arbitration Provision are exactly the same under paragraph 4. When he was asked the meaning of paragraph 3b, he acknowledged that he did not know what it meant, having never noticed it before. Mr. Singleton said that, although he provided the financing on this contract, he never considered himself to be a "lender" and had never considered the possibility that paragraph 3b applied to him.

The doctrine of unconscionability has both procedural and substantive elements. Procedurally, in this case there was no real negotiation. The Arbitration Provision was not the result of talking things out and respectful explanation under the principle of *házhó'ógó*. *See Green Tree Servicing, supra*, slip op. at 11. Instead, it was part of a contract of adhesion. An adhesion contract is a standardized contract, imposed and drafted by the party of superior bargaining strength, which gives to the other party only the opportunity to adhere to the contract or reject it. The Arbitration Provision was presented to the buyers as a "take it or leave it" proposition; if the buyers failed to sign it, the sale would fall through. They had no meaningful choice about whether or not to sign the Arbitration Provision. The form was presumably drafted by the Defendants or their lawyers, and not as a result of back and forth negotiations between both parties. The Defendants, being merchants with decades of experience in sales, were in a superior bargaining position.

A contract of adhesion is not in itself unenforceable, but it is subject to scrutiny for unconscionability. An arbitration agreement imposed in an adhesive context lacks basic fairness and is therefore unconscionable if it requires one contracting party, and not the other, to arbitrate all claims arising out of the contract. The lack of meaningful choice would not be enough by itself to render the provision unenforceable if the terms of the agreement were even-handed; however, they are not.

Substantively, the Arbitration Provision is unfair. The Defendants argue that the fact that paragraph 4 of the Arbitration Provision is in all capital letters and bolded makes it a clear and obvious explanation of the rights given up by the parties as required for enforcement under *Green Tree Servicing*. The Defendants further argue that because both parties are equally bound to arbitrate, *Green Tree Servicing* does not apply, and the provision is enforceable. The Court agrees that paragraph 4 is sufficiently highlighted to draw attention to its terms, and that its language is clear and understandable. The terms of paragraph 4, however, are in this case directly contradicted by the terms of paragraph 3b, which are written in legalese and not highlighted in any way. Considering not only the highlighted language of paragraph 4, but also the language and effect of paragraph 3b, the obligation to arbitrate goes only one way. The buyer has to arbitrate, and arbitrate everything; the lender may choose whether to arbitrate "at its sole discretion;" it does not have to arbitrate anything. Mr. Singleton testified that he does not consider himself a "lender" subject to the terms of paragraph 3b, and stated that he never lent the Plaintiff any money, but acknowledged that Singleton's Mobile Home Sales, Inc. did provide financing for the purchase of the mobile home. As an entity providing financing, Singleton's Mobile Home Sales, Inc. is a lender. In fact, as holder of a security interest in

the contract, Singleton's Mobile Home Sales, Inc. counterclaimed for acceleration of the contract's terms and repayment of the balance due, and also claimed a right of repossession. As a lender, it had the benefit of paragraph 3b's provision that the arbitration agreement may be invoked at the "sole discretion" of the lender, and its provision that "[n]othing in this contract requires a lender or mortgagee to invoke this Arbitration Provision . . . ." The unfettered discretion retained by the Singleton's Mobile Home Sales, Inc. in paragraph 3b means it retains the right to decide whether or not to arbitrate, and the promises contained in paragraph 4 are illusory.

Reading only paragraph 4 of the Arbitration Provision's, in bold capital letters, it might appear at first look that it is a two-way, mutual agreement that requires both parties equally to arbitrate their claims. It repeatedly refers to "the parties" and "they." The apparent fairness of paragraph 4 obscures the fact that paragraph 3b, not bolded and not capitalized, and written in more legalistic language than paragraph 4, preserves all the lender's rights to go to court. This Arbitration Provision seeks to deliberately obscure the one-sided nature of the agreement, and for this reason it is even more unconscionable than the arbitration clause struck down in *Green Tree Servicing*. The Arbitration Provision as a whole is difficult to read and understand. In the absence of an explanation, the Arbitration Provision is meaningless to an untrained person. It is unrealistic to suppose that the Plaintiff, or most buyers, would have the background to understand the significance of the rights she was relinquishing.

The Supreme Court in *Green Tree Servicing*, which also involved a consumer contract for the sale and financing of a mobile home, held that a one-sided arbitration agreement could be enforced only if the contract calls attention to the inequities of the

agreement. The arbitration agreement should contain clear and specific language explaining to the consumer that she is surrendering her rights to bring claims to court, but at the same time is allowing the lender to bring its claims to court. *Id.*, at 13. This Arbitration Provision does the opposite: instead of explaining the whole situation in clear and specific language, it seeks to hide the unfairness in the fine print, while in bold and capital letters declaring a mutuality of obligation that in fact does not exist. The Arbitration Provision as a whole is not only difficult to read, but it is deceptively arranged. In addition, the fine print in paragraph 3b nullifies the highlighted paragraph 4, where, as in this case, the seller is also the lender. These terms, and their relative placement within the document, make the Arbitration Provision substantively unconscionable. *See* Special Plain Language Comment to 5A N.N.C. § 2-302 (categories of unconscionable provisions).

Neither the statute validating arbitration clauses nor the policy favoring such provisions should be used as a shield to block a party's access to a judicial forum. This is especially true where the clause itself is substantively unfair, and the process for getting a buyer to sign such a clause is one of adhesion. The compulsory Arbitration Provision, in the context of a form document signed by a consumer as part of a consumer loan transaction which contains substantial waiver of substantive rights, including access to the courts, while preserving the creditor's right to a judicial forum, is so one-sided as to be void as a matter of law. If the arbitration process required of buyers in this Arbitration Provision is indeed fair, then the lender as well as the buyer should be willing to submit its claims under the contract to arbitration. As noted above, Singleton's Mobile Home Sales, Inc. has counterclaimed for acceleration of the contract and repayment of the

balance owed. Perversely, if Plaintiff's claims in this Court were to be barred by the Arbitration Provision, the Singleton's Mobile Home Sales, Inc.'s counterclaims, which are asserted in its capacity as lender, would remain standing in this Court against the Plaintiff. Without any reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing the lender's advantage. Arbitration was not intended for this purpose. Defendants have pursued an acceptable objective—arbitration—in an unacceptable manner. The Court will not enforce the Arbitration Provision.

IT IS THEREFORE ORDERED:

The Motion to Compel Arbitration is denied.

SO ORDERED this 27th day of September, 2011.

Irene Black
JUDGE, District Court of the Navajo Nation

CERTIFICATE OF SERVICE

I certify that on this 28th day of September, 2011, I sent a true copy of the foregoing Order to:

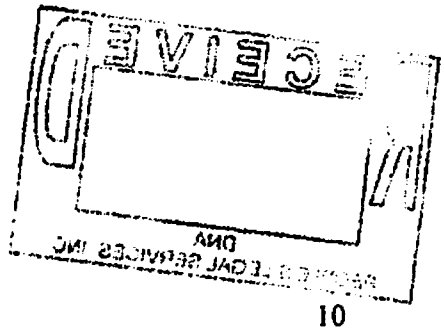
Matt VanWormer, Counsel for Plaintiff
DNA-People's Legal Services, Inc.
Post Office Box 987
Shiprock, New Mexico 87420

F.D. Moeller, Counsel for Defendants
Moeller Law Offices, Inc.
424 West Broadway
Farmington, New Mexico 87410

By: _____

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE INSTRUMENT ON FILE IN THE COURTS OF THE NAVAJO NATION.

_____
CLERK, COURTS OF THE NAVAJO NATION



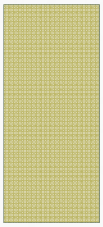
Navajo Nation Law CLE

Section 8

Criminal Law Overview

CRIMINAL LAW OVERVIEW

NAVAJO NATION



GERTRUDE LEE

Navajo Nation Chief Prosecutor

Window Rock

928-871-6622

gertrudelee@navajo-nsn.gov

WHERE TO FIND THE LAW
GENERAL CRIMINAL TIMELINE
BAIL/RELEASE ISSUES
ARRAIGNMENT
DISCOVERY
PRETRIAL MOTIONS (I)
PRETRIAL CONFERENCE(S)
PRETRIAL MOTIONS (II)
TRIAL
SENTENCING

NAVAJO CRIMINAL LAW
WHERE IS IT?

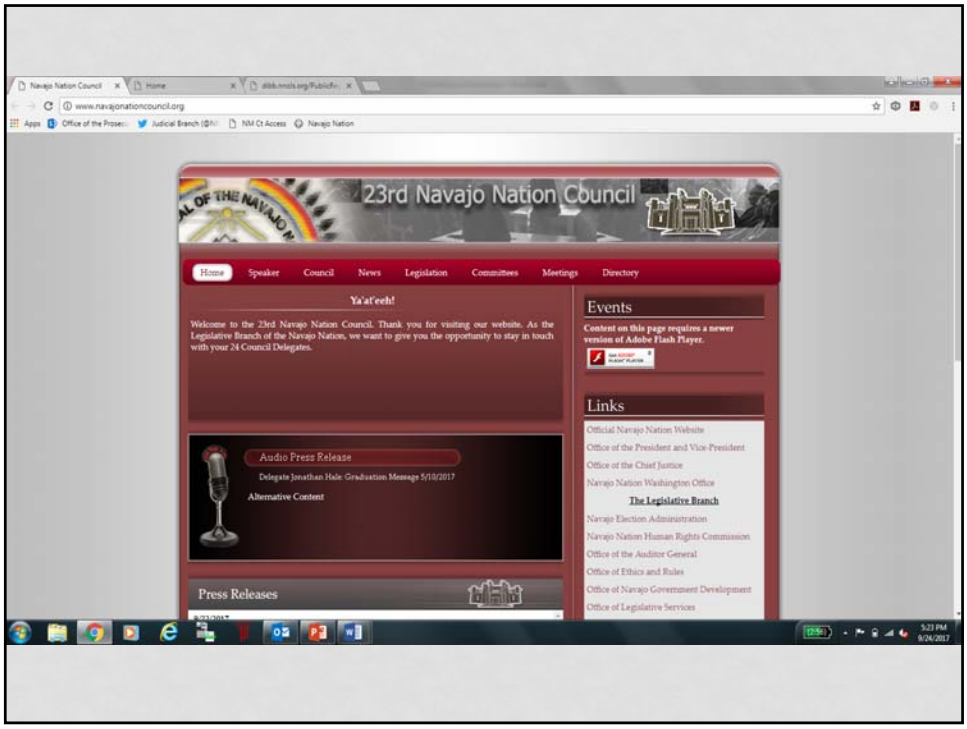
- 1 N.N.C. §§1-9: Navajo Bill of Rights & Indian Civil Rights Act
- Title 17: Navajo Nation Criminal Code
- Title 14: Motor Vehicle Code
- Navajo Rules of Criminal Procedure (And Civil Procedure)
- Navajo Nation Supreme Court opinions
- Diné Bi Beenahaz'áanii

NAVAJO CRIMINAL LAW
WHERE IS IT?

- Title 14 has not been amended since 1988
- Title 17 (a little more problematic)
- Code Books/Website current through 2009
- Supreme Court Cases

WHERE DO YOU FIND UPDATES TO TITLE 17 SINCE 2009?

- Two Places:
  - Navajo Nation Council Website
  - http://www.navajonationcouncil.org/
  - Navajo Nation Office of Legislative Services
    - DIBBS
  - http://dibb.nnols.org/PublicReporting.aspx


www.navajonationcouncil.org
23rd Navajo Nation Council
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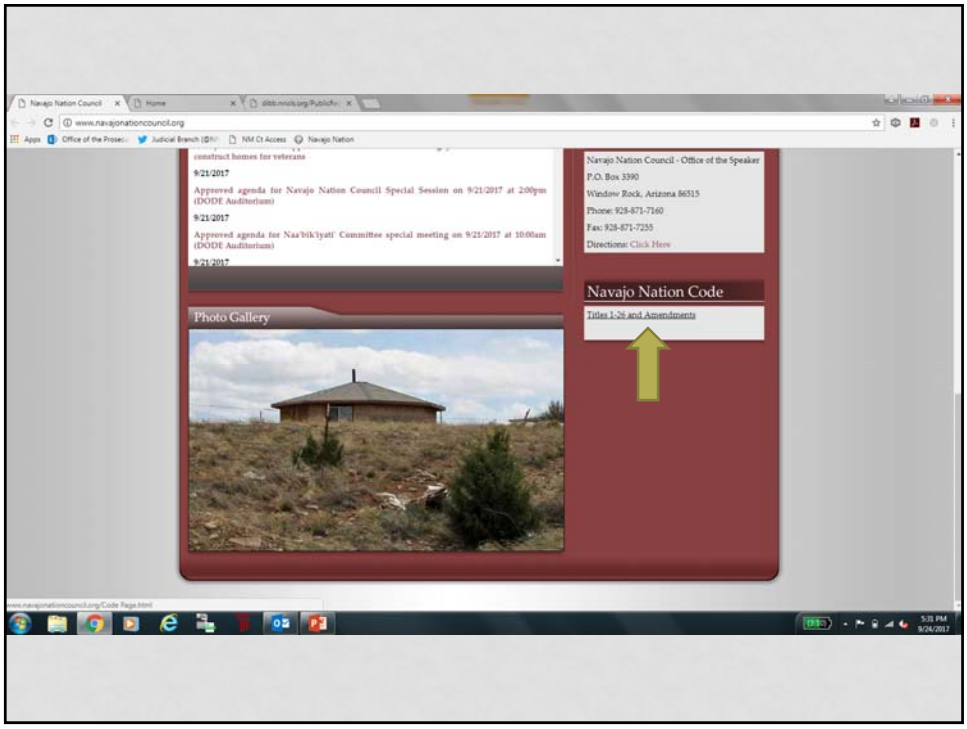
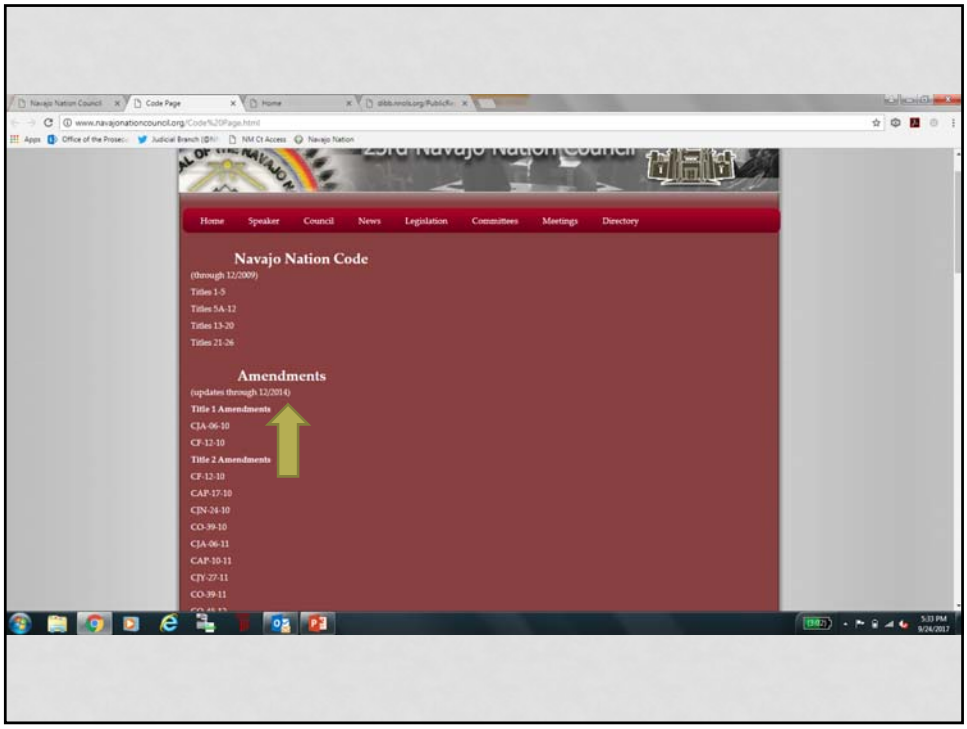
Ya'at'eeh!
Welcome to the 23rd Navajo Nation Council. Thank you for visiting our website. As the Legislative Branch of the Navajo Nation, we want to give you the opportunity to stay in touch with your 24 Council Delegates.
Events
Content on this page requires a newer version of Adobe Flash Player.
Links
Official Navajo Nation Website
Office of the President and Vice-President
Office of the Chief Justice
Navajo Nation Washington Office
The Legislative Branch
Navajo Election Administration
Navajo Nation Human Rights Commission
Office of the Auditor General
Office of Ethics and Rules
Office of Navajo Government Development
Office of Legislative Services
Audio Press Release
Delegate Jonathan Hale Graduation Message 5/10/2017
Alternative Content
Press Releases


www.navajonationcouncil.org
construct homes for veterans
9/21/2017
Approved agenda for Navajo Nation Council Special Session on 9/21/2017 at 2:00pm (DODE Auditorium)
9/21/2017
Approved agenda for Naa'bik'iyati' Committee special meeting on 9/21/2017 at 10:00am (DODE Auditorium)
9/21/2017
Navajo Nation Council - Office of the Speaker
P.O. Box 3390
Window Rock, Arizona 86515
Phone: 928-871-7160
Fax: 928-871-7255
Directions: Click Here
Navajo Nation Code
Titles 1-26 and Amendments
Photo Gallery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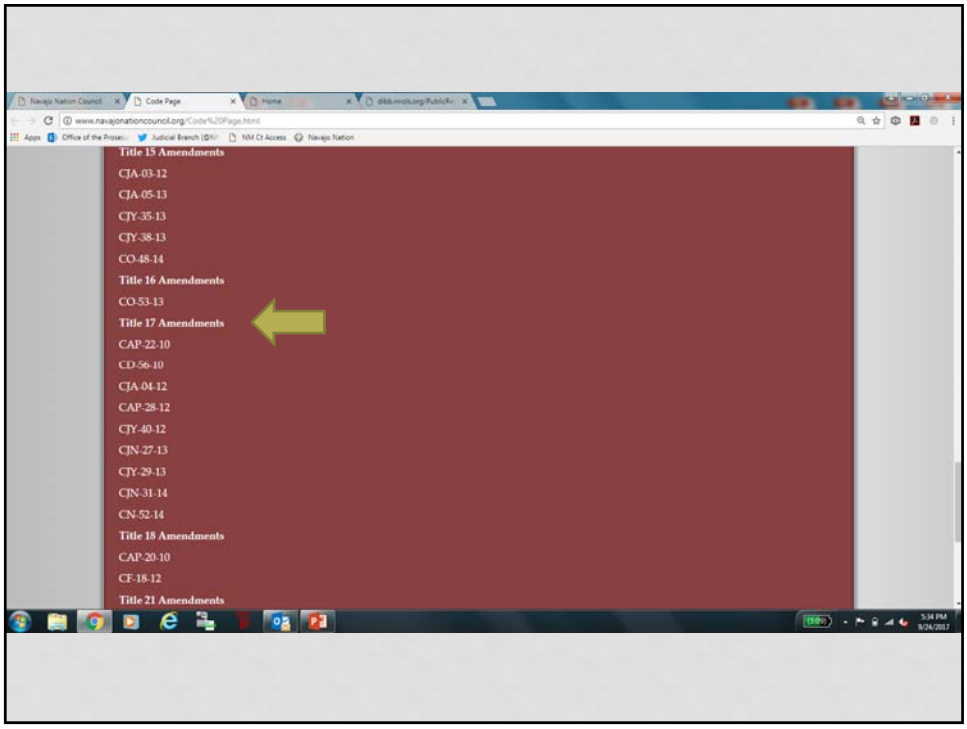
Navajo Nation Code
(through 12/2009)
Titles 1-5
Titles 5A-12
Titles 13-20
Titles 21-26
Amendments
(updates through 12/2014)
Title 1 Amendments
CJA-06-10
CF-12-10
Title 2 Amendments
CF-12-10
CAP-17-10
CJN-24-10
CO-39-10
CJA-06-11
CAP-10-11
CJY-27-11
CO-39-11


Title 15 Amendments
CJA-03-12
CJA-05-13
CJY-35-13
CJY-38-13
CO-48-14
Title 16 Amendments
CO-53-13
Title 17 Amendments
CAP-22-10
CD-56-10
CJA-04-12
CAP-28-12
CJY-40-12
CJN-27-13
CJY-29-13
CJN-31-14
CN-52-14
Title 18 Amendments
CAP-20-10
CF-18-12
Title 21 Amendments

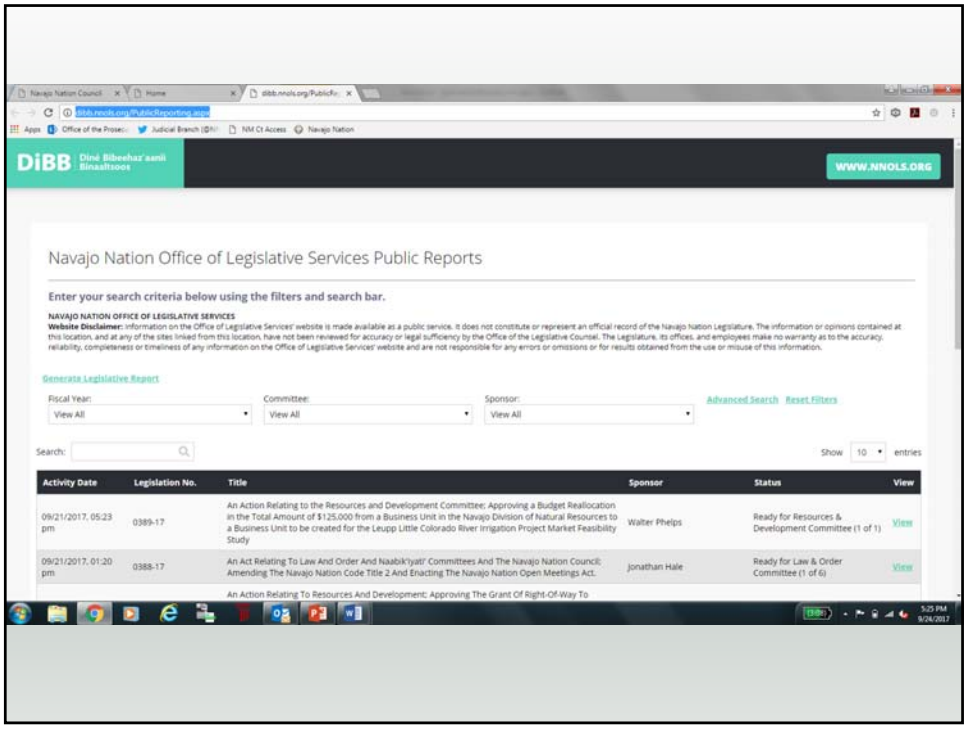
WHERE DO YOU FIND UPDATES TO TITLE 17 SINCE 2009?

- Two Places:
  - Navajo Nation Council Website
  - http://www.navajonationcouncil.org/

  - **CAP-22-10 – Internet Sex Offenses Act**
  - CD-56-10 – Cross Commissions Agreement Act
  - **CJA-04-12 – Violence Against Family Act**
  - **CAP-28-12 – Sex Offender Registration & Notification Act**
  - CJY-40-12 – Amending 17 NNC § 412 (exceptions) - Liquor
  - CJN-27-13 – Amending 17 NNC § 412 (exceptions) - Liquor
  - CJY-29-13 – Amending Extradition & Detainer statute
  - **CJN--31-14 – Amending SORNA (addressing absconders)**
  - **CN-52-14 – Amending sentencing provision of Title 17**

WHERE DO YOU FIND UPDATES TO TITLE 17 AFTER 2014?

- Navajo Nation Office of Legislative Services
  - DIBBS
- http://dibb.nnols.org/PublicReporting.aspx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Navajo Nation Office of Legislative Services Public Reports
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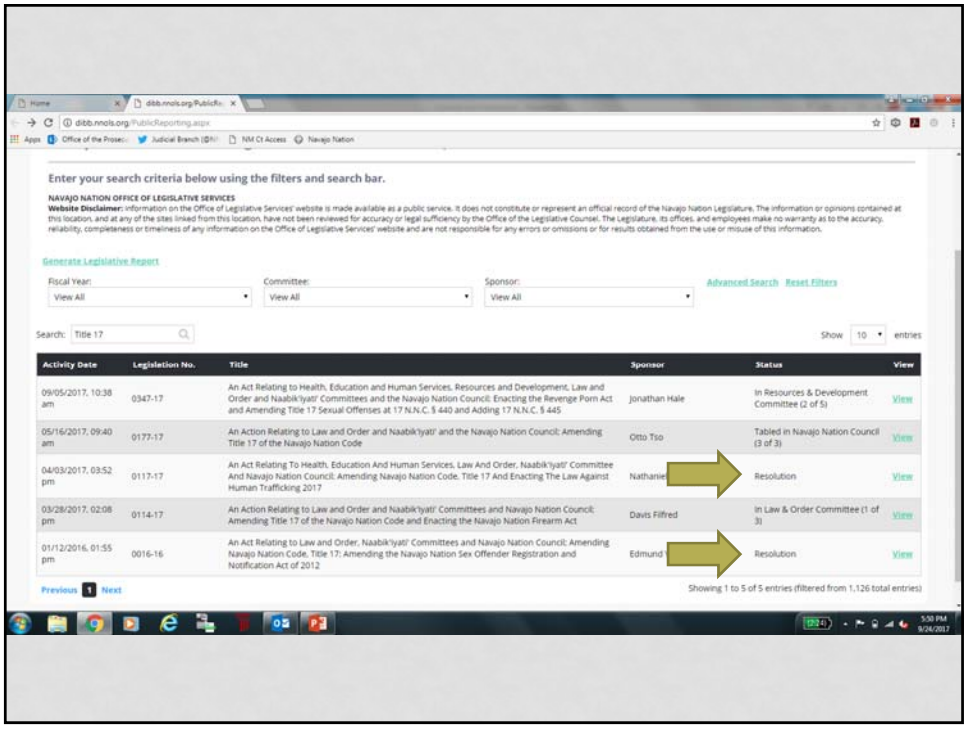
09/21/2017, 05:23 pm
0389-17
An Action Relating to the Resources and Development Committee; Approving a Budget Reallocation in the Total Amount of $125,000 from a Business Unit in the Navajo Division of Natural Resources to a Business Unit to be created for the Leupp Little Colorado River Irrigation Project Market Feasibility Study
Walter Phelps
Ready for Resources & Development Committee (1 of 1)
View
09/21/2017, 01:20 pm
0388-17
An Act Relating To Law And Order And Naabik'iyati' Committees And The Navajo Nation Council; Amending The Navajo Nation Code Title 2 And Enacting The Navajo Nation Open Meetings Act.
Jonathan Hale
Ready for Law & Order Committee (1 of 6)
View
An Action Relating To Resources And Development; Approving The Grant Of Right-Of-Way To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Committee:
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Advanced Search
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Search: Title 17
Show 10 entries
Activity Date
Legislation No.
Title
Sponsor
Status
View
09/05/2017, 10:38 am
0347-17
An Act Relating to Health, Education and Human Services, Resources and Development, Law and Order and Naabik'iyati' Committees and the Navajo Nation Council; Enacting the Revenge Porn Act and Amending Title 17 Sexual Offenses at 17 N.N.C. § 440 and Adding 17 N.N.C. § 445
Jonathan Hale
In Resources & Development Committee (2 of 5)
View
05/16/2017, 09:40 am
0177-17
An Action Relating to Law and Order and Naabik'iyati' and the Navajo Nation Council; Amending Title 17 of the Navajo Nation Code
Otto Tso
Tabled in Navajo Nation Council (3 of 3)
View
04/03/2017, 03:52 pm
0117-17
An Act Relating To Health, Education And Human Services, Law And Order, Naabik'iyati' Committee And Navajo Nation Council; Amending Navajo Nation Code, Title 17 And Enacting The Law Against Human Trafficking 2017
Nathaniel
Resolution
View
03/28/2017, 02:08 pm
0114-17
An Action Relating to Law and Order and Naabik'iyati' Committees and Navajo Nation Council; Amending Title 17 of the Navajo Nation Code and Enacting the Navajo Nation Firearm Act
Davis Filfred
In Law & Order Committee (1 of 3)
View
01/12/2016, 01:55 pm
0016-16
An Act Relating to Law and Order, Naabik'iyati' Committees and Navajo Nation Council; Amending Navajo Nation Code, Title 17; Amending the Navajo Nation Sex Offender Registration and Notification Act of 2012
Edmund
Resolution
View
Previous
1
Next
Showing 1 to 5 of 5 entries (filtered from 1,126 total entries)

WHERE DO YOU FIND UPDATES TO TITLE 17 AFTER 2014?

- Navajo Nation Office of Legislative Services
  - DIBBS
- http://dibb.nnols.org/PublicReporting.aspx

- CJA-11-16 – SORNA Amendments (Clarifying Tiers)
- **CJY-48-17 – Law Against Human Trafficking**

RULES

Navajo Nation Judicial Branch Website

- http://www.navajocourts.org/index.htm
- Rules of Criminal Procedure
  - http://www.navajocourts.org/Rules/criminalpro.htm
- Rules of Evidence
  - http://www.navajocourts.org/Rules/evidence.htm
- Supreme Court Opinion
  - Navajo Reporter – Opinions from 1969-2005
  - Versus Law & West Law (opinions 2006-present)
  - Opinions 2013- present can be located at: http://www.navajocourts.org/suctopinions.html

NAVAJO SUPREME COURT OPINIONS

- ✓ *Navajo Nation v. Aaron John*, No. SC-CR-01-09 (Nav. Sup. Ct. October 30, 2009)
- ✓ *Navajo Nation v. Kayenta District Court*, No. SC-CV-50-13 (Nav. Sup. Ct. March 4, 2014)
- ✓ *Apachito v. Navajo Nation*, 8 Nav. R. 339 (Nav. Sup. Ct. 2003)
- ✓ *Wood v. Window Rock District Court, the Navajo Nation, Real Party in Interest*, No. SC-CV-20-09 (Nav. Sup. Ct. July 1, 2009)
- ✓ *Bitsie v. Delores Greyeyes, Director, Navajo Nation Department of Corrections*, No. SC-CV-55-11 (Nav. Sup. Ct. December 29, 2011)
- ✓ *Seaton v. Greyeyes*, No. SC-CV-04-06 (Nav. Sup. Ct. March 28, 2006)
- ✓ *Navajo Nation v. Lee*, 4 Nav. R. 185 (W.R. Dist. Ct. 1983)
- ✓ *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992)
- ✓ *Navajo Nation v. Rodriguez*, 8 Nav. R. 604 (Nav. Sup. Ct. 2004)
- ✓ *Navajo Nation v. Judge James Atcitty*, 4 Nav. R. 130 (Nav. Ct. App. 1983)
- ✓ *Navajo Nation v. Morgan*, 8 Nav. R. 732 (Nav. Sup. Ct. 2005)
- ✓ *Curley v. Navajo Nation*, 8 Nav. R. 269 (Nav. Sup. Ct. 2002)

CRIMINAL TIMELINE

Prosecutor files complaint(s)

ARRAIGNMENT

(discovery)

PRETRIAL CONFERENCE(S)

(more discovery; pretrial motions)

TRIAL

SENTENCING

POST-TRIAL WORK

THE COMPLAINT

- No joinder of offenses (Rule 7)
- No joinder of defendants (Rule 7)
- Check content of complaint (Rule 8)
  - Client's name (or description that IDs w/ reasonable clarity)
  - Client's census #, if any
  - Client's address
  - Essential facts, including jurisdictional facts
  - Statutory name of offense
  - Section of Code allegedly violated
  - No unnecessary allegations

SUMMONS & SERVICE – 9(C)

- Was your client served by a Navajo Nation Police officer?
- Was your client served within the territorial jurisdiction of the Navajo Nation?
- Was the summons and complaint handed directly to your client?

BAIL

17 N.N.C. §1807

"Every person arrested for an alleged offense against the Navajo Nation shall, within a period of 18 hours from the time of commitment, be given an opportunity to be released on bail."

SO WHO OFFERS/DECIDES BAIL?

Judges

- ✓ Specific bail in each case (not to exceed maximum fine)
- ✓ Bail *schedule* for various offenses (majority of judges w/ Chief Justice's concurrence)
  - ✓ Police officers authorized by the Director of the Department of Law Enforcement could implement the schedule
  - ✓ Department of Corrections could implement the schedule
- ✓ 17 N.N.C. §1815 Director of the Department of Law Enforcement is authorized and directed to authorize officers to admit persons to bail when Court is not in session
- ✓ 17 N.N.C. §1815 Director of the Department of Law Enforcement is directed to assure that an officer authorized to admit persons to bail be on duty at each jail facility during said times
- ✓ "Consent decree" (1992) and *Navajo Nation v. Holmes* (2013)

BAIL/RELEASE

17 N.N.C. §1805

"No person shall be detained, jailed or imprisoned under any law of the Navajo Nation for a longer period than 36 hours, unless there be issued a commitment bearing the signature of a duly qualified judge of the Court of the Navajo Nation…."

BAIL/RELEASE (FRIDAY, WEEKENDS, HOLIDAYS)

17 N.N.C. §1805

"…however, that a person arrested on a Friday, Saturday, Sunday, or a day before a holiday, who, having been given an opportunity within 36 hours after arrest to be released on bail does not provide bail, may be held in custody pending commitment for a reasonable additional period not to exceed eight hours following the opening of court on the next day it is in session."

BAIL/RELEASE

"…there is a legal presumption for release by personal recognizance unless the Navajo Nation objects and a judge makes 'certain findings' to the contrary at the defendant's initial appearance."

Wood v. Window Rock Dist. Ct.
slip op. No. SC-CV-20-29
(Nav. Sup. Ct. July 1, 2009)

BAIL/RELEASE

"Certain findings"

The court has reason to believe:

- ✓ Defendant is dangerous to public safety (Rule 15(d))
- ✓ Defendant will commit a serious crime (Rule 15(d))
- ✓ Defendant will seek to intimidate any witness (Rule 15(d))
- ✓ Defendant will otherwise unlawfully interfere with the administration of justice (Rule 15(d))
- ✓ "For any other reason allowed by law" (Rule 15(d))
- ✓ Defendant is unable to care for his or her personal safety (17 N.N.C. §1812)
- ✓ Defendant will pose a danger to any other person (17 N.N.C. §1812)
- ✓ Defendant will leave the lands subject to the jurisdiction of the Navajo Nation and fail to appear (17 N.N.C. §1812)

BAIL/RELEASE

Rule 15(b) & 17 N.N.C. §1812 findings

Must be made by CLEAR AND CONVINCING evidence

ONE MORE "CERTAIN FINDING" 17 N.N.C. §1812(A)(4)

"When the person charged has allegedly done or committed acts as part of the same design or transaction upon which the alleged offense against the Navajo Nation is charged which would in the officer's or the judge's belief constitute a felonious offense, which shall be for the purposes of this Section, an offense under 18 U.S.C. §1153."

MAJOR CRIMES ACT
18 U.S.C. §1153

Any Indian who commits against the person or property of another Indian or other person:

- ✓ Murder
- ✓ Manslaughter
- ✓ Kidnapping
- ✓ Maiming
- ✓ Felony under chapter 109A
- ✓ Incest
- ✓ Assault w/ intent to commit murder
- ✓ Assault w/ a dangerous weapon
- ✓ Assault resulting in serious bodily injury
- ✓ Assault against someone under 16 years old
- ✓ Felony child abuse or neglect
- ✓ Arson
- ✓ Burglary
- ✓ Robbery
- ✓ Felony under section 661 in Indian Country

EGREGIOUSNESS OF ALLEGED OFFENSE NOT SUFFICIENT

"…mere seriousness of the alleged offense does not, by itself, justify continued detention."

"To hold a defendant merely because the complaint *alleges* a serious offense improperly treats the defendant as guilty before the trial, by assuming the allegations are true and essentially punishing him or her before the Nation has established beyond a reasonable doubt that the offense occurred. This clearly violated Seaton's right to due process."

Seaton v. Greyeyes

CLEAR AS MUD?

- ✓A Defendant must be offered bail
  - ✓Bail Agreement – third party release (17 N.N.C. §1808)
  - ✓Cash bond (17 N.N.C. §1809)
- ✓Prosecutor must request denial of bail and findings must be made by clear and convincing evidence
  - ✓Motion to deny bail (written or verbal at arraignment or bail hearing)
  - ✓"Certain findings" by clear and convincing evidence to deny bail
- ✓Most writs are filed because of bail/release issues

ARRAIGNMENT - PURPOSE

Rule 12

✓To bring the defendant before the Court

✓To advise the defendant of the specific nature of the charges against him or her

✓To advise the defendant of his rights under the law

✓To ask the defendant to enter a plea

NOT GUILTY

GUILTY

NO CONTEST

ARRAIGNMENT - PROCEDURE

English(for the record); Navajo (if necessary)

- ✓Defendant is given a copy of the complaint
- ✓Case name and number is called
- ✓Defendant stands and faces the Bench
- ✓Court asks Defendant's name, DOB, tribal membership, C#, and SS#
- ✓Court reads complaint to defendant and asks if defendant understands
- ✓Judge informs Defendant of rights
- ✓Judge informs Defendant of maximum penalty if found guilty or pleads guilty
- ✓Defendant enters a plea

PLEAS

Pleas must be knowingly, voluntarily and intelligently made.

- ✓Some judges routinely enter not guilty pleas for Defendants
- ✓Some judges accept a guilty plea
- ✓Some judges colloquy well with Defendants

DISCOVERY

(RULES 24-28)

DISCLOSURE BY THE NAVAJO NATION

AT THE TIME OF ARRAIGNMENT

✓**GIVE TO DEFENDANT** List of witnesses with their addresses which Navajo Nation intends to use against Defendant

✓"No other witnesses shall be allowed to testify against him except on notice to the defendant and with permission of the court." Rule 25(a)

DISCLOSURE BY THE NAVAJO NATION

NO LATER THAN 10 DAYS AFTER ARRAIGNMENT

✓MAKE AVAILABLE TO THE DEFENDANT FOR EXAMINATION AND REPRODUCTION THE FOLLOWING MATERIAL AND INFORMATION WITHIN THE PROSECUTION'S POSSESSION OR CONTROL:

(Rule 25(b))

DISCLOSURE BY THE NAVAJO NATION

NO LATER THAN 10 DAYS AFTER ARRAIGNMENT

1. All statements of the defendant
2. Names and addresses of any experts who have examined the defendant or any evidence in the case; results of physical examinations or tests; written reports or statements made by those experts
3. List of all papers, documents, photographs or tangible objects which Prosecutor intends to use or which were obtained from or purportedly belonged to the defendant

DISCLOSURE BY THE NAVAJO NATION

NO LATER THAN 10 DAYS AFTER ARRAIGNMENT

4. A list of all prior convictions of the defendant which Prosecutor will use at trial
5. A list of all prior acts of the defendant which Prosecutor intends to use to prove motive, intent, knowledge or otherwise use at trial
6. All material or information, which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce his punishment thereof, including all prior convictions of witnesses whom the prosecutor expects to call at trial

MORE DISCLOSURE BY THE NAVAJO NATION

WITHIN 10 DAYS AFTER ARRAIGNMENT

Rule 25(c) POSSIBLE COLLATERAL ISSUES

MAKE AVAILABLE TO DEFENDANT information as to whether:

- ✓there was any electronic surveillance of the defendant, or defendant's business/residence
- ✓Whether a search warrant has been executed in connection with the case
- ✓Whether or not the case has involved an informant

EXTENT OF PROSECUTOR'S DUTY TO OBTAIN INFORMATION

Rule 25(e)

The prosecutor's obligation under this Rule extends to material and information in the possession or control of members of his staff and of any other persons who have participated in the investigation or evaluation of the ae and who are under the prosecutor's control.

REQUEST FOR ADDITIONAL DISCLOSURE

Rule 25(d)

Defendant may request additional disclosure from the prosecution by a motion.

MOTION MUST SPECIFY:

- ✓Nature of the additional disclosure
- ✓Need for the additional disclosure

Practice Tip: *call* the prosecutor before seeking intervention from the Court

DISCLOSURE BY DEFENDANT

Rule 26

WITHIN 20 DAYS OF ARRAIGNMENT

Must serve Prosecutor notice of any affirmative defenses and identify witnesses in support of affirmative defenses

ALIBI
ENTRAPMENT
SELF-DEFENSE
COMPETENCY (BUT SEE RULE 29(c))

CONTINUING DUTY TO DISCLOSE

Rule 24(d)

Both parties have ongoing duty of disclosure throughout the discovery process

STATEMENT OF COMPLIANCE

Rule 25(f)

Prosecutor must file statement of compliance w/in 20 days of trial.

"We have fully met our obligations in disclosing discovery."

OTHER DISCOVERY ISSUES

"Open File" Rule
Depositions – Rule 27
Subpoenas
Motions to compel
Motions to suppress

See the recent Supreme Court Case:
Navajo Nation v. Roy Tso, Jr., No. SC-CR-03-16 (Nav. Sup. Ct. October 25, 2016)

PRETRIAL MOTIONS (I)

WITHIN 15 DAYS OF ARRAIGNMENT – RULE 29(b)

- ✓Change of venue
- ✓Jury Demand
- ✓Conditions of pretrial release
- ✓Defective complaint
- ✓Amend the complaint

GENERAL MOTIONS PRACTICE

- ✓Responding party has 10 days from service to respond
- ✓Continuances granted for "good cause shown"
- ✓Trial continuances less than 10 days before trial require "unforeseeable or exigent circumstances," with no unreasonable delay in seeking the continuance

- ✓Rule 29(d): waiver because of untimeliness may be rebutted by 1) good cause for lateness and 2) interest of substantial justice

PRETRIAL CONFERENCE(S)

Rule 31
Discretionary except when jury demand
Defendant's presence mandatory(?) (Rule 31(d)(4))
Specify/argue pretrial motions
Stipulations of fact or legal issues to be tried
Jury instructions
Finalize lists of witnesses
Finalize lists of exhibits

PRETRIAL MOTIONS (II)

AT LEAST 20 DAYS BEFORE TRIAL – RULE 29(c)

✓Discovery motions
✓Disqualification of judge
✓Name additional witnesses
✓Speedy trial
✓Evidentiary motions (including to suppress)
✓Raising mental capacity

JURISDICTION MAY BE CHALLENGED AT ANY TIME

TRIAL

Rules 34-46

Order of proceedings

- ✓Complaint read into record and plea stated
- ✓Prosecutor makes opening statement
- ✓Defense makes opening statement or defers
- ✓Prosecutor offers evidence
- ✓Defense offers evidence in rebuttal
- ✓Parties present closing arguments

SENTENCING

Rule 50

Sentence shall be imposed "without unreasonable delay."

Court may order a presentence report by PPS

- ✓ Defendant receives copy and may comment on it

Defendant has the right to make a statement

- ✓ Present any information, even hearsay, in mitigation

Defendant's counsel and Prosecutor have the right to speak

Court may continue bail or commit Defendant prior to sentencing

APPEALS

Defendant has 30 days to appeal a *final* judgment or order

- ✓ Cannot appeal if client "sentenced to imprisonment or labor for less than fifteen days or a fine of less than $26, or both." N.R.A.P. 2(e)

Can request stay of jail, fine or probation pending appeal

Navajo Nation Law CLE

Section 9

Suits against attorneys representing a tribal entity when sovereign immunity protects the entity

Suits Against Attorneys Representing A Tribal Entity When Sovereign Immunity Protects the Entity

Introduction

Lawsuits against lawyers representing tribal entities raise an initial question: Where can such a lawsuit be filed? As a practical matter, for state tort lawyers who sue attorneys, this is *the question* because if the case must be resolved in tribal court, absent unusual circumstances, this will end the litigation. That is why this discussion will focus so much on jurisdiction. If the case can be filed outside of tribal courts, state courts are the logical venue because they are the courts of general jurisdiction. Of course, cases can be brought in federal court if there is diversity of citizenship.

The remaining questions concerning suits against attorneys representing a tribal entity have to do with who is suing the lawyer. Is it the client? A third party? A third party beneficiary of the lawyer's services? Does the lawyer have a duty to the Plaintiff? What is the nature of the claim – contract, statutory or common law? And, has the lawyer acted outside of the scope of his/her authority?

1. General Principles of Jurisdiction – Where Are Lawsuits Filed?

We start with the basic policy expressed in *Williams v. Lee*, 358 U.S. 217 (1959). In that case, the United States Supreme Court reiterated the holding of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) that state courts have limited jurisdiction over Native-Americans. The Court noted:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

Williams, 358 U.S. at 220. In *Williams*, the Supreme Court held that Arizona courts lacked jurisdiction to hear a case where the transaction occurred entirely on the reservation. A non-Indian sued an Indian in state court for debts incurred on the reservation. The Court explained:

> Implicit in these treaty terms [between the Navajo Nation and the United States], as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. Since then, Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts . . . . The Tribe itself has in recent years greatly improved its legal system through increased expenditures and better-trained personnel. Today the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants.

* * *

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from the, it is for Congress to do it.

Id. at 221-222.

The fundamental premise is simply stated: The Supreme Court has repeatedly held that states may not unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Fisher v. District Court*, 424 U.S. 382 (1976); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971). In *Fisher*, for example, the tribal court had exclusive jurisdiction because the case involved an adoption proceeding in which all parties were tribal Indians residing on the reservation. Federal policies of "tribal self-sufficiency and economic development" underlie the promotion of "Indian sovereignty" over tribal affairs and Native Americans. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

Keeping that principal in mind, there are generally three factors to consider in determining jurisdiction: (1) the parties involved (Indians or non-Indians); (2) whether the cause of action arose within the Indian reservation; and (3) what is the nature of the interest to be protected. For example, on the one hand, there is exclusive tribal court jurisdiction where an "Indian is being sued by a non-Indian over an occurrence or transaction arising in Indian country" or "an action involves a

proprietary interest in Indian land". *Foundation Reserve Insurance Company v. Garcia*, 1987-NMSC-024, Para. 10, 734 P.2d 754. On the other hand, when the activity took place on and off the reservation, state/tribal courts may have concurrent jurisdiction. *See, e.g., Garcia v. Gutierrez*, 2009-NMSC-044, 217 P.3d 591.

However, even where the disputes occurred entirely off of the reservation, tribal jurisdiction may still apply if the action impermissibly infringes on tribal sovereignty. *See Fisher v. District Court*, 424 U.S. 382 (1976).

Federal courts similarly defer to tribal jurisdiction. *See e.g. Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) ("tribal courts play a vital role in tribal self-government and the Federal Government consistently encouraged their development.") *See also Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992) (*en banc*) (affirming the trial court's decision to abstain from exercising jurisdiction over a legal malpractice action arising at least in part on the reservation.)[1]

[1] The doctrine of exhaustion of tribal remedies can be applied when a non-tribal member defendant challenges the exertion of tribal authority (typically a tribal court) over it. It is a doctrine developed in federal courts to advance federal goals to enhance tribal self-government and self determination. *National Farmers U. Ins. Cos. V. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) "That policy favors a rule that will provide the

2. State Courts Are the Logical Place for Legal Malpractice Claims.

Neither tribal courts nor federal courts are courts of general jurisdiction. The "contention that tribal courts are courts of 'general jurisdiction' is [ ] quite wrong." *Nevada v. Hicks*, 533 U.S. 353, 367 (2001). For example, tribal courts have no jurisdiction over complaints that nonmembers committed torts outside the reservations. *Attorney's Process and Investigating Service, Inc. v. Sac & Fax Tribe of Miss. In Iowa*, 809 F.Supp.2d 916, 928 (N.D. Iowa 2011) ("tribal jurisdiction is lacking where the nonmember conduct at issue did not occur on the tribe's reservation.").

Federal courts are also courts of limited jurisdiction, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U. 375, 377 (1994), and have no subject matter jurisdiction over garden-variety state law tort claims such as those alleging attorney malpractice, whether arising on or off the reservation, because such claims do not raise substantial federal questions, *see, e.g., Baker v. Martin Marietta Mat'ls, Inc.*, 745 F.3d 919, 923-25 (8th Cir. 2013). Of course, cases may still proceed to federal court is there is complete diversity of citizenship.

[tribal] forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id*.

There are several avenues for state court jurisdiction. A tribe may decide to bring suit in state court. Honoring a tribal organization's choice of forum in state court "is particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself." *Three Affil. Tribes of Ft. Berthold Res. V. Wold Eng'g, P.C.,* 467 U.S. 138, 148-49 (1984). Stated another way, failing to honor a tribal entity's choice of forum "would be to undercut the Tribe's self-government and self-determination." *Altheimer & Gray v. Sioux Mfg. Co*rp. 983 F.2d 803, 815 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993). The aggrieved non-tribal plaintiff may bring a case in state court under the appropriate contract, statutory or common law theory. However, this is subject to: (1) removal to federal court if there is complete diversity of citizenship; or (2) the defendants can effectively argue that the case belongs in tribal court. *See* discussion above.

3. The Limits of the Application of Sovereign Immunity

Sovereign immunity does not attach to a person who acts as an individual or outside the scope of those powers that have been delegated to him or her. *See, e.g*., 1 N.N.C. Section 554(E)(1), (2) (Navajo officials not immunized for conduct outside the scope of their authority). *See also Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010);

Vigil v. State Auditor's Office, 2005-NMCA-096, Para. 12 ("Consequently, if Martinez was not acting within the scope of duty when he authorized the independent audit and published its results, Vigil's recourse is against Martinez personally, but the State would not be obliged to pay any settlement or judgment that might result").

And then there is the question of whether the professional can receive the benefits of sovereign immunity when the entity is he/she represented is suing him. Apart from the ethical issues attendant to such an argument, at least the Navajo Nation Supreme Court has refused to apply the Navajo Sovereign Immunity Act to "internal Navajo suits." *Morgan v. Shirley*, No. SC-CV-02-10, slip op. at 7 (Nav. Sup. Ct. June 2, 2010).

4. Other Issues In Suits Against Attorneys Representing Tribal Entities

A. Issues of Duty – Who can sue?

- Type of claim being brought:
- Legal Malpractice; Abuse of Process; Contract Claims; Statutory Claims

B. Rules of Professional Conduct – Tribal Rules/State Rules – what applies?

C. Which laws apply to determine the formation of a cause of action or the attendant damages that may be recovered?

*141 Ariz. 157, *; 685 P.2d 1309, **;*
*1984 Ariz. LEXIS 242, ****

William Stewart ALEXANDER and Constance Jean Alexander, husband and wife, Petitioners, v. SUPERIOR COURT of the State of Arizona, In and For the COUNTY OF MARICOPA; Honorable Peter D'Angelo, Judge thereof; State of Arizona, ex rel., Robert K. Corbin, Attorney General; and the Arizona Corporation Commission, real parties in interest, Respondents

No. 17343-SA

Supreme Court of Arizona

141 Ariz. 157; 685 P.2d 1309; 1984 Ariz. LEXIS 242

May 29, 1984

SUBSEQUENT HISTORY: **[***1]** Reconsideration Denied July 10, 1984.

PRIOR HISTORY: SPECIAL ACTION PRAYER FOR RELIEF GRANTED

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner sellers sought review by special action of an order of the Superior Court for the County of Maricopa (Arizona), which granted respondent State's motion to disqualify the sellers' attorney because of a conflict of interest.

OVERVIEW: In a tax court action, the sellers' attorney notified investors of a group petition and disclosed to one investor that the sellers had backdated a document. The State claimed that the attorney should be disqualified from representation of the sellers in the action because the communication regarding backdating was a client confidence under Ariz. Sup. Ct. R. 29(a) and constituted a conflict of interest. The court vacated the disqualification order because there were no violations of rule 29(a), and an appearance of impropriety was insufficient to grant the state standing. The motion was made for the purpose of harassing the sellers, the State did not show that it would be damaged if the motion was not granted, there were alternative solutions, and the benefits of continued representation outweighed the possibility of public suspicion. The communication was not privileged because the parties were joint clients, and there was no expectation of confidentiality between them. However, the investors had to employ other counsel because it was possible that adverse interests could develop, and the sellers had the right of retention as the primary clients.

OUTCOME: The matter was remanded with directions that the order be vacated.

CORE TERMS: investor, disqualification, confidence, attorney-client, former client, secret, advice, conflict of interest, present case, privileged, greyhound, professional judgment, confidential, consultation, disclosure, dog, petitioner's counsel, client consents, client confidence, relationship existed, appearance of impropriety, adversely affected, continued representation, disqualified, disqualify, notice, tax audit, cause of action, confidential communications, opposing counsel

LEXISNEXIS(R) HEADNOTES

Civil Procedure > Counsel > General Overview

HN1 Only in extreme circumstances can a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent. The burden is upon the moving party to show sufficient reason why an attorney should be disqualified from representing his client.

Legal Ethics > Client Relations > Confidentiality of Information

HN2 See Ariz. Sup. Ct. R. 29(a).

Legal Ethics > Client Relations > Conflicts of Interest

HN3 See Ariz. Sup. Ct. R. 29(a).

Legal Ethics > Client Relations > Confidentiality of Information

HN4 A communication between a client and his attorney is considered confidential, and therefore privileged, if the communication was made in the context of the attorney-client relationship and was maintained in confidence. When considering whether a confidence was received, the court must first determine if an attorney-client relationship existed. The appropriate test is a subjective one, where the court looks to the nature of the work performed and to the circumstances under which the confidences were divulged An attorney-client relationship is said to exist when the party divulging confidences and secrets to an attorney believes that he is approaching the attorney in a professional capacity with the intent to secure legal advice.

Legal Ethics > Client Relations > Confidentiality of Information

HN5 There is a recognized presumption that as between joint clients ordinarily there is no expectation of confidentiality.

Legal Ethics > Client Relations > Confidentiality of Information

HN6 If the client himself does not treat the particular communication as privileged, that communication will not be recognized as a confidence by the court.

Civil Procedure > Counsel > General Overview

HN7 When adverse representations are undertaken concurrently, the appropriateness of disqualification must be measured against the duty of undivided loyalty which an attorney owes to each of his clients.

Civil Procedure > Counsel > General Overview

HN8 The court, when considering a motion for disqualification based upon the appearance of impropriety, considers the following: (1) whether the motion is being made for the purposes of harassing the defendant, (2) whether the party bringing the motion will be damaged in some way if the motion is not granted, (3) whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances, and (4) whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation.

COUNSEL: Farley, Robinson & Lee by James J. Farley, R. Chip Larsen and Harris & Peacock by Donald W. Harris, Phoenix, for petitioners.

Robert K. Corbin, Atty. Gen. by Patrick M. Murphy, Ronald W. Collett, Michael W. Sillyman, Asst. Attys. Gen., Phoenix, for respondents.

JUDGES: In Banc. Cameron, Justice. Holohan, C.J., Gordon, V.C.J., and Hays and Feldman, JJ., concur.

OPINION BY: CAMERON

OPINION

[*159] [1311]** This is a petition for special action taken from an order of the trial court disqualifying petitioners' attorneys, Farley, Robinson & Lee, from further representation of the petitioners, William Stewart Alexander and Constance Jean Alexander. We have jurisdiction pursuant to Art. 6, § 5(4) of the Arizona Constitution and Rule 8, Arizona Rules of Procedure for Special Actions, 17A A.R.S.

We must answer one question:

> Does the State have standing to object to petitioners' representation by Farley, Robinson and & Lee?

The facts necessary for a determination of this matter on appeal follow. Prior to November, 1982, the

Alexanders were engaged in selling tax shelters in greyhound racing **[***2]** dogs. The Internal Revenue Service disallowed most of the investment tax credits, depreciation, and other deductions claimed by the investors who had purchased greyhound racing dogs from the Alexanders.

In November of 1982, Alexander asked his legal counsel, Greg Robinson of Farley, Robinson & Lee, to represent the investors in Tax Court for the purpose of obtaining a reversal of the IRS rulings. Robinson sent a form letter to over seventy investors, advising them that he had been retained by Mr. Alexander to file petitions in Tax Court. The letter read:

> Dear ___:
>
> I have been retained by Mr. William S. Alexander to file United States Tax Court petitions with respect to the Notices of Deficiency issued by the Internal Revenue Service relating to greyhound investments. I will be filing a group petition on behalf of you and other investors.
>
> Mr. Alexander has provided me with a copy of the Notice of Deficiency mailed to you. I have not received a copy of the A & A Kennels file on your greyhound investment.
>
> Enclosed is a checklist of information which will enable me to pursue this matter on your behalf. Please complete the form and return it to me in the enclosed envelope **[***3]** no later than November 15, 1982.

Investors interested in being represented by Robinson in the Tax Court were asked to complete a checklist of information so that Robinson could pursue the matter on their behalf. Thereafter, Robinson filed petitions on behalf of most of the investors who were contacted based upon the information submitted by the investors and the Alexanders' kennel file on each investor's greyhound. Robinson did not bill the investors for these services but did, as the letters indicated, look to the Alexanders for his attorney fees in the matter.

[*160] [1312]** Robinson did not meet personally with any of the investors, and his only contact with them, with one exception, was limited to phone inquiries by the investors as to the status of the petitions. Robinson also advised the investors to settle with the IRS because the prospects of success in Tax Court were not promising. The only exception was Perry Johnson, who called Robinson to inquire about the status of the petitions. In the course of this conversation, Johnson disclosed to Robinson that, on the advice of Alexander, he had backdated a document relating to his investment. Johnson's affidavit **[***4]** (obtained by the State) read:

> 41. That I received a letter dated November 2, 1982, from Gregory A. Robinson (Robinson) of Farley, Robinson & Lee, attorneys for William S. Alexander * * *. In this letter Mr. Robinson advised me that he was retained by Alexander to file petitions on behalf of investors in greyhound dogs with the IRS in respect to the Notices of Deficiency. I completed a form authorizing him to represent me in this action.
>
> * * *
>
> 43. That I did not hear anything further from Mr. Robinson regarding the status of the IRS case. On approximately October 6, 1983, I called Mr. Robinson to find out the status of the case. I informed him that I had been advised by Mr. Alexander that if I paid for the dog before April, 1980, I would be able to obtain a tax credit for 1979 and 1980; that Alexander had filled out the Bill of Sale * * *, back-dating it to March 31, 1979 and signed it in my presence.
>
> 44. That Mr. Robinson responded that "quite candidly" the IRS was looking for that type of information and if they found out about it they could criminally prosecute Alexander and myself. He implied that I should not pass this information on to anyone else. He also told me **[***5]** that because my dog was dead I did not have a good case to support the tax credits and deductions which I took on my 1979 and 1980 tax returns. I asked Mr. Robinson if he was still representing me and he was very evasive.
>
> 45. That Mr. Robinson has given me no legal advice concerning my tax audit as to whether I should pay my tax liabilities, proceed with the tax audit, appeal from an adverse determination or whether I have a cause of action against Alexander.

In September of 1983, after the last petition was filed in the Tax Court, the State served the Alexanders a summons and complaint alleging violations of the Arizona Securities Act, A.R.S. § 44-1841, et seq., the Arizona Consumer Fraud Act, A.R.S. § 44-1521, et seq., and the Arizona Racketeering Act, A.R.S. § 13-2301, et seq. The case was denominated a "priority case" pursuant to A.R.S. § 13-2314(H), which requires that the matter be expedited. Simultaneously, a temporary restraining order without notice was issued and the Alexanders' assets and accounts were seized. The next day the Alexanders were served with twenty-three separate pleadings and papers.

Before the Alexanders could respond, the State filed a motion **[***6]** to disqualify Farley, Robinson & Lee from further representation of the Alexanders. The State contended that the law firm's representation of the investors in Tax Court would place it directly in conflict with its representation of the Alexanders in the present action. The State also alleged that the information given by investor Johnson was a client confidence and that its disclosure would violate Canon 4 of the Model Code of Professional Responsiblity.

On 5 January 1984 the Superior Court, after a hearing, issued an order to the effect that (1) while an apparent mutuality of interests existed between the Alexanders and the investors, one exception was the communication to Robinson from investor Johnson regarding backdating, (2) such communication was a client confidence under DR 4-101, and (3) this circumstance alone constituted a sufficient conflict of interest to disqualify Farley, Robinson & Lee from further representation of the Alexanders. **[*161] [**1313]** Disqualification of counsel was ordered and the Alexanders sought relief by filing a special action in this court. We granted oral argument and a stay of proceedings in the Superior Court. After oral argument **[***7]** we accepted jurisdiction because there is no plain, speedy, or adequate remedy by appeal and because it is a matter of statewide importance. *See State v. Superior Court of Arizona, In And For the County of Maricopa*, 129 Ariz. 156, 159, 629 P.2d 992, 995 (1981).

HN1Only in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent, *e.g., Board of Education of New York City v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir.1979); *Trinity Ambulance Service, Inc. v. G & L Ambulance Services, Inc.*, 578 F.Supp. 1280, 1282 (D.Conn.1984). The burden should be upon the moving party to show sufficient reason why an attorney should be disqualified from representing his client. Whenever possible the courts should endeavor to reach a solution that is least burdensome upon the client or clients.

The State's allegations bring into play three Canons from the American Bar Association's Model Code of Professional Responsibility: Canon 4 ("A Lawyer Should Preserve the Confidences and Secrets of a Client"), Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client"), and Canon 9 ("A Lawyer Should Avoid **[***8]** Even the Appearance of Professional Impropriety"). We have adopted the Model Code as part of the Arizona Rules of the Supreme Court, with some modifications. Rule 29(a), Arizona Rules of the Supreme Court, 17A A.R.S. The Canons themselves do not appear in our Rules. Instead, our Rules consist of Disciplinary Rules (DR's) derived from the Model Code's rules. The confidence rule states:

> ***HN2***Preservation of Confidences and Secrets of a Client
>
> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except as permitted by DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> * * *

DR 4-101, Rule 29(a), **[***9]** Arizona Rules of the Supreme Court, 17A A.R.S. The conflict of interest rule reads:

HN3 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each client.

* * *

[*162] [1314]** DR 5-105, Rule **[***10]** 29(a), Arizona Rules of the Supreme Court, 17A A.R.S.

HN4 A communication between a client and his attorney is considered confidential, and therefore privileged, if "the communication [was] made in the context of the attorney-client relationship and [was] maintained in confidence." Casenote, 19 Ariz.L.Rev. 587, 592 (1977); *accord*, Casenote, 19 Ariz.L.Rev. 602, 610 (1977). *See also*, A.R.S. § 12-2234 (attorney-client testimonial privilege). When considering whether a confidence was received, we must first determine if an attorney-client relationship existed. We believe the appropriate test is a subjective one, where "the court looks to the nature of the work performed and to the circumstances under which the confidences were divulged." Developments of the Law -- Conflicts of Interest in the Legal Profession, 94 Harv.L.Rev. 1244, 1321-22 (1981) ["Developments"]. E.g., *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319-20 (7th Cir.1978), cert. denied, 439 U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346 (1978); *Trinity*, supra, at 1283. "An attorney-client relationship is said to exist when the party divulging confidences and secrets to an attorney believes **[***11]** that he is approaching the attorney in a professional capacity with the intent to secure legal advice." *Trinity*, supra, at 1283, citing Developments, supra, at 1322.

In the present case, an attorney-client relationship existed between Robinson and the Alexanders. Robinson gave the Alexanders advice concerning the tax shelters and other transactions. He consented to representing the Alexanders in Tax Court and, as part of Robinson's representation of the Alexanders, consented to represent the investors who had purchased the tax shelters. Robinson's relationship with the Alexanders is clearly an attorney-client relationship.

Whether the client thought an attorney-client relationship existed is important in evaluating the relationship. *Trinity*, supra, at 1283. The record shows it would have been reasonable for Johnson and the other investors to believe Robinson was their attorney for the Tax Court case. Johnson completed the form authorizing Robinson to represent him and the checklist of information for Robinson's use. Johnson has not sought to retain another attorney. Even though Robinson did not advise Johnson concerning his tax audit, tax liabilities, possible appeals, **[***12]** or other causes of action (for example against the Alexanders), we find Robinson was the attorney for the investors, including Johnson, in the Tax Court.

We must next decide whether any confidential communications were made and maintained. Apparently, the only possibly confidential communication was Johnson's statement concerning the backdating of the bill of sale. We believe, however, that the simultaneous representation exception applies:

[I]t is our conclusion that the privilege provided by the law, statutory or common, although quite conclusive as between an attorney and a sole client, does not apply as to communications between the parties involved in a given transaction which has been submitted to an attorney for action or advice by two or more persons for their mutual benefit.

* * *

[I]t seems desirable and proper to permit and encourage the consultation of an attorney by several parties on matters or transactions in which they have joint and mutual interests, although in almost every such case there is a potential conflict of interest and, if and when it develops, that

lawyer cannot and should not try to render further service or advice therein.

[*13]** *Henke v. Iowa Home Mutual Casualty Company*, 249 Iowa 614, 620-21, 87 N.W.2d 920, 924 (1958). *See also*, Moore, Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy, 61 Tex.L.Rev. 211, 226 (1982) ("Potential benefits that may outweight the risk of multiple representation include reduced legal fees, the avoidance of unnecessary future conflicts, and, in litigation, **[*163]** **[**1315]** the opportunity to present a united front."). Thus, HN5 there is a recognized presumption that "[a]s between joint clients ordinarily there is no expectation of confidentiality." Udall & Livermore, Arizona Practice, Law of Evidence § 74 at 142. E.g., *Nitrini v. Feinbaum*, 18 Ariz.App. 307, 313, 501 P.2d 576, 582 (1972); *Nichols v. Elkins*, 2 Ariz.App. 272, 277, 408 P.2d 34, 39 (1965); *Petty v. Superior Court*, 116 Cal.App.2d 20, 29, 253 P.2d 28, 34 (1953). In the instant case, the Alexanders have no objection to Robinson's continued representation, and because Johnson has revealed any information that might have been confidential, that information is no longer privileged. HN6 If the client himself does **[***14]** not treat the particular communication as privileged, that communication will not be recognized as a confidence by this court. *See Allegaert v. Perot*, 434 F.Supp. 790, 800 (S.D.N.Y.1977), aff'd 565 F.2d 246 (2d Cir.1977) ("secondary" client did not have any expectation that his communication would be kept secret from "primary" clients); *Petty*, supra, 116 Cal.App.2d at 29, 253 P.2d at 34 (client being jointly represented did not assert that information given out of the presence of other client was confidential and therefore no confidential communication found); Udall & Livermore, supra, at 142 ("if the client were to tell people what he told his lawyer, the privilege could be found no longer to attach either on the ground that this was an implicit waiver or that such conduct demonstrated the original communication not to have been intended to be confidential.").

Johnson has not treated the information concerning the backdated document as if it were privileged. He testified to the information in an affidavit, which has become a matter of public record. If the information ever were privileged, that privilege has been implicitly waived. DR 4-101 is not applicable to the present **[***15]** case.

The question remains whether DR 5-105 would disqualify petitioner's counsel from representing the investors in Tax Court. Concurrent representation does not become a problem unless the interests of the clients are adverse or become adverse during the trial. *See State v. Latigue*, 108 Ariz. 521, 522, 502 P.2d 1340, 1341 (1972); *In re Maltby*, 68 Ariz. 153, 155, 202 P.2d 902, 903 (1949). HN7 "When adverse representations are undertaken concurrently, * * * the appropriateness of disqualification must be measured against 'the duty of undivided loyalty which an attorney owes to each of his clients.' * * * [T]he court's attention in these cases will likely be riveted on the more compelling grounds provided by Canon 5 and the ancient maxim that 'no man can serve two masters'." Note, The Chinese Wall Defense to Law-Firm Disqualification, 128 U.Penn.L.Rev. 677, 684 (1980).

Although the Alexanders and the investors had mutual interests when Farley, Robinson & Lee agreed to represent the investors, it appears that adverse interests may develop between the two parties. Because of this, the firm may no longer represent the investors under DR 5-105. The Alexanders are the firm's **[***16]** "primary" clients and should retain the firm's loyalties over and above the investors. *See Allegaert v. Perot*, supra, at 800, aff'd 565 F.2d 246 (2d Cir.1977) ("the firms' respective clients are entitled to the continued services of the lawyers upon whose advice they have been relying over these many years"); *accord, Williamsburg Wax Museum v. Historic Figures*, 501 F.Supp. 326, 330 (D.D.C.1980); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 479 F.Supp. 465, 468-69 (E.D.La.1979). The investors, therefore, must employ other counsel.

We are next presented with the problem of representation adverse to that of a former client. The investors will now be former clients of Farley, Robinson & Lee because the firm has been disqualified from representing them. The seminal case in the area of former client representation held that

> the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters **[*164]** **[**1316]** or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during **[***17]** the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

T.C. Theatre Corp. v. Warner Barothers Pictures, Inc., 113 F.Supp. 265, 268-69 (S.D.N.Y.1953). The present

litigation is, indeed, "substantially related" to the Tax Court litigation. As we have stated, however, the present case does not involve any disclosures of confidential information from Farley, Robinson & Lee's former clients. Thus, the substantial relationship test is not applicable. Several courts have agreed with this reasoning. *See Trinity*, supra, at 1284; *Allegaert*, supra, at 798, aff'd 565 F.2d 246 (2d Cir.1977); *Williamsburg Wax Museum*, supra, at 330; *Domed Stadium Hotel*, supra, at 468-69. We find no conflict of interest.

Although not adopted by this court at this time, we feel it important to discuss two of the rules found in the American Bar Association Model Rules of Professional Conduct adopted by **[***18]** the House of Delegates on 2 August 1983. Rule 1.7 addresses multiple representation and reads:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> > (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> >
> > (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> > (1) the lawyer reasonably believes the representation will not be adversely affected; and
> >
> > (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

In the present case, petitioners' counsel has asked to be relieved of representing the investors in Tax Court in an effort to avoid a possible conflict of interest. It is therefore obvious that **[***19]** petitioners' counsel did not reasonably believe that representation of the Alexanders would not be adversely affected or did believe that representing the investors might materially limit the firm's responsibilities to the Alexanders. Thus, the firm was correct in asking to withdraw from the Tax Court case.

Model Rule 1.9 reads:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> > (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
> >
> > (b) use information relating to the representation to the disadvantage of the former client except * * * when the information has become generally known.

We believe our holding in the present case meets both sections of Rule 1.9. Section (a) of the Rule codifies the substantially related test of *T.C. Theatre*, supra. We have already held that the substantially related test is not applicable in this case. See discussion, supra, at 1315. Neither would Farley, Robinson & Lee be restricted from representing the Alexanders under **[***20]** Section (b). The comment to Rule 1.9 provides further instruction:

> Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, **[*165]** **[**1317]** the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Because Johnson's statement about backdating the document "has become generally known," it would not be

excludable under Rule 1.9(b).

We are, then, only concerned with the "appearance of impropriety," and the question we have before us is whether an appearance of impropriety alone will give a party standing to interfere with an adverse party's choice of counsel. We agree with the line of cases that have applied a stricter scrutiny when reviewing possible Canon 9 violations as a basis for disqualification. *See Board of Education of New York City v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir.1979) ("when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except **[***21]** in the rarest of cases"); *Woods v. Covington County Bank*, 537 F.2d 804, 819 (5th Cir.1976) ("Inasmuch as attempts to disqualify opposing counsel are becoming increasingly frequent, we cannot permit Canon 9 to be manipulated for strategic advantage on the account of an impropriety which exists only in the minds of imaginative lawyers"); *International Electronics Corp. v. Flanzer*, 527 F.2d 1288, 1295 (2d Cir.1975) ("Canon 9 * * * should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules"). *See also* ABA Formal Opinion 342 (24 Nov. 1975). It is obvious from a reading of these cases that the use of Canon 9 "as a convenient tool for disqualification" should not be encouraged. "To call for the disqualification of opposing counsel for delay or other tactical reasons, in the absence of prejudice to either side, is a practice which will not be tolerated." *Cottonwood Estates v. Paradise Builders*, 128 Ariz. 99, 105, 624 P.2d 296, 302 (1981).

We believe that HN8 the court, when considering a motion for disqualification based upon the appearance of impropriety, should **[***22]** consider the following: (1) whether the motion is being made for the purposes of harassing the defendant, (2) whether the party bringing the motion will be damaged in some way if the motion is not granted, (3) whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances, and (4) whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation. After answering these questions, we do not believe the State's motion should be granted.

First, we believe that the motion is, indeed, being made for the purpose of harassing petitioners. By "drying up" petitioners' funds, the State has successfully prevented petitioners from engaging the services of a lawyer. Even if the petitioners were possessed of sufficient funds, obtaining the services of a new attorney and having him "brought up to date" in time to respond would cause petitioners to incur a much greater expense.

Second, the State has not shown it will be damaged if the motion is not granted. The only damage in this case appears to be to the Alexanders if they are denied the assistance of their counsel, Farley, Robinson **[***23]** & Lee.

Third, there is at least one alternative solution. Withdrawal by petitioners' counsel in the Tax Court case alleviates any possible conflict of interest that might have occurred and is a much less disruptive solution than disqualification.

Fourth, we believe disqualification at this point might actually raise public suspicion. The State appears to be using disqualification as a tactical tool. This can only promote general public suspicion of the legal profession. "[F]or the [State] to participate in the selection or rejection of its opposing counsel is unseemly if for no other reason than the distasteful impression which could be conveyed." *State v. Madrid*, 105 Ariz. 534, 535, 468 P.2d 561, 562 **[*166]** **[**1318]** (1970). See also *Rodriguez v. State*, 129 Ariz. 67, 70, 628 P.2d 950, 953 (1981); *Knapp v. Hardy*, 111 Ariz. 107, 112, 523 P.2d 1308, 1313 (1974).

Several benefits will accrue due to continued representation. The Alexanders will be represented by an attorney familiar with the case. This should save money and avoid delay. The State has declared this a priority case which means that it must be expedited by the court. By allowing the attorneys **[***24]** who are most knowledgeable about the case to continue to represent the Alexanders, delay can be avoided and the interest of the State expedited. The facts in this case weigh in favor of continued representation.

We acknowledge that two prior cases, *Matter of Evans*, 113 Ariz. 458, 556 P.2d 792 (1976) and *Bicas v. Superior Court in and for Pima County*, 116 Ariz. 69, 567 P.2d 1198 (App. 1977) may appear to conflict with our holding in the present case. Both cases are distinguishable on their facts. Evans, supra, was a disciplinary case, not a disqualification case, and was brought under DR 5-105. In Evans we held that the attorney in question, "by representing the complainants on other matters at the time of his drafting of the agreement, created the appearance that he was, in fact, representing the complainants at the same time, and it is not surprising that the complainants believed he was their attorney at the time the agreement was being drawn." *Evans*, supra, 113 Ariz. at 462, 556 P.2d at 796. Thus, the action in Evans involved confusion concerning the existence of an attorney-client relationship. That is not the case here. Investor Johnson believed that an attorney-client **[***25]** relationship existed between he and Mr. Robinson and we agree. Furthermore, we

note that there may be situations where attorneys can be in violation of the rules and still not be disqualified from representing their clients.

In *Bicas*, supra, a disqualification action centering upon the possible revelation of client confidences, the court stated that, "any attorney must avoid not only the fact, but even the appearance of representing conflicting interests." 116 Ariz. at 73, 567 P.2d at 1202. Further on in *Bicas*, however, the court held that, "[w]here it can reasonably be said that in the course of former representation an attorney *might* have acquired information related to the subject matter of his subsequent representation, the attorney should be disqualified." *Id.* at 74, 567 P.2d at 1203 (emphasis in original). This statement is limited to the situation where a revelation of a client confidence might be possible. As we stated in our discussion of DR 4-101, supra, that is not the case here.

The matter is remanded to the trial court with directions that the order disqualifying petitioners' attorney be vacated, and for such other proceedings not inconsistent with **[***26]** this opinion.

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TITLE 12. COURTS AND CIVIL PROCEEDINGS
CHAPTER 13. EVIDENCE
ARTICLE 4. PRIVILEGED COMMUNICATIONS

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A.R.S. § 12-2234 (2012)

§ 12-2234. Attorney and client

A. In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. An attorney's paralegal, assistant, secretary, stenographer or clerk shall not, without the consent of his employer, be examined concerning any fact the knowledge of which was acquired in such capacity.

B. For purposes of subsection A, any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:

1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.

2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.

C. The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney.

HISTORY: Last year in which legislation affected this section: 1994

NOTES:

LexisNexis 50 State Surveys, Legislation & Regulations

Testimonial Privileges

ANALYSIS

Purpose.

Applicability.

Common Interest Doctrine.

Corporate Employees.

Underlying Facts.

Waiver.

Waiver Not Found.

PURPOSE.

The purpose of the attorney-client privilege is to encourage a client to provide all information to the attorney so the attorney can provide effective legal representation to the client. Ulibarri v. Superior Court ex rel. Coconino County, 184 Ariz. 382, 909 P.2d 449 (Ct. App. 1995), review denied, 186 Ariz. 419, 924 P.2d 109 (1996).

APPLICABILITY.

A communication between a client and his attorney is considered confidential, and therefore privileged, if the communication was made in the context of the attorney-client relationship and was maintained in confidence. Alexander v. Superior Court ex rel. Maricopa, 141 Ariz. 157, 685 P.2d 1309 (1984).

The privilege does not apply where one consults an attorney not as a lawyer but as a friend or business advisor. G & S Invs. v. Belman, 145 Ariz. 258, 700 P.2d 1358 (Ct. App. 1984).

The 1994 amendment to § 12-2234 did not simply overrule *Samaritan Foundation* by adopting the United States Supreme Court's interpretation of the attorney-client privilege in *Upjohn Co. v. United States*, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981), the legislation defined the privilege differently, extended it to entities other than corporations, and expressly applied it to an attorney's paralegals and assistants; consequently, even in civil cases, the Arizona privilege differs from the privilege applicable in federal and other states' courts. Roman Catholic Diocese v. Superior Court, 204 Ariz. 225, 62 P.3d 970, 2003 Ariz. App. LEXIS 17 (Ct. App. 2003).

Under the 1994 amendment, any communications between an attorney and an employee or agent of the corporation, made for the purpose of providing legal advice or obtaining information to provide legal advice, are protected, under § 12-2234; under *Samaritan Foundation*, the privilege would apply only to employee-initiated communications intended to seek legal advice or to communications concerning the employee's own conduct for the purpose of assessing legal consequences for the corporation. The critical distinction between the two interpretations is whether information is being sought or obtained in connection with one's own

conduct as an employee. Roman Catholic Diocese v. Superior Court, 204 Ariz. 225, 62 P.3d 970, 2003 Ariz. App. LEXIS 17 (Ct. App. 2003).

The 1994 amendment to the corporate attorney-client privilege statute, § 12-2234, did not address the attorney-client privilege in criminal proceedings, § 13-4062(2); the diocese therefore had to provide subpoenaed documents to a grand jury. Roman Catholic Diocese v. Superior Court, 204 Ariz. 225, 62 P.3d 970, 2003 Ariz. App. LEXIS 17 (Ct. App. 2003).

Where the court appointed an attorney to represent a missing person in a conservatorship proceeding and a proceeding to declare him deceased, the attorney's investigation into his disappearance was not privileged under this section for purposes of discovery. Since the attorney never met or communicated with the missing person, there was no communication to protect. Dyer v. Westover (In re Westover), -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2009 Ariz. App. LEXIS 797 (Ct. App. June 2, 2009), (unpublished).

Judge abused his discretion in ordering the nonprofit corporation to disclose the summaries of interviews of corporation employees, prepared by an investigator at the direction of legal counsel, as these communications were privileged under § 12-2234 and were not subject to discovery under Ariz. R. Civ. P. 26(b)(1); with respect to the corporation's volunteers, the judge had to determine whether such volunteers were "agents" or "members" of the corporation, as contemplated by § 12-2234(B), entitling their communications to the same privilege. Salvation Army v. Bryson, -- Ariz. --, 629 Ariz. Adv. Rep. 11, 273 P.3d 656, 2012 Ariz. App. LEXIS 30 (Ct. App. 2012).

COMMON INTEREST DOCTRINE.

Documents exchanged between the Arizona Independent Redistricting Commission and a group of consultants were not protected by the common interest doctrine because there was no showing that the documents furthered the legal interests of both parties, despite the fact that they had a common interest in developing a redistricting plan. Ariz. Indep. Redistricting Comm'n v. Fields, 206 Ariz. 130, 75 P.3d 1088, 2003 Ariz. App. LEXIS 150 (Ct. App. 2003).

CORPORATE EMPLOYEES.

Communications directly initiated by an employee to corporate counsel seeking legal advice on behalf of the corporation are privileged, regardless of the employee's position within the corporate hierarchy. Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

All communications made in confidence to counsel in which the communicating employee is directly seeking legal advice are privileged. Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

Where an employee is not seeking legal advice in confidence, his or her communications to corporate counsel are within the corporation's attorney-client privilege if they concern the employee's own conduct within the scope of his or her employment and are made to assist the lawyer in assessing or responding to the legal consequences of that conduct for the corporation; this excludes from the privilege communications from those who, but for their status as officers, agents or employees, are witnesses. Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

The corporation should not be given greater privileges than are enjoyed by a natural person and the same reasoning should be applied to corporations as has been applied in regard to natural persons in reference to the attorney-client privilege. Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

UNDERLYING FACTS.

The attorney-client privilege does protect disclosure of a communication by a client to a lawyer, but does not protect disclosure of the underlying facts by those who communicate with a lawyer. That is to say, a client who has a duty to disclose facts in discovery or otherwise is not relieved of that duty simply because those same facts have been communicated to a lawyer. Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

WAIVER.

A client waives the privilege by disclosing confidential communications to a third party. Ulibarri v. Superior Court ex rel. Coconino County, 184 Ariz. 382, 909 P.2d 449 (Ct. App. 1995), review denied, 186 Ariz. 419, 924 P.2d 109 (1996).

In a suit for breach of a disability income insurance policy and of the covenant of good faith and fair dealing, insurers were required to produce memorandum notes from their adjusters to their lawyers and their lawyers' written replies to their adjusters' questions; the adjusters impliedly waived the attorney-client privilege by relying in part on the lawyers' legal advice to support the insurers' claims of good faith and reasonableness in handling the insureds' claims. Roehrs v. Minn. Life Ins. Co., 228 F.R.D. 642, 2005 U.S. Dist. LEXIS 11787 (D. Ariz. 2005).

WAIVER NOT FOUND.

Pursuant to Fed. R. Evid. 501, a nursing home operator was able to show that only one document addressed to the in-house counsel from an employee was privileged under this section pursuant to the attorney-client privilege; however, that privilege was not waived when the document was shared with the state agency regulating the operator. Bickler v. Senior Lifestyle Corp., 266 F.R.D. 379, 2010 U.S. Dist. LEXIS 24227 (D. Ariz. 2010).

Additional Cases of Historical Interest (1955 -- 1984)

ANALYSIS

Civil Procedure

...Counsel > General Overview

...Privileged Matters > General Overview

Evidence

...Attorney-Client Privilege > General Overview

...Attorney-Client Privilege > Scope

Legal Ethics

...Client Relations > Confidentiality of Information

...Unauthorized Practice of Law

Civil Procedure

...Counsel > General Overview

Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 259, 619 P.2d 1036, 1980 Ariz. LEXIS 290 (Nov. 3, 1980).

Overview: *A non-lawyer could represent an employee in a quasi-judicial hearing that concerned a disputed personnel action where the value of the dispute made it impractical to hire a lawyer and the amount in controversy was not greater that $ 1000.*

- The grant of permission for lay representation in a quasi-judicial setting does not affect the provisions of Ariz. Rev. Stat. § 12-2234, which makes communications between attorney and client privileged. A lay representative is not an attorney within the means of § 12-2234, so there is no statutory privilege to protect the confidentiality of communications between, for example, an employee and his lay representative. Go To Headnote

Nitrini v. Feinbaum, 18 Ariz. App. 307, 501 P.2d 576, 1972 Ariz. App. LEXIS 850 (Ct. App. Oct. 10, 1972).
Overview: *Deceased former husband held beneficial interest in land trust as constructive trustee for himself and partners and not his estate because clear and convincing evidence showed constructive trust was created and it was equitable result.*

- Ariz. Rev. Stat. § 12-2234 states: In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. The principle which bars an attorney from representing an interest adverse to that of a former client is said to be grounded upon the confidential relationship which exists between attorney and client, and courts take the position that by imposing this disability upon the attorney, confidential information is protected. Go To Headnote

...Privileged Matters > General Overview

Granger v. Wisner, 134 Ariz. 377, 656 P.2d 1238, 1982 Ariz. LEXIS 292 (Dec. 17, 1982).
Overview: *Attorney client privilege did not prevent doctor in medical malpractice action from calling an expert witness consulted by the patient in the absence of a prior objection and in light of proscription by trial court of any mention of a consultation.*

- The attorney-client privilege protects only confidential communications between a client and his or her attorney. Ariz. Rev. Stat. § 12-2234 protects "communications" from the client and "advice" to the client. It does not extend to facts which are not part of the communication between lawyer and client. The fact that a client has consulted an attorney, the identity of the client, and the dates and number of visits to the attorney are normally outside the scope and purpose of the privilege. Go To Headnote

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...Attorney-Client Privilege > General Overview

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Legal Ethics

...Client Relations > Confidentiality of Information

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Nitrini v. Feinbaum, 18 Ariz. App. 307, 501 P.2d 576, 1972 Ariz. App. LEXIS 850 (Ct. App. Oct. 10, 1972).
Overview: *Deceased former husband held beneficial interest in land trust as constructive trustee for himself and partners and not his estate because clear and convincing evidence showed constructive trust was created and it was equitable result.*

- Ariz. Rev. Stat. § 12-2234 states: In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. The principle which bars an attorney from representing an interest adverse to that of a former client is said to be grounded upon the confidential relationship which exists between attorney and client, and courts take the position that by imposing this disability upon the attorney, confidential information is protected. Go To Headnote

Lietz v. Primock, 84 Ariz. 273, 327 P.2d 288, 1958 Ariz. LEXIS 220 (June 18, 1958).
Overview: *The confidential relationship between an attorney and a client created an exception to the general rule that opinion statements may not serve as a basis for actionable fraud.*

- Ariz. Rev. Stat. § 12-2234 codifies the attorney-client privilege in this state and reads in pertinent part that in a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. Go To Headnote

...Unauthorized Practice of Law

Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 259, 619 P.2d 1036, 1980

Ariz. LEXIS 290 (Nov. 3, 1980).
Overview: *A non-lawyer could represent an employee in a quasi-judicial hearing that concerned a disputed personnel action where the value of the dispute made it impractical to hire a lawyer and the amount in controversy was not greater that $ 1000.*

- The grant of permission for lay representation in a quasi-judicial setting does not affect the provisions of Ariz. Rev. Stat. § 12-2234, which makes communications between attorney and client privileged. A lay representative is not an attorney within the means of § 12-2234, so there is no statutory privilege to protect the confidentiality of communications between, for example, an employee and his lay representative. Go To Headnote

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TOC: Arizona Revised Statutes, Constitution, Court Rules & ALS, Combined **>** / . . . / **>** ARTICLE 4. PRIVILEGED COMMUNICATIONS **> § 12-2234. Attorney and client**
Citation: **ARIZ. REV. STAT. 12-2234**
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Date/Time: Friday, August 17, 2012 - 4:52 PM EDT

Ariz. Rules of Prof'l Conduct R. 1.6

This document reflects changes received by the publisher as of July 1, 2015.

Arizona Court Rules **ARIZONA RULES OF PROFESSIONAL CONDUCT** **CLIENT-LAWYER RELATIONSHIP**

ER 1.6. Confidentiality of information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

(d) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(2) to mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to prevent reasonably certain death or substantial bodily harm.

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

History

Effective December 1, 2003 by R-02-0045; amended by R-08-0014, effective Jan. 1, 2010; amended by R-13-0060, effective January 1, 2015.

Annotations

Commentary

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See ER 1.18 for the lawyer's duties

with respect to information provided to the lawyer by a prospective client, ER 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and ERs 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See ER 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality also applies in such situations where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or situation involved.

AUTHORIZED DISCLOSURE. [5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or, to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their

representation is designed to advance.

DISCLOSURE ADVERSE TO CLIENT. [7] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b) recognizes the overriding value of life and physical integrity, and requires the lawyer to make a disclosure in order to prevent homicide or serious bodily injury that the lawyer reasonably believes is intended by a client. In addition, under paragraph (c), the lawyer has discretion to make a disclosure of the client's intention to commit a crime and the information necessary to prevent it. It is very difficult for a lawyer to "know" when such unlawful purposes will actually be carried out, for the client may have a change of mind.

[8] Paragraph (c) permits the lawyer to reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime. Paragraph (c) does not require the lawyer to reveal the intention of a client to commit wrongful conduct, but the lawyer may not counsel or assist a client in conduct the lawyer knows is criminal or fraudulent. See ER 1.2(d); see also ER 1.16 with respect to the lawyer's obligation or right to withdraw from the representation from the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct, in connection with this Rule, the lawyer may make inquiry within the organization as indicated in ER 1.13(b).

[9] The range of situations where disclosure is permitted by paragraph (d)(1) of the Rule is both broader and narrower than those encompassed by paragraph (c). Paragraph (c) permits disclosure only of a client's intent to commit a future crime, but is not limited to instances where the client seeks to use the lawyer's services in doing so. Paragraph (d)(1), on the other hand, applies to both crimes and frauds on the part of the client, and applies to both on-going conduct as well as that contemplated for the future. The instances in which paragraph (d)(1) would permit disclosure, however, are limited to those where the lawyer's services are or were involved, and where the resulting injury is to the financial interests or property of others. In addition to this Rule, a lawyer has a duty under ER 3.3 not to use false evidence.

[10] Paragraph (d)(2) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (d)(2) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[11] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (d)(3) permits such disclosure because of the importance of a lawyer's compliance

with the Rules of Professional Conduct.

[12] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (d)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[13] A lawyer entitled to a fee is permitted by paragraph (d)(4) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[14] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes ER 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by ER 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (d)(5) permits the lawyer to make such disclosures as are necessary to comply with the law.

[15] Paragraph (d)(5) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise and except for permissive disclosure under paragraphs (c) or (d), assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by this Rule, the attorney-client privilege, the work product doctrine, or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. See ER 1.4. Unless review is sought, however, paragraph (d)(5) permits the lawyer to comply with the court's order.

[16] In situations not covered by the mandatory disclosure requirements of paragraph (b), paragraph (d)(6) permits discretionary disclosure when the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm.

[17] Paragraph (d)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See ER 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only when there is a reasonable possibility that a new relationship might be established. Any such disclosure should ordinarily include no more than the identity of the persons and entities

involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these ERs.

[18] Any information disclosed pursuant to paragraph (d)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (d)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (d)(7). Paragraph (d)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[19] Paragraph (d) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyers to the fullest extent practicable.

[20] Paragraph (d) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (d)(1) through (d)(5). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (d) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by this Rule. See ERs 1.2(d), 4.1(b), 8.1 and 8.3. ER 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See ER 3.3(b).

WITHDRAWAL. [21] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in ER 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's

confidences, except as otherwise provided in ER 1.6. Neither this Rule nor ER 1.8(b) nor ER 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

ACTING COMPETENTLY TO PRESERVE CONFIDENTIALITY. [22] Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See ERs 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this ER or may give informed consent to forgo security measures that would otherwise be required by this ER. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these ERs. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see ER 5.3, Comments [3]-[4].

[23] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this ER or may give informed consent to the use of a means of communication that would otherwise be prohibited by this ER. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these ERs.

FORMER CLIENT. [24] The duty of confidentiality continues after the client-lawyer relationship has terminated. See ER 1.9(c)(2). See ER 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Case Notes

CONSTRUCTION.

This rule is much broader than the attorney-client privilege. It protects all information, relating to the representation, from noncompulsory disclosure. Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

ATTORNEY-CLIENT RELATIONSHIP.

The guarantees of the Sixth Amendment include the right to an attorney with undivided loyalty, counsel must be free to zealously defend the accused in a conflict-free environment; counsel has a duty to move to withdraw upon a good faith belief that a conflict exists, the trial court then determines whether withdrawal was appropriate. Romley v. Schneider, 202 Ariz. 362, 366 Ariz. Adv. Rep. 15, 45 P.3d 685, 2002 Ariz. App. LEXIS 17 (Ct. App. 2002).

The appropriate test to determine if an attorney-client relationship exists is a subjective one, where the court looks to the nature of the work performed and to the circumstances under which the confidences were divulged. Alexander v. Superior Court ex rel. Maricopa, 141 Ariz. 157, 685 P.2d 1309 (1984).

CONCEALMENT.

Although the attorney did not affirmatively conceal his former client's offense from the authorities, rather, he failed to take affirmative steps to report the offense, and he ethically could have reported the offense, but was not required to do so. In re Morris, 164 Ariz. 391, 793 P.2d 544 (1990).

CONFIDENTIALITY.

Where the public defender's continued representation of defendant would have resulted in a violation of ER 1.7, 1.3 and this rule, the trial court abused its discretion when it denied defense counsel's motion to withdraw. Okeani v. Superior Court, 178 Ariz. 180, 871 P.2d 727

(Ct. App. 1993).

CONFLICT OF INTEREST.

The trial court should not have required defense counsel to disclose confidential information when counsel avowed that counsel had an ethical conflict requiring withdrawal. Maricopa County Pub. Defender's Office v. Superior Court, 187 Ariz. 162, 927 P.2d 822 (Ct. App. 1996).

DISCLOSURE.

--ADVERSE TO CLIENT.

An ex parte conference between plaintiff, his attorney, and the trial judge was improper and was held to have prejudiced the opposing party. In re Evans, 162 Ariz. 197, 782 P.2d 315 (1989).

--REFUSAL.

Attorney violated subdivision (d) where after a client terminated attorney's representation, he refused the client and her new attorney access to client's file. In re Struthers, 179 Ariz. 216, 877 P.2d 789 (1994).

--REQUIRED.

Defendant sent a facsimile which made threats against his defense counsel to the Maricopa County Public Defender's Office; although the communication was confidential, the letter was appropriately disclosed. State v. Hampton, 208 Ariz. 241, 430 Ariz. Adv. Rep. 29, 92 P.3d 871, 2004 Ariz. LEXIS 75 (2004).

Any requirement that the defendant's attorney turn over to the prosecutor physical evidence, which may aid in the conviction of the defendant, may harm the attorney-client relationship; however, this reason, by itself, is not sufficient to avoid disclosure. Hitch v. Pima County Superior Court, 146 Ariz. 588, 708 P.2d 72 (1985).

NONPRIVILEGED INFORMATION.

A communication is not privileged simply because a lawyer has a duty to keep it confidential; a lawyer must reveal nonprivileged information when required to do so. Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).

If the client himself does not treat the particular communication as privileged, that communication will not be recognized as a confidence by the court. Alexander v. Superior Court ex rel. Maricopa, 141 Ariz. 157, 685 P.2d 1309 (1984).

PRIVILEGED INFORMATION.

A communication between a client and his attorney is considered confidential, and therefore privileged, if the communication was made in the context of the attorney-client relationship and was maintained in confidence. Alexander v. Superior Court ex rel. Maricopa, 141 Ariz.

157, 685 P.2d 1309 (1984).

ARIZONA COURT RULES ANNOTATED

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Arizona Court Rules **ARIZONA RULES OF PROFESSIONAL CONDUCT** **CLIENT-LAWYER RELATIONSHIP**

ER 1.13. Organization as client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of ER 1.7. If the organization's consent to the dual representation is required by ER 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

History

Effective December 1, 2003 by R-02-0045; amended Oct. 4, 2004, effective Dec. 1, 2004 by R-04-006.

Annotations

Commentary

COMMENT

THE ENTITY AS THE CLIENT. [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by ER 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews, made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by ER 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organization client in order to carry out the representation or as otherwise permitted by ER 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable,

minimize the risk of revealing information relating to the representation outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interests of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

RELATION TO OTHER RULES. [6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under ERs 1.6, 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(d) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule l.6(d)(1)-(5). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(d)(1) and 1.6(d)(2) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the later reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

GOVERNMENT AGENCY. [9] The duty defined in this Rule applies to governmental

organizations. Defining precisely the identity of the client and prescribing the resulting obligations of lawyers may be more difficult in the government context. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action of failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope. Government lawyers also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.

CLARIFYING THE LAWYER'S ROLE. [10] There are times when the organization's interests may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

DUAL REPRESENTATION. [12] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

DERIVATIVE ACTIONS. [13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident or an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, ER 1.7 governs who should represent the directors and the organization.

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Client: -None-

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*176 Ariz. 497, *; 862 P.2d 870, **;*
*1993 Ariz. LEXIS 110, ***; 152 Ariz. Adv. Rep. 14*

SAMARITAN FOUNDATION, an Arizona corporation; **Samaritan** Health Services, dba Good **Samaritan** Regional Medical Center, an Arizona corporation; Cathey Milam Chester and Elaine Fraiz, Petitioners, Lawrence J. Koep, M.D., P.C., an Arizona corporation and Lawrence J. Koep, M.D., Defendants-Petitioners, v. The Honorable Stanley Z. GOODFARB, a judge thereof, Superior Court of the State of Arizona, in and for the County of Maricopa, Respondent Judge, and Arista Mia DAWSON, a minor, By and Through her next friend and natural father, Robert E. DAWSON; Robert E. Dawson and Dale M. Dawson, husband and wife, Real Parties in Interest. PHOENIX CHILDREN'S HOSPITAL, INC., an Arizona corporation, Petitioner, v. The Honorable Stanley Z. GOODFARB, a judge thereof, Superior Court of the State of Arizona, in and for the County of Maricopa, Respondent Judge, and Arista Mia DAWSON, a minor, By and Through her next friend and natural father, Robert E. DAWSON; Robert E. Dawson and Dale M. Dawson, husband and wife, Real Parties in Interest

No. CV-92-0282-PR

Supreme Court of Arizona

176 Ariz. 497; 862 P.2d 870; 1993 Ariz. LEXIS 110; 152 Ariz. Adv. Rep. 14; 26 A.L.R.5th 893

November 16, 1993

SUBSEQUENT HISTORY: Reconsideration Denied January 11, 1994.

PRIOR HISTORY: **[***1]** Court of Appeals Nos. 1 CA-SA 90-0220 and 1 CA-SA 90-0232 [Consolidated]. Appeal from the Superior Court of Arizona in Maricopa County. The Honorable Stanley Z. Goodfarb, Judge. Maricopa County Superior Court No. CV 88-24894. Court of Appeals, Division One. 173 Ariz. 426, 844 P.2d 593 (App. 1992). VACATED IN PART

DISPOSITION: AFFIRMED

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner hospital and medical foundation requested a review of an order from the Court of Appeals (Arizona), which rejected petitioners' claim of attorney-client privilege as to communications of petitioners' employees to petitioners' counsel concerning a surgical procedure, the result of which gave rise to a medical negligence action.

OVERVIEW: Petitioner hospital and medical foundation were defendants in a medical negligence action and the lower court affirmed an order that rendered communications between petitioners' employees and petitioners' counsel as discoverable attorney work-product and not within the absolute protection of petitioners' attorney-client privilege. Petitioners sought review of the lower court's decision and the court affirmed the denial of petitioners' relief. The court found that application of a functional approach focusing on the communication rather than the communicator resulted in a finding that the communications were not privileged. The court held that the communications were not privileged because petitioners' employees were not seeking legal advice in confidence, their actions did not subject petitioners to potential liability, their statements concerned the events going on around them and not their conduct, and the statements were not made in response to the legal consequences of their conduct within the scope of their employment. The court found that as the employees were merely witnesses to the event, their statements were not protected under an attorney-client privilege.

OUTCOME: An order denying relief to petitioner hospital and medical foundation from discovery of employee communications to petitioners' counsel concerning a surgical event underlying a medical negligence action as attorney-client privilege was affirmed on the grounds that the statements were not privileged because they concerned the surgical event as witnessed by the employees and not the employees' conduct in the scope of employment with petitioners.

CORE TERMS: attorney-client, group test, legal advice, privileged, subject matter, corporate counsel, communicator, non-control, functional, corporate employee, work product doctrine, corporate client, control group, confidence, imputed, advice, underinclusive, disclosure, initiated, nurse, legal consequences, corporate entity, communicate, technician, admissible, disclose, scrub, amici, responding, assessing

LEXISNEXIS(R) HEADNOTES

Evidence > Privileges > Attorney-Client Privilege > Elements
Evidence > Privileges > Attorney-Client Privilege > Scope
Evidence > Privileges > Attorney-Client Privilege > Waiver

HN1 Pursuant to Ariz. Rev. Stat. Ann. § 12-2234 and Ariz. Rev. Stat. Ann. § 13-4062(2), under the attorney-client privilege, unless a client consents, a lawyer may not be required to disclose communications made by the client to the lawyer or advice given to the client in the course of professional employment.

Evidence > Privileges > Attorney-Client Privilege > General Overview
Legal Ethics > Client Relations > Confidentiality of Information

HN2 There must be an attorney-client relationship before the attorney-client privilege exists. And, to be privileged, the communication must be made to or by the lawyer for the purpose of securing or giving legal advice, must be made in confidence, and must be treated as confidential. Thus, not all communications to one's lawyer are privileged.

Legal Ethics > Client Relations > Accepting Representation
Legal Ethics > Client Relations > Confidentiality of Information

HN3 Pursuant to Model Rules of Prof'l Conduct ER 1.16(a) and Model Rules of Prof'l Conduct ER 3.4(a), if a client refuses to disclose facts communicated to the lawyer in confidence, at a minimum the lawyer would have to withdraw.

Business & Corporate Law > Agency Relationships > Causes of Action & Remedies > Burdens of Proof
Business & Corporate Law > Agency Relationships > Duties & Liabilities > Knowledge & Notice > Agent Knowledge
Evidence > Hearsay > Exemptions > Statements by Party Opponents > Vicarious Statements

HN4 Under the doctrine of respondeat superior, the conduct of an agent is imputed to the corporation when that conduct is committed within the scope of the agent's employment. Likewise, the knowledge of a corporate agent is imputed to the corporation if it is acquired by the agent within the scope of his or her employment and relates to a matter within his or her authority. So, too, statements made by an employee or agent concerning a matter within the scope of the agency or employment, made during the existence of the relationship, are directly admissible against the corporation as the admission of a party-opponent under Ariz. R. Evid. 801(d)(2).

Evidence > Privileges > Attorney-Client Privilege > General Overview
Legal Ethics > Client Relations > Confidentiality of Information

HN5 The corporation must not be given greater privileges than are enjoyed by a natural person and a trial court should apply to corporations the same reasoning as has been applied in regard to natural persons in reference to the attorney-client privilege.

Evidence > Privileges > Attorney-Client Privilege > General Overview
Legal Ethics > Client Relations > Confidentiality of Information
HN6 Model Rules of Prof'l Conduct ER 1.6 protects all information relating to the representation against even non-compulsory disclosure.

Labor & Employment Law > Employment Relationships > Employment at Will > Employees
Legal Ethics > Client Relations > Conflicts of Interest
HN7 Model Rules of Prof'l Conduct ER 4.2, prohibits a lawyer who represents a party adverse to an organization represented by another lawyer from talking to persons in the organization whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

COUNSEL: Jones, Skelton & Hochuli by Bruce D. Crawford, Lori A. Shipley and David C. Lewis, Phoenix, for **Samaritan** Foundation.

O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears by Paul J. Giancola and Harding B. Cure, Phoenix, for Lawrence J. Koep, M.D.

Weyl, Guyer, MacBan & Olson by Thomas G. Bakker, Jolane D. Veeder and Cheralee W. Fisk, Phoenix, for Phoenix Children's Hosp., Inc.

Leonard & Clancy by Kenneth P. Clancy and James J. Leonard, Jr., Phoenix, for Arista Mia Dawson, Robert E. Dawson and Dale M. Dawson.

Bess & Dysart by Brad K. Keogh and Timothy R. Hyland, Phoenix, for Nat. Ass'n of Legal Assistants, Inc., Legal Assistants of Metropolitan Phoenix, amici curiae.

Lewis and Roca by Beth J. Schermer, Janet A. Napolitano and Alexandra **[***2]** M. Shafer, Phoenix, for America West Airlines, Airzona Hosp. Ass'n, Arizona Public Service Co., Bank of America Arizona, Calmat of Arizona, The Dial Corp., Phelps Dodge Corp., First Interstate Bank of Arizona, Salt River Project, Product Liability Advisory Council, Inc., Tucson Elec. Power Co. and Valley Nat. Bank, amici curiae.

Ulrich Thompson Kessler by Paul G. Ulrich and Donn G. Kessler, Phoenix, for Truck Ins. Exchange, amicus curiae.

Gallagher & Kennedy by Kevin E. O'Malley, Elliot Talenfeld and David C. Donohue, Phoenix, for Arizona Ass'n of Defense Counsel, amicus curiae.

Sacks, Tierney & Kasen by Lawrence J. Rosenfeld, Snell & Wilmer by Barry D. Halpern, Thea Foglietta Silverstein and Broening Oberg & Woods by Cynthia van R. Cheney, Phoenix, for Arizona Ass'n of Health Care Lawyers, Arizona Medical Ass'n, Arizona Soc. for Healthcare Risk Management, amici curiae.

Fennemore Craig by Timothy Berg and Janice K. Procter-Murphy, Phoenix, for Arizona Chamber of Commerce, Arizona Ass'n of Industries, McDonnell Douglas Helicopter Co., amici curiae.

JUDGES: En Banc. Martone, Justice. Feldman, C.J., Moeller, V.C.J., and Corcoran and Zlaket, JJ., concur.

OPINION BY: MARTONE

OPINION

[*499] [872]** OPINION

This case requires us to define the nature and scope of the corporate attorneyclient privilege. We necessarily examine the nature of the communication and the communicator. In the process, we reject the control group test as being both overinclusive and underinclusive. Our conclusions focus more on the nature of the communication than on the status of the communicator. The relevant inquiry is: to which corporate employee *communications* does the privilege apply, not to which corporate *employees* does the privilege apply. We hold that all communications initiated by the employee and made in confidence to counsel, in which the communicating employee is directly seeking legal advice, are privileged. In contrast, where an investigation is initiated by the corporation, factual communications from corporate employees **[*500] [**873]** to corporate counsel are within the corporation's privilege only if they concern the employee's own conduct within the scope of his or her employment and are made to assist counsel in assessing or responding to the legal consequences of that conduct for the **[***4]** corporate client.

I. *BACKGROUND*

A child's heart stopped during surgery at the Phoenix Children's Hospital in the Good **Samaritan** Regional Medical Center in 1988. A Good **Samaritan** lawyer investigated the incident and directed a nurse paralegal to interview three nurses and a scrub technician who were present during the surgery. Each of these **Samaritan** employees signed a form agreeing to accept legal representation from **Samaritan's** legal department. The paralegal summarized the interviews in memoranda that she then submitted to corporate counsel.

The child and her parents brought an action against Phoenix Children's Hospital and the physicians who participated in the surgery, alleging that the cardiac arrest and resulting impairment were caused by the defendants' medical negligence. When deposed two years later, the four **Samaritan** employees were unable to remember what happened in the operating room. Having learned of the existence of the interview summaries through discovery, plaintiffs sought their production. **Samaritan,** a non-party, and Phoenix Children's Hospital resisted, arguing that the interview summaries were protected by the attorney-client privilege and the work product **[***5]** doctrine. The trial court ordered production of the summaries for *in camera* review. It said it would strike out attorney work product and then release to the plaintiffs those portions of the summaries that would otherwise constitute witness statements. In short, the trial judge treated the documents as though they were not within the corporate attorney-client privilege, but were within the work product doctrine.

Samaritan and Children's Hospital filed petitions for special action in the court of appeals arguing, among other things, that under the rule of *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), the employee communications summarized in the memoranda were within **Samaritan's** attorney-client privilege. The court of appeals accepted jurisdiction but denied relief. It rejected *Upjohn*, adopted the control group test, and created a qualified attorney-client privilege for non-control group employees. It held that only communications of control group employees were within the absolute protection of the corporation's attorney-client privilege. The court concluded that the plaintiffs had made a showing of the sort **[***6]** of need that is required to reach work product, and because the nurses and scrub technician were not control group employees, rejected **Samaritan's** claim of attorney-client privilege. ***Samaritan*** *Foundation v. Superior Court*, 173 Ariz. 426, 844 P.2d 593 (App.1992). We granted **Samaritan's** and Phoenix Children's Hospital's petitions for review and now affirm the trial court but vacate that part of the court of appeals' opinion that addresses the corporate attorney-client privilege.

II. *ANALYSIS*

We resolve preliminary issues first. To the extent that each of the petitions for review raises issues other than the corporate attorney-client privilege, we resolve them against the petitioners. This means that we agree with the resolution by the court of appeals of issues relating to the work product doctrine. And, because the documents have been produced by **Samaritan,** Phoenix Children's Hospital's claim of immunity based upon non-possession is moot. The surviving issues in each of the petitions for review relate to the rejection by the court of appeals of the *Upjohn* case, and its creation of a qualified attorney-client privilege for non-control **[***7]** group employees. It is to these fundamental issues that we now turn.

In *Upjohn*, the Court rejected the control group test under federal common law. The control group test focuses on the nature of the communicator rather than the communication. Under it, persons in a position **[*501]** **[**874]** to control or take a substantial part in a decision about action a corporation may take upon advice of counsel have the capacity to make communications to corporate counsel that are within the corporation's attorney-client privilege. *See City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F.Supp. 483, 485 (E.D.Pa.), *petition for writ of mandamus or prohibition denied sub nom. General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir.1962), *cert. denied*, 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969 (1963). Other employees do not. Eschewing *Upjohn*, our court of appeals adopted the control group test, and then created a lesser, qualified privilege for non-control group employees. We think an approach that focuses solely upon the status of the communicator fails to adequately meet the objectives sought to be served by the attorney-client **[***8]** privilege. We take a functional approach. The focus is on the nature of the communication and not the communicator. This does not, however, mean that **Samaritan** prevails, for as we shall see, under our functional approach, the privilege does not apply to corporate-initiated factual communications from those who, but for their status as employees, are mere witnesses.

A. *First Principles*

Because our approach focuses on the substance of the attorney-client privilege, we state some first principles. HN1 Under the attorney-client privilege, unless a client consents, a lawyer may not be required to disclose communications made by the client to the lawyer or advice given to the client in the course of professional employment. A.R.S. § 12-2234 (1982) (civil actions). *See also* A.R.S. § 13-4062(2) (1989) (criminal proceedings). The privilege is intended to encourage the client in need of legal advice to tell the lawyer the truth. Unless the lawyer knows the truth, he or she cannot be of much assistance to the client. Thus, the privilege is central to the delivery of legal services in this country. *See State v. Holsinger*, 124 Ariz. 18, 22, 601 P.2d 1054, 1058 (1979) **[***9]** ("The reason for the privilege is not to protect the client, but to encourage free exchange of information between the attorney and the client and to promote the administration of justice.")

The privilege is not without its costs. It can interfere with the search for truth when, for example, the client cannot remember that which it told its lawyer. One would like to go to the lawyer and ask. *See generally* 1 *McCormick on Evidence* § 72, at 269 (John W. Strong ed., 4th ed. 1992); 8 John H. Wigmore, *Evidence* § 2291, at 554 (McNaughten rev. ed. 1961).

Of course, HN2 there must be an attorney-client relationship before the privilege exists. *Alexander v. Superior Court*, 141 Ariz. 157, 162, 685 P.2d 1309, 1314 (1984) (party divulges secrets to lawyer to secure advice). And, to be privileged, the communication must be made to or by the lawyer for the purpose of securing or giving legal advice, must be made in confidence, and must be treated as confidential. *Wigmore, supra*, § 2292, at 554. *See United States v. Kovel*, 296 F.2d 918, 922 (2d Cir.1961) ("What is vital to the privilege is that the communication **[***10]** be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer*.") (Friendly, J.). Thus, not all communications to one's lawyer are privileged.

Plaintiffs have argued here that under Rule 26.1, Ariz.R.Civ.P., the new disclosure rule, factual communications are no longer privileged. This is not the case. We must distinguish between

facts, which the client must disclose with or without a lawyer, and the *communication* of those facts by a client to a lawyer on a confidential basis when seeking legal advice. The privilege does protect disclosure of the communication but does not protect disclosure of the underlying facts by those who communicate with a lawyer. That is to say, a client who has a duty to disclose facts in discovery or otherwise is not relieved of that duty simply because those same facts have been communicated to a lawyer. *Upjohn* notes the distinction well. 449 U.S. at 395-96, 101 S.Ct. at 685-86 ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who **[*502]** **[**875]** communicated with the attorney."). Clients and their lawyers have and continue to **[***11]** have an obligation to respond truthfully to discovery requests seeking facts within their knowledge. [1]

FOOTNOTES

[1] *HN3* If a client refuses to disclose facts communicated to the lawyer in confidence, at a minimum the lawyer would have to withdraw. See ER 1.16(a)(1) and ER 3.4(a).

B. *The Problem of the Corporate Client*

When a client is a person, things are relatively simple. That person's communications are client communications. But when the client is a corporation, things become complex. [2] The corporation is a fictional entity which has independent status under the law. But it can only act through its agents. Thus, the client, the corporate entity, and its agents, who are the only ones who can communicate, are separated. Client communications cannot be identified simply as those of particular agents, as in the control group test, because although an agent can make statements on behalf of the corporate client, he or she can also make statements as an individual. But how do we determine which communications made by the corporation's **[***12]** agents are those of the corporate client and not merely those of the individual speaker?

FOOTNOTES

[2] *See Radiant Burners, Inc. v. American Gas Ass'n.*, 207 F.Supp. 771 (N.D.Ill.1962) (corporation cannot be a client for purpose of attorney-client privilege), rev'd, 320 F.2d 314 (7th Cir.1963) (reversing district court and holding that attorney-client privilege is not limited to natural persons); *American Cyanamid Co. v. Hercules Powder Co.*, 211 F.Supp. 85 (D.Del.1962) (commenting on the complexity of the attorney-corporate client privilege). *See generally* David Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953 (1956).

We are not the first to acknowledge the complexity of the issue and to seek some unifying answer. Two competing theories have emerged. Illinois adopted the control group test in *Consolidation Coal Co. v. Bucyrus -- Erie Co.*, 89 Ill.2d 103, 59 Ill. Dec. 666, 432 N.E.2d 250 (1982). **[***13]** If otherwise privileged, it protects communications by decisionmakers or those who substantially influence corporate decisions. Our court of appeals relied on *Consolidation Coal* in adopting the control group test. But it, too, acknowledged that the control group test is underinclusive and adopted a new theory: a qualified attorney-client privilege for non-control group employees. In effect, it relegated non-control group employees to the kind of limited protection afforded by the work product doctrine. But this affords to some *client* communications only the lesser protection afforded *witnesses. See Hickman v. Taylor*, 329 U.S. 495, 508, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947). Hence, it is still underinclusive.

A second major test, the subject matter test, takes a broader approach to deal with the underinclusiveness of the control group test. As articulated in *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir.1970), *aff'd by an equally divided court*, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971), it focuses on the nature of the communication -- not the status of

the communicator. Under it, an **[***14]** employee, within or without the control group, can make a privileged communication to corporate counsel if it is made at the direction of his superiors and if the subject matter upon which advice is sought is the employee's performance of his duties. [3] The vice of the subject matter test as it has evolved is its overinclusiveness. It will capture statements by employees who, because of their duties, are witnesses to the conduct of others.

FOOTNOTES

[3] *See* Restatement (Third) of the Law Governing Lawyers § 123 cmt. d (Tentative Draft No. 2, 1989) (draft adopts the subject matter test).

How do we avoid the underinclusiveness of the control group test, and at the same time avoid the overinclusiveness of a broad interpretation of the subject matter test?

Recall that a similar problem exists in other areas of the law involving corporations. For example, HN4 under the doctrine of respondeat superior, the conduct of an agent is imputed to the corporation when that conduct is committed within the scope of the agent's employment. **[***15]** *See Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 502, **[*503]** **[**876]** 647 P.2d 629, 633 (1982). Likewise, the knowledge of a corporate agent is imputed to the corporation if it is acquired by the agent within the scope of his or her employment and relates to a matter within his or her authority. *Fridena v. Evans*, 127 Ariz. 516, 519, 622 P.2d 463, 466 (1980). So, too, statements made by an employee or agent concerning a matter within the scope of the agency or employment, made during the existence of the relationship, are directly admissible against the corporation as the admission of a party-opponent under Rule 801(d)(2), Ariz.R.Evid.

Thus, we see in other areas that what an employee does, knows, or says is sometimes imputed to the corporation without reference to where in the chain of command the employee belongs. Instead, behavior, knowledge, and statements are imputed to the corporation as a function of the nature of the behavior, knowledge, and statements, and the context surrounding them, and not upon the identity of the actor or speaker. This suggests that a functional approach ought similarly **[***16]** to apply to the problem posed by the corporate entity within the context of the attorney-client privilege. The defining characteristic of this functional approach is the nature, purpose, and context within which the communication occurs.

We agree with the Supreme Court of California that HN5 "the corporation not be given greater privileges than are enjoyed by a natural person" and that we should "apply to corporations the same reasoning as has been applied in regard to natural persons in reference to [the attorney-client] privilege." *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal.2d 723, 36 Cal.Rptr. 468, 477, 388 P.2d 700, 709 (1964).

C. *The Privilege for Communications in the Course of Seeking Legal Advice*

Client communications tend to fall into two categories: those initiated by the employee seeking legal advice and those made in response to an overture initiated by someone else in the corporation. It is universally accepted that communications directly initiated by an employee to corporate counsel seeking legal advice on behalf of the corporation are privileged. We agree that these kinds of communications by a corporate employee, regardless of position within the corporate hierarchy, **[***17]** are privileged. When a corporate employee or agent communicates with corporate counsel to secure or evaluate legal advice for the corporation, that agent or employee is, by definition, acting on behalf of the corporation and not in an individual capacity. These kinds of communications are at the heart of the attorney-client relationship. And it is plain that these communications can occur at any level of the chain of command. At one end of the spectrum is the chief executive officer seeking advice from corporate counsel on the antitrust implications of corporate behavior, even if the behavior is not his. At the other end, the

driver of a corporate truck may run into corporate counsel's office seeking advice about an accident. In either case, the privilege applies because the employee is seeking legal advice concerning that employee's duties (the chief executive officer) or behavior (the driver) on behalf of the corporation. As to these kinds of legal communications, including the communication of facts, we hold that all communications made in confidence to counsel in which the communicating employee is directly seeking legal advice are privileged.

D. *The Privilege for Factual Communications* **[***18]** *Made by Employees in Response to Overtures by Someone Else in the Corporation*

The real debate concerning the proper scope of the corporation's attorney-client privilege is its applicability to factual communications made in response to an overture initiated by someone else in the corporation. Unless there is some self-limiting feature, the breadth of corporate activity could transform what would be witness communications in any other context into client communications. In such an event, the costs of the privilege are potentially much greater when asserted by a corporation over the statements of its agents than **[*504]** **[**877]** when asserted by an individual over his or her own statements. But there is no countervailing benefit. The rationale of the privilege is that by assuring the individual client that his or her communications cannot be disclosed without consent, it encourages the client to be candid. But this only works if the communicator controls the privilege. In the corporate context, the privilege belongs to the corporation and not the person making the communication. [4]

FOOTNOTES

[4] Indeed, one commentator has suggested a theory of corporate attorney-client privilege that applies only to the communications of persons "who have the authority to control the subsequent use and distribution of the communications." Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 Hofstra L.Rev. 279, 306 (1984). By vesting so much authority in the communicator, this approach, too, has the potential to be widely over and underinclusive.

[*19]** If an employee has exposed the corporation to liability, it seems less problematic to legitimize the corporation's control over the privileged nature of the employee's communications. After all, it is the action of this employee that is being imputed to the corporation. It is this employee's statements that are directly admissible against the corporation under Rule 801(d)(2)(D), Ariz.R.Evid. This employee's statements are also the most important in enabling corporate counsel to assess the corporation's legal exposure and formulate a legal response. And none of this has anything at all to do with whether the employee is a member of a control group. We must, therefore, always look at the relationship between the communicator and the incident giving rise to the legal matter, the nature of the communication and its context.

If the employee is not the one whose conduct gives rise to potential corporate liability, then it is fair to characterize the employee as a "witness" rather than as a client. The vice of the control group test is that it includes in the privilege the factual statements of control group employees even if they were mere witnesses to the events in question, while at **[***20]** the same time it fails to take into account the need to promote institutional candor with respect to factual communications of non-control group employees whose conduct has exposed the corporation to possible adverse legal consequences. The test is both overinclusive and underinclusive. We, therefore, reject the control group test as unsatisfactory on its own terms.

Over and above its inadequacy as a theory to deal with the complex problems of the attorney-client privilege in the corporate context, there are other reasons to avoid the control group test. Our world is growing smaller. Corporate activity is increasingly global and almost always national. Although its outer limits are unclear, *Upjohn* at a minimum rejects the control group test as a rule of federal common law. We should minimize disparities between federal and state law when it comes to privilege. When clients seek legal advice, they do not expect that the

privilege will exist for purposes of some claims but not others. Much litigation today consists of both state and federal claims, sometimes in the same action. Federal and state claims can be asserted simultaneously in federal and state forums. For example, there **[***21]** are frequently pendent state claims attached to federal question claims in the United States district courts. Similarly, there are frequently federal claims, such as actions under 42 U.S.C. § 1983, joined with state law claims in state court. The adoption of the control group test would mean that some communications would be admissible as to one claim but not the other. *See* Julie E. Rice, Note, *The Attorney-Client Privilege in the Corporate Context: The Intersection of Federal and Illinois Law*, 1984 U.Ill.L.Rev. 175, 187. It is hard to imagine a judge instructing a jury to consider a communication received in evidence as to one claim, and because of privilege, not the other.

But what of *Upjohn?* After rejecting the control group test as too narrow a definition of the attorney-client privilege, the Court went on to hold that the communications at issue there were privileged. 449 U.S. at 395, 101 S.Ct. at 685. It declined, however, to "lay down a broad rule or series of rules to govern all conceivable **[*505]** **[**878]** future questions in this area." *Id.* at 386, 101 S.Ct. at 681. **[***22]** Nevertheless, **Samaritan** argues that *Upjohn* adopted a broad version of the subject matter test, which includes within the privilege communications by all employees who speak at the direction of their corporate superiors to the corporation's lawyer regarding matters within the scope of their corporate duties in order to facilitate the formulation of legal advice for the corporation. *See Harper & Row*, 423 F.2d at 491-92; *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir.1977); Jack B. Weinstein and Margaret A. Berger, 2 *Weinstein's Evidence*, para. 503(b)[04], at 503-68 (1992).

There is language in *Upjohn* to support **Samaritan's** argument. The Court noted that "[t]he communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." *Upjohn*, 449 U.S. at 394, 101 S.Ct. at 685. From this, **Samaritan** argues that the privilege protects the employee communications at issue here because the nurses and scrub **[***23]** technician were carrying out their corporate duties while present in the operating room. Plaintiffs argue that the employees were merely witnesses to what happened.

We are of the view that a broad interpretation of the subject matter test, requiring only that the communication concerns factual information gained in the course of performing the speaker's corporate duties, is inadequate. The employee's connection to the liability-causing event is too attenuated to fit the classical model of what it means to be a client. Such a broad standard would only exclude from the privilege factual communications of employees whose knowledge was truly fortuitous. For example, under a broad formulation, the statement of a corporate officer who glances out the window and happens to see the corporation's truck negligently collide with another vehicle would not be privileged. However, the statement of a corporate employee who is present in the truck by virtue of his or her corporate duties but was not driving the truck or otherwise involved in causing the accident would be privileged. This is the construction urged by **Samaritan** and the various amici. We believe, however, that the latter person also **[***24]** should be considered a mere witness for purposes of the privilege. Although the employee's presence, and hence the employee's knowledge, is a function of his or her corporate employment, the employee bears no other connection to the incident. The employee did not cause it. His actions did not subject the corporation to possible liability. When this employee speaks, it is not about his or her own actions, but the actions of someone else -- the driver.

We, therefore, reject a broad version of the subject matter test. We believe it is subject to a narrower interpretation, one more consistent with the concerns we have expressed. Many of the most often cited authorities suggest that we require that the employee's communication relate to the employee's own activities that are within the scope of his or her employment and are being attributed to the corporation. *See Harper & Row*, 423 F.2d at 491-92 (communication privileged "where the subject matter upon which the attorney's advice is sought by the corporation and dealt within the communication is the performance by the employee of the duties of his employment"); *Diversified Industries*, 572 F.2d at 608 **[***25]** (communications

at issue were made by employees whose conduct was the subject of the corporate attorney's legal advice); Weinstein & Berger, *supra*, para. 503(b)[04], at 503-68 (subject matter of the communication must be "the performance by the employee of the duties of his employment").

We believe that a functional approach that focuses on the relationship between the communicator and the need for legal services is truer to the objective sought to be achieved by the attorney-client privilege. The California Supreme Court adopted this approach 30 years ago. *D.I. Chadbourne,* **[*506]** *Inc.*, 36 Cal.Rptr. at 477, **[**879]** 388 P.2d at 709. [5] We also believe that such an approach is closer to the holding of *Upjohn*, if not some of its language. Recall that in *Upjohn* the communications were from foreign general and area managers regarding questionable payments to foreign governments. It is unclear whether these managers participated in the matters that were the subject of the investigation. The lower court had rejected the claim of privilege because these persons were not within the control group. The Supreme Court held otherwise, reversed, and remanded for further proceedings. Chief Justice **[***26]** Burger wrote a concurring opinion eschewing the majority's extremely fact-specific approach and distilling from the case a narrowing of the subject matter test to that conduct of an employee which could bind the corporation. 449 U.S. at 403, 101 S.Ct. at 689 (Burger, C.J., concurring.)

FOOTNOTES

[5] We need not, and therefore do not, reach all the "basic principles" stated at 36 Cal.Rptr. at 477-78, 388 P.2d at 709-10.

Instead of applying a narrower version of the subject matter test, the court of appeals below adopted a broad version for communications of non-control group employees, but then, because of the concerns we have already expressed, made it qualified. A qualified privilege, however, is an uncertain privilege, and an uncertain privilege is tantamount to no privilege at all. Unless the privilege is known to exist at the time the communication is made, it will not promote candor. Thus, an uncertain privilege has the potential of achieving the worst possible result: it could **[***27]** harm the truth seeking process without a corresponding increase in candor. Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 Harv.L.Rev. 424, 434 (1970). Balancing competing interests is appropriate when formulating the extent of the privilege, but balancing on a case by case basis defeats the purpose of the privilege. We conclude that a narrow but absolute privilege is preferable to a broad but amorphous one.

We are not persuaded by the amici that, without a broader privilege, corporations will forego prompt post-accident investigations. By not extending the privilege, we place the corporate client on a par with the individual client asserting a privilege as to his or her own communications. This is the purpose of our functional approach. It is, in any event, in the interest of the corporation to be informed, and in most cases it will conclude that ignorance is too high a price to pay to avoid taking witness statements that are potentially discoverable. After all, even those statements have the more qualified protection afforded by the work product doctrine. We are not persuaded that a corporation will intentionally **[***28]** put itself in the position of being the last to know the facts when it is facing potential liability for the acts of its agents. Finally, under the privilege as we have defined it, the kind of communications most likely to be characterized as client statements will be privileged.

Amici also argue that, without a broader privilege, corporations will cease policing their own activities to ensure that they comply with the law. We do not agree. Corporations comply with the law because they wish to avoid liability.

The Rules of Professional Conduct are consistent with a functional approach. Amici have argued that a comment to ER 1.13 ("[w]hen one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by ER 1.6") supports their view that all employee communications

are within the attorney-client privilege. But HN6 ER 1.6 is much broader than the attorney-client privilege. It protects all information relating to the representation against even non-compulsory disclosure. Rules of Professional Conduct ER 1.6 cmt. A communication is not privileged simply because a lawyer has a duty to keep **[***29]** it confidential. A lawyer must reveal non-privileged information when required to do so.

Closer to the point is HN7 ER 4.2, which prohibits a lawyer who represents a party **[*507] [**880]** adverse to an organization represented by another lawyer from talking to persons in the organization "whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." ER 4.2 cmt. That such a person is identified with the corporate party suggests that an uninvolved employee (as we have defined it) is not.

We therefore hold that, where someone other than the employee initiates the communication, a factual communication by a corporate employee to corporate counsel is within the corporation's privilege if it concerns the employee's own conduct within the scope of his or her employment and is made to assist the lawyer in assessing or responding to the legal consequences of that conduct for the corporate client. This excludes from the privilege communications from those who, but for their status as officers, agents or employees, are witnesses.

We believe that this is the appropriate **[***30]** place to draw the line. It has all the advantages of a narrow reading of *Upjohn* (rough comparability with federal common law) without the attendant disadvantages of a broad reading of *Upjohn* (fails to limit the scope of the privilege to its purpose). Thus, litigants may not be faced with drastically different privileges in a single proceeding. Although we cannot control how federal courts will interpret *Upjohn*, should there be differences, they will not be as great as they would be if we adopted the control group test or the control group/qualified subject matter test adopted by the court of appeals.

Our definition of the privilege dovetails with doctrines adopted in response to the problems posed by the corporate entity in other areas of the law. For example, factual communications of the employee concerning the acts of that employee that can be imputed to the corporation under the doctrine of respondeat superior will be privileged. These generally are the statements that would in other contexts be admissible against the corporation as admissions by a party-opponent under Rule 802(d)(2)(D), Ariz.R.Evid. Though we do not suggest that perfect symmetry will always prevail **[***31]** among the various doctrines, a unified approach to the problem posed by the corporate entity in disparate areas of the law promotes clarity, consistency, and reason.

III. *RESOLUTION*

Applying our test to the facts of this case, we conclude that the statements made by the nurses and scrub technician to **Samaritan's** counsel are not within **Samaritan's** attorney-client privilege. These employees were not seeking legal advice in confidence. The initial overture was made by others in the corporation. Although the employees were present during the operation, their actions did not subject **Samaritan** to potential liability. Their statements primarily concerned the events going on around them and the actions of the physicians whose alleged negligence caused the injuries. These statements were not gathered to assist **Samaritan** in assessing or responding to the legal consequences of the speaker's conduct, but to the consequences for the corporation of the physician's conduct. Thus, these **Samaritan** employees were witnesses to the event, and their statements are not within the attorney-client privilege.

The effort by corporate counsel to sign these employees as independent clients is itself an acknowledgement **[***32]** that the corporation was not satisfied that the employee statements were within the corporation's privilege. The forms presented to the employees state that they may be called as a "witness" in connection with the incident under investigation, yet also imply, in oblique terms, that the employee may be in need of legal representation and that **Samaritan** will supply them with such representation. It tells the employees that those who want **Samaritan** to represent them should not discuss the case with anyone other than

Samaritan's lawyers, and other persons not here relevant. Because the employees in this case did not perceive a need for legal advice, and because no attorney-client relationship was established, it is **[*508]** **[**881]** difficult to see what these forms intended to accomplish other than to silence the employees by shielding their communications in the cloak of the attorney-client privilege. But unless the employees sought legal advice in an individual capacity, no attorney-client relationship was created with **Samaritan's** counsel. And, because these were employee-witnesses rather than employee-clients, the corporation's own privilege does not cover their statements. It is substance, not form, **[***33]** which controls.

IV. *CONCLUSION*

We reject the control group test because it is inadequate to deal with the complexity of the attorney-client privilege in the corporate setting. It is both overinclusive and underinclusive. Because we reject the control group test, we also reject a qualified privilege for non-control group employees. We reject an expansive subject matter test for corporate employee communications. Instead, we adopt a functional approach and hold that where an employee is not seeking legal advice in confidence, his or her communications to corporate counsel are within the corporation's privilege if they concern the employee's own conduct within the scope of his or her employment and are made to assist the lawyer in assessing or responding to the legal consequences of that conduct for the corporation. This approach more closely approximates the nature and scope of the attorney-client privilege where the client is an individual. The employee communications here were not of this sort. Thus, they were not within the corporation's attorney-client privilege.

We affirm the order of the trial court but vacate that part of the opinion of the court of appeals that relates to **[***34]** the corporate attorney-client privilege.

*449 U.S. 383, *; 101 S. Ct. 677, **;*
*66 L. Ed. 2d 584, ***; 1981 U.S. LEXIS 56*

UPJOHN CO. ET AL. v. UNITED STATES ET AL.

No. 79-886

SUPREME COURT OF THE UNITED STATES

449 U.S. 383; 101 S. Ct. 677; 66 L. Ed. 2d 584; 1981 U.S. LEXIS 56; 49 U.S.L.W. 4093; 81-1 U.S. Tax Cas. (CCH) P9138; 1980-81 Trade Cas. (CCH) P63,797; Fed. Sec. L. Rep. (CCH) P97,817; 47 A.F.T.R.2d (RIA) 523; 30 Fed. R. Serv. 2d (Callaghan) 1101

November 5, 1980, Argued
January 13, 1981, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

DISPOSITION: 600 F.2d 1223, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: The court granted certiorari on a judgment from the United States Court of Appeals for the Sixth Circuit, which held that the attorney-client privilege did not apply to communications made by petitioner corporation's mid-level and lower-level officers and agents, and that the work-product doctrine did not apply to the administrative tax summonses issued under 26 U.S.C.S. § 7602.

OVERVIEW: Responding to a claim that its foreign subsidiary made illegal payments to secure a government business, petitioner corporation initiated an investigation and sent out a questionnaire to all of its foreign general and area managers to determine the nature and magnitude of such payments. After petitioner disclosed such payments to the Securities and Exchange Commission, the Internal Revenue Service demanded a production of all the files relating to the investigation. Petitioner refused to produce the documents. The court rejected the "control group" test applied by the lower appellate court, concluding that even low-level and mid-level employees could have the information necessary to defend against the potential litigation, and that Fed. R. Evid. 501 protected any client information that aided the orderly administration of justice. The court rejected the lower appellate court's conclusion that the work-product doctrine did not apply to tax summonses, but remanded the issue because the work-product at issue was based on potentially privileged oral statements. The doctrine could only be overcome upon a strong showing of necessity for disclosure, and unavailability by other means.

OUTCOME: The judgment was reversed because petitioner's low- and mid-level employees' information was protected by the attorney-client privilege where it was necessary to defend against potential litigation, and the work-product doctrine applied to tax summonses. The court remanded the case for a determination as to whether the work-product doctrine applied, and to allow respondent to show a necessity for the disclosure.

CORE TERMS: attorney-client, disclosure, work-product, legal advice, control group, questionnaire, interview, advice, summons, discovery, work product, outside counsel, legal problem, mental processes, confidential, interviewed, privileged, summonses, managers, common law, corporate counsel, oral statements, mental impressions, undue hardship, questionable, subsidiary, order to secure, legal theories, relevant information, special

protection

LEXISNEXIS(R) HEADNOTES

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

HN1 The work-product doctrine does apply in tax summons enforcement proceedings.

Evidence > Privileges > Attorney-Client Privilege > Elements

HN2 See Fed. R. Evid. 501.

Evidence > Privileges > Attorney-Client Privilege > Scope
Evidence > Privileges > Psychotherapist-Patient Privilege > Scope

HN3 The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN4 The attorney-client privilege applies when the client is a corporation.

Evidence > Privileges > Attorney-Client Privilege > General Overview
Labor & Employment Law > Employment Relationships > Employment at Will > Employees

HN5 In the corporate context, it will frequently be employees beyond the control group--officers and agents responsible for directing the company's actions in response to legal advice--who will possess the information needed by the corporation's lawyers. Middle-level and lower-level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives.

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN6 The protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

HN7 See Fed. R. Civ. P. 26(b)(3).

Civil Procedure > Pleading & Practice > Service of Process > General Overview
Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

HN8 The obligation imposed by a tax summons remains subject to the traditional privileges and limitations. The Federal Rules of Civil Procedure are made applicable to summons enforcement proceedings by Fed. R. Civ. P. 81(a)(3).

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
Civil Procedure > Discovery > Relevance

HN9 Not all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Production might be justified where the witnesses are no longer available or can be reached only with difficulty. This does not apply to oral statements made by witnesses, whether presently in the form of the attorney's mental impressions or memoranda.

SYLLABUS

When the General Counsel for petitioner pharmaceutical manufacturing corporation (hereafter petitioner) was informed that one of its foreign subsidiaries had made questionable payments to foreign government officials in order to secure government business, an internal investigation of such payments was initiated. As part of this investigation, petitioner's attorneys sent a questionnaire to all foreign managers seeking detailed information concerning such payments, and the responses were returned to the General Counsel. The General Counsel and outside counsel also interviewed the recipients of the questionnaire and other company officers and employees. Subsequently, based on a report voluntarily submitted by petitioner disclosing the questionable payments, the Internal Revenue Service (IRS) began an investigation to determine the tax consequences of such payments and issued a summons pursuant to 26 U. S. C. § 7602 demanding production of, *inter alia*, the questionnaires and the memoranda and notes of the interviews. Petitioner refused to produce the documents on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. The United States then filed a petition in Federal District Court seeking enforcement of the summons. That court adopted the Magistrate's recommendation that the summons should be enforced, the Magistrate having concluded, *inter alia*, that the attorney-client privilege had been waived and that the Government had made a sufficient showing of necessity to overcome the protection of the work-product doctrine. The Court of Appeals rejected the Magistrate's finding of a waiver of the attorney-client privilege, but held that under the so-called "control group test" the privilege did not apply "[to] the extent that the communications were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" The court also held that the work-product doctrine did not apply to IRS summonses.

Held:

1. The communications by petitioner's employees to counsel are covered by the attorney-client privilege insofar as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. Pp. 389-397.

(a) The control group test overlooks the fact that such privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. While in the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same, in the corporate context it will frequently be employees beyond the control group (as defined by the Court of Appeals) who will possess the information needed by the corporation's lawyers. Middle-level -- and indeed lower-level -- employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is

adequately to advise the client with respect to such actual or potential difficulties. Pp. 390-392.

(b) The control group test thus frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client. The attorney's advice will also frequently be more significant to noncontrol employees than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. P. 392.

(c) The narrow scope given the attorney-client privilege by the Court of Appeals not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. Pp. 392-393.

(d) Here, the communications at issue were made by petitioner's employees to counsel for petitioner acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. Information not available from upper-echelon management was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. Pp. 394-395.

2. The work-product doctrine applies to IRS summonses. Pp. 397-402.

(a) The obligation imposed by a tax summons remains subject to the traditional privileges and limitations, and nothing in the language or legislative history of the IRS summons provisions suggests an intent on the part of Congress to preclude application of the work-product doctrine. P. 398.

(b) The Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The notes and memoranda sought by the Government constitute work product based on oral statements. If they reveal communications, they are protected by the attorney-client privilege. To the extent they do not reveal communications they reveal attorneys' mental processes in evaluating the communications. As Federal Rule of Civil Procedure 26, which accords special protection from disclosure to work product revealing an attorney's mental processes, and *Hickman* v. *Taylor*, 329 U.S. 495, make clear, such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. P. 401.

COUNSEL: Daniel M. Gribbon argued the cause and filed briefs for petitioners.

Deputy Solicitor General Wallace argued the cause for respondents. With him on the brief were Solicitor General McCree, Assistant Attorney General Ferguson, Stuart A. Smith, and Robert E. Lindsay. *

* Briefs of amici curiae urging reversal were filed by Leonard S. Janofsky, Leon Jaworski, and Keith A. Jones for the American Bar Association; by Thomas G. Lilly, Alfred F. Belcuore, Paul F. Rothstein, and Ronald L. Carlson for the Federal Bar Association; by Erwin N. Griswold for the American College of Trial Lawyers et al.; by Stanley T. Kaleczyc and J. Bruce Brown for the Chamber of Commerce of the United States; and by Lewis A. Kaplan, James N. Benedict, Brian D. Forrow, John G. Koeltl, Standish Forde Medina, Jr., Renee J. Roberts, and Marvin Wexler for the Committee on Federal Courts et al.

William W. Becker filed a brief for the New England Legal Foundation as amicus curiae.

JUDGES: REHNQUIST, J., delivered the opinion of the Court, in which BRENNAN, STEWART,

WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined, and in Parts I and III of which BURGER, C. J., joined. BURGER, C. J., filed an opinion concurring in part and concurring in the judgment, post, p. 402.

OPINION BY: REHNQUIST

OPINION

[*386] [*589] [**681]** JUSTICE REHNQUIST delivered the opinion of the Court.

[*LEdHR1A]** [1A] **[***LEdHR2A]** [2A]We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. 445 U.S. 925. With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that HN1 the work-product doctrine does apply in tax summons enforcement proceedings.

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants so informed petitioner Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter **[*387]** began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees **[***590]** who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments. [1] A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U. S. C. § 7602 demanding production of:

"All files relative to the investigation conducted under the supervision of Gerard Thomas to

identify payments to employees of foreign governments and any **[**682]** political **[*388]** contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

"The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." App. 17a-18a.

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U. S. C. §§ 7402 (b) and 7604 (a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, 600 F.2d 1223, 1227, n. 12, but agreed that the privilege did not apply "[to] the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" *Id.*, at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District **[***591]** Court so that a determination of who was **[*389]** within the "control group" could be made. In a concluding footnote the court stated that the work-product doctrine "is not applicable to administrative summonses issued under 26 U. S. C. § 7602." *Id.*, at 1228, n. 13.

FOOTNOTES

1 On July 28, 1976, the company filed an amendment to this report disclosing further payments.

II

Federal Rule of Evidence 501 HN2 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). HN3 Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel* v. *United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher* v. *United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the

[*390] **[**683]** law, and not an individual; but this Court has assumed that HN4 the privilege applies when the client is a corporation, *United States* v. *Louisville & Nashville R. Co.*, 236 U.S. 318, 336 (1915), and the Government does not contest the general proposition.

[*LEdHR3]** [3]The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole." 600 F.2d, at 1226. The first case to articulate the so-called "control group test" adopted by the court below, *Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483, 485 (ED Pa.), petition for mandamus and prohibition denied *sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (CA3 1962), cert. denied, 372 U.S. 943 (1963), reflected a similar conceptual approach:

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice **[***592]** when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, *he is (or personifies) the corporation* when he makes his disclosure to the lawyer and the privilege would apply." (Emphasis supplied.)

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. See *Trammel, supra*, at 51; *Fisher, supra*, at 403. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts **[*391]** with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1:

"A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

See also *Hickman* v. *Taylor*, 329 U.S. 495, 511 (1947).

In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. HN5 In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below -- "officers and agents . . . responsible for directing [the company's] actions in response to legal advice" -- who will possess the information needed by the corporation's lawyers. Middle-level -- and indeed lower-level -- employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (CA8 1978) (en banc):

"In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem 'is thus faced with a "Hobson's choice". If he **[**684]** interviews employees not having "the very highest authority", **[*392]** their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with "the very highest authority", he may find it **[***593]** extremely difficult, if not impossible, to determine what happened.'" *Id.*, at 608-609 (quoting Weinschel, Corporate Employee Interviews

and the Attorney-Client Privilege, 12 B. C. Ind. & Com. L. Rev. 873, 876 (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. See, *e. g., Duplan Corp*. v. *Deering Milliken, Inc*., 397 F.Supp. 1146, 1164 (SC 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it").

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, *e. g., United States* v. *United States Gypsum Co*., 438 U.S. 422, 440-441 (1978) ("the behavior proscribed by the [Sherman] Act is **[*393]** often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct"). [2] The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers **[***594]** who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. Compare, *e. g., Hogan* v. *Zletz*, 43 F.R.D. 308, 315-316 (ND Okla. 1967), aff'd in part *sub nom. Natta* v. *Hogan*, 392 F.2d 686 (CA10 1968) (control group includes managers and assistant managers of patent division and research and development department), with *Congoleum Industries, Inc*. v. *GAF Corp*., 49 F.R.D. 82, 83-85 (ED Pa. 1969), aff'd, 478 F.2d 1398 (CA3 1973) (control group includes only division and corporate **[**685]** vice presidents, and not two directors of research and vice president for production and research).

FOOTNOTES

[2] The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege: an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

[*394] **[***LEdHR1B]** [1B] The communications at issue were made by Upjohn employees [3] to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments*." (Emphasis supplied.) 78-1 USTC para. 9277, pp.

83,598, 83,599. Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. [4] The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. App. 40a. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation." **[*395]** It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." *Id.*, at 165a-166a. This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of **[***595]** the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, *id.*, at 39a, 43a, and have been kept confidential by the company. [5] Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

FOOTNOTES

[3] Seven of the eighty-six employees interviewed by counsel had terminated their employment with Upjohn at the time of the interview. App. 33a-38a. Petitioners argues that the privilege should nonetheless apply to communications by these former employees concerning activities during their period of employment. Neither the District Court nor the Court of Appeals had occasion to address this issue, and we decline to decide it without the benefit of treatment below.

[4] See *id.*, at 26a-27a, 103a, 123a-124a. See also *In re Grand Jury Investigation*, 599 F.2d 1224, 1229 (CA3 1979); *In re Grand Jury Subpoena*, 599 F.2d 504, 511 (CA2 1979).

[5] See Magistrate's opinion, 78-1 USTC para. 9277, p. 83,599: "The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel."

[*LEdHR4]** [4]The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

HN6 "[The] protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different **[*396]** **[**686]** thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Philadelphia* v. *Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (ED Pa. 1962).

See also *Diversified Industries*, 572 F.2d, at 611; *State ex rel. Dudek* v. *Circuit Court*, 34 Wis. 2d 559, 580, 150 N. W. 2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer"). Here the Government was free to question the

employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman* v. *Taylor*, 329 U.S., at 516: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S. Rep. No. 93-1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis"); *Trammel*, 445 U.S., at 47; *United States* v. *Gillock*, 445 U.S. 360, 367 (1980). **[***596]** While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client **[*397]** privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" sanctioned by the Court of Appeals in this case cannot, consistent with "the principles of the common law as . . . interpreted . . . in the light of reason and experience," Fed. Rule Evid. 501, govern the development of the law in this area.

III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. App. 27a-28a, 91a-93a. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U. S. C. § 7602. [6]

FOOTNOTES

[6] The following discussion will also be relevant to counsel's notes and memoranda of interviews with the seven former employees should it be determined that the attorney-client privilege does not apply to them. See n. 3, *supra*.

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. Brief for Respondents 16, 48. This doctrine was announced by the Court over 30 years ago in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Id.*, at 510. The Court noted that "it is essential that a lawyer work with **[*398]** a certain degree of privacy **[**687]** " and reasoned that if discovery of the material sought were permitted

"much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 511.

The "strong public policy" underlying the work-product doctrine was reaffirmed recently in *United States* v. *Nobles*, 422 U.S. 225, 236-240 (1975), and has been substantially incorporated in

Federal Rule of Civil Procedure 26 (b)(3) . [7]

FOOTNOTES

[7] This provides, in pertinent part:

HN7 "[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

[*LEdHR5]** [5] As **[***597]** we stated last Term, *HN8* the obligation imposed by a tax summons remains "subject to the traditional privileges and limitations." *United States* v. *Euge*, 444 U.S. 707, 714 (1980). Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine. Rule 26 (b)(3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable **[*399]** to summons enforcement proceedings by Rule 81 (a)(3). See *Donaldson* v. *United States*, 400 U.S. 517, 528 (1971). While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found, 78-1 USTC para. 9277, p. 83,605. The Government relies on the following language in *Hickman*:

HN9 "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. . . . And production might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U.S., at 511.

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from *Hickman*, however, did not apply to "oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda." *Id.*, at 512. As to such material the Court did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters, petitioner's case is not of that type." *Id.*, at 512-513. See also *Nobles, supra*, at 252-253 (WHITE, J., concurring). Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, 329 U.S., at 513 ("what he saw fit to write down regarding witnesses' remarks"); *id.*, at 516-517 (" **[**688]** the statement would be his [the **[*400]** attorney's] language, permeated **[***598]** with his inferences") (Jackson, J., concurring). [8]

FOOTNOTES

[8] Thomas described his notes of the interviews as containing "what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions

that I would have to ask or things that I needed to find elsewhere." 78-1 USTC para. 9277, p. 83,599.

[*LEdHR2B]** [2B]Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate, 78-1 USTC para. 9277, p. 83,604. Rule 26 goes on, however, to state that "[in] ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U. S. C. App., p. 442 ("The subdivision . . . goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories . . .").

[*401] Based on the foregoing, some courts have concluded that *no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses. See, *e. g., In re Grand Jury Proceedings*, 473 F.2d 840, 848 (CA8 1973) (personal recollections, notes, and memoranda pertaining to conversation with witnesses); *In re Grand Jury Investigation*, 412 F.Supp. 943, 949 (ED Pa. 1976) (notes of conversation with witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection. See, *e. g., In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (CA3 1979) ("special considerations . . . must shape any ruling on the discoverability of interview memoranda . . . ; such documents will be discoverable only in a 'rare situation'"); cf. *In re Grand Jury Subpoena*, 599 F.2d 504, 511-512 (CA2 1979).

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the "substantial **[***599]** need" and "without undue hardship" standard articulated in the first part of Rule 26 (b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we **[*402]** **[**689]** think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings.

It is so ordered.

CONCUR BY: BURGER (In Part)

CONCUR

CHIEF JUSTICE BURGER, concurring in part and concurring in the judgment.

I join in Parts I and III of the opinion of the Court and in the judgment. As to Part II, I agree fully with the Court's rejection of the so-called "control group" test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged. As the Court states, however, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Ante*, at 393. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See *ante*, at 394-395. Because of the great importance of the issue, in my view the Court should make clear now that, as a **[*403]** general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating **[***600]** whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct. See, *e. g., Diversified Industries, Inc*. v. *Meredith*, 572 F.2d 596, 609 (CA8 1978) (en banc); *Harper & Row Publishers, Inc*. v. *Decker*, 423 F.2d 487, 491-492 (CA7 1970), aff'd by an equally divided Court, 400 U.S. 348 (1971); *Duplan Corp*. v. *Deering Milliken, Inc*., 397 F.Supp. 1146, 1163-1165 (SC 1974). Other communications between employees and corporate counsel may indeed be privileged -- as the petitioners and several *amici* have suggested in their proposed formulations * -- but the need for certainty does not compel us now to prescribe all the details of the privilege in this case.

FOOTNOTES

* See Brief for Petitioners 21-23, and n. 25; Brief for American Bar Association as *Amicus Curiae* 5-6, and n. 2; Brief for American College of Trial Lawyers and 33 Law Firms as *Amici Curiae* 9-10, and n. 5.

Nevertheless, to say we should not reach all facets of the privilege does not mean that we should neglect our duty to provide guidance in a case that squarely presents the question in a traditional adversary context. Indeed, because Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," this Court has a special duty to clarify aspects of the law of privileges properly **[*404]** before us. Simply asserting that this failure "may to some slight extent undermine desirable certainty," *ante*, at 396, neither minimizes the consequences **[**690]** of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented.

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Federal Quick Index, Privileged Communications; Tax Enforcement; Work Product Doctrine

Annotation References:

What matters are protected by attorney-client privilege or are proper subject of inquiry by Internal Revenue Service where attorney is summoned in connection with taxpayer-client under federal tax examination . 15 ALR Fed 771.

Attorney-client privilege in federal courts: under what circumstances can corporation claim privilege for communications from its employees and agent corporation's attorney. 9 ALR Fed 685.

Development, since Hickman v Taylor, of "work product" doctrine , 35 ALR3d 412.

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