

STRENGTHENING THE NNBA BAR EXAM:
Rebuilding on the Foundation of Navajo Fundamental Law

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I. Background and Need

There is a serious and increasingly dire need to strengthen the Navajo Nation Bar Association (NNBA) semi-annual Bar Examination (Exam) and the course of study used to prepare for it. For many years if not decades, most aspiring tribal court advocates – the majority of whom are *Diné* living and working on or near the Navajo Nation – have not passed the Exam. This should not be surprising: The problem lies with the Exam and process used to prepare for it, not with the candidates who study and take it.

The current Exam was patterned after state bar examination from the 1980s and remains largely unchanged, in both content and structure, since that era. In contrast, the four states whose bar admission qualifies non-Navajo attorneys to seek admission to the NNBA – Arizona, Colorado, New Mexico and Utah – have all since reformed their bar exams in recent years. This includes substantially reducing the number of subject-matter topics that candidates are expected to master as well as reducing candidates’ reliance on rote memorization while emphasizing practice problem-solving analytical tools and skills. Moreover, the NNBA Exam does little to test candidates’ knowledge or even awareness of the most basic *Diné* legal concepts and methods of analysis that judges, attorneys and advocates use today, and on which the Nation’s own lawmakers increasingly depend. This deficiency in the current Exam stubbornly exists notwithstanding that such basic *Diné bizáád* terminology has for the past generation been the primary rule of legal interpretation in the Nation’s judiciary. The NNBA provides a “Traditional Teachings” certificate, requiring all candidates to attend a seminar on Navajo Fundamental Law to complete their eligibility to be admitted to practice. Yet that is all.

The fact is, the NNBA Exam no longer accurately reflects what attorneys, advocates and judges at Navajo should be expected to know to practice law ethically and responsibly. Candidates for the Exam are

expected to prepare extensively in more than two dozen specific areas of law, as opposed to a maximum of five or six major subject areas on state bar examinations. Moreover, instead of ensuring that all legal practitioners – attorneys and tribal advocates alike – are competent, the Exam tests a narrow range of skills in a way that is largely unrelated to the practice of law, and rewards the ability to memorize dozens if not hundreds of legal rules rather than mastering foundational reasoning and analytical ability.

Perhaps most ironically, the Exam tends to prioritize Anglo-American law notwithstanding the dramatic and deliberate shift by the Navajo Nation government to emphasize and codify *Diné* Fundamental Law and make the primary rule of decision in the Nation’s courts. In 1991, the Navajo Nation Judicial Conference, representing all Navajo justices, judges and professional staff, adopted the Navajo Nation Code of Judicial Conduct, expressly recognizing *Diné bi bee haz ’áanii*, including the doctrines of *hózhó*, *k’é*, and *k’éí*, as the basis for administering the Nation’s justice system. In 2002, the Navajo Nation Council voted to establish its own rule on the adoption of non-Navajo (*Bilagáana*) law: that when borrowing or assimilating non-Navajo law as a rule of decision, Navajo courts are required to interpret those laws in a manner consistent with *Diné bi bee haz ’áanii*, and to reject any interpretation inconsistent with traditional Navajo beliefs and values. The combined effect of these reforms has been revolutionary. No longer are litigants in the Navajo courts permitted to default to state and federal case law to address new issues or resolve disputes. Instead, Navajo courts either avoid *Bilagáana* law entirely or adopt classic Anglo-American legal doctrines and constructs only after reinterpreting them based on *Diné* Fundamental Law. One of the few vestiges of the pre-1991 legal landscape is the NNBA Exam.

Against this backdrop it is small wonder so many *Diné* tribal advocates, who have not graduated from a three-year law school, have had such difficulty in preparing for and passing the current Exam. The Exam does not effectively measure the knowledge, skills and understanding that should be required of both attorneys and advocates to practice law in the Navajo Nation. In simple terms, the Exam is not as “Navajo” as it should and must be. Strengthening the Exam, and the Bar Review course used to prepare for it, is critical to maintaining a legal system that continuously reinforces Navajo culture, language and society. With so many experienced tribal advocates retiring, and with the Nation’s rapid population growth, the

NNBA should embrace this opportunity to strengthen Navajo government, institutions, civic and community life, and the Nation's economy.

There is a better way – the Navajo Way.

In a nutshell, the proposed NNBA Exam would test students' knowledge of the Nation's laws and justice system while analyzing issues and disputes from both a Navajo and Anglo-American perspective. The Exam would still provide a mix of essay and short-answer questions and would be the same duration (eight hours in total) as currently, but test a fewer total number of subjects. Candidates for admission to the NNBA would be expected to demonstrate proficiency in basic, foundational Diné concepts and terminology that bear on their expected work as attorneys and advocates practicing law on the Navajo Nation. The goal of strengthen the NNBA Exam is –

1. To respect the primary and enduring importance of Navajo Fundamental Law in the Nation's justice system and in reinforcing and extending *Diné* sovereignty and self-governance;
2. To test foundational concepts and methods of analysis in both Navajo and Anglo-American Law; and
3. To more effectively prepare attorneys, advocates and judges to serve NNBA-member clients, the Navajo Judicial Branch, and the Nation's laws, institutions and communities.

II. Rebuilding the Exam Based on the 'Four Directions' Approach

An essential first step in determining how to strengthen the current NNBA Exam is to approach it from the "Four Directions" and use that foundational *Diné* philosophy to design the test itself, including preparing model questions and answers (essay, multiple choice and short-answer), around that concept:

Nit'saá'kis: "Think about it." After thinking carefully about the Nation's needs, and closely evaluating and comparing how state bar associations test and evaluate candidates, one lesson is striking: The current NNBA Exam tests far too many subjects (more than two dozen) and relies heavily on mass-memorization in its scoring. It

would be more effective to reduce the number of total subject-areas tested to no more than eight primary areas that reflect the bulk of practice on the Nation: Contracts, Torts, Criminal law and procedure, Family Law, Property Law, Evidence, Federal Indian Law and the Fundamental Law of the *Diné*.

Nahatá: “Plan it.” Planning for the new Exam means crafting a series of model exam questions, reflecting the eight core subject areas, which are rooted in real-life based scenarios by which candidates can apply their knowledge and skills from both a Navajo and Anglo-American perspective. Planning also means taking the current Bar Exam outlines and developing one consistent, uniform set of preparation materials designed to prepare students for the eight subject areas. These course outlines would reside institutionally with NNBA after being approved by the Training and Admissions Committees; instructors would be expected to use this common set of course materials for teaching purposes. Model questions and answers would be specifically keyed off these outlines to ensure direct relevance between study preparation and the Exam.

Íiná: “Live it.” The current NNBA Exam requires all candidates to prepare for and take a test that is largely based on Anglo-American methods of inquiry and analysis. In contrast, the new Exam would test students’ ability to approach the practical issues and disputes they are likely to encounter in law practice from both a Navajo and Anglo-American perspective. The ability to examine and evaluate a situation from a *Diné* perspective has, until now, been virtually untested as part of the Exam. That approach tends to diminish the lessons that many Navajo people may experience throughout their lives, even though such practical knowledge and experience lies at the heart of what it means to practice law at Navajo. As discussed below, *Íiná* can also be taught to non-Navajos as part of their foundational knowledge of the Four Directions on which the Nation’s justice system and institutions are built, nourished and sustained.

Sihásen: “Persevere through it” (Resilience). The new Exam rests of a singular guiding premise: Knowledge and awareness of *Diné* Fundamental Law should never come second to the Anglo-American system, but must become the primary component by which candidates gain admission to the NNBA. *Diné Bi Beenahaz’áanii* is the ultimate

source of guiding principles by which life being exists. It is what the Holy People used to think the world into reality and lies at the heart of how and why the People persevere.

III. Foundational Concepts for the NNBA Exam

Gaining admission to the NNBA should mean demonstrating respect for the central importance of Navajo language, culture and tradition, Creation Scripture and teachings. This includes understanding the Four Directions approach as well as acquiring at least some basic awareness of the building blocks of *Diné bi bee haz'áanii*, including:

- ***Sa'ah Náa'ghai Bikéh Hozh'óon***: Life-time experience for better or worst.
- ***Hózhǫ***: A perfect state of condition where everything is in the proper place or state of balance.
- ***Hóchxó***: A state of disharmony.
- ***Hozho'ji and Hochxo'ji***: From beginning of time, the *Diné* were created with the perfect and imperfect state of being. The forces of *hozho* and *hochxo* coexist side-by-side to benefit life and others are always in conflict within all life beings. When conflict arises, either too much *hozho'ji* or *hochxo'ji* can be harmful (*dóó yá'at'éeh da*) for our well-being; the balance of *hozho* and *hochxo* is necessary to sustain life.
- ***Nayéé'***: Anything that causes disharmony.
- ***Alchí Silá***: is a state that everything in life comes in duality. When two things come face-to-face, they make things happen. They coexist and are indispensable with each other. (e.g. female/male, earth/sky, good/bad, order/chaos, and life/death, *hozho/hochxo*.)
- ***K'e***: Kinship through *hozho'ji* value, unity, duty, and responsibility. *K'e* is a core value that is highly valued by the

Navajo society. It is a principle to guide the behavior and relationship of the Dine People and all life beings. Duty to care and respect for all life is deeply embedded in the principle of *K'e*. It is articulated in the basic Navajo teachings of *Haa'beh hodza'* (a sense of duty, compassion, and responsibility).

- ***K'ei*** (also *hak'ei*): The connection and relationship of all life in the whole universe.
- ***Nabik'iyati'***: Talking things out.
- ***Naa'chuid***: Assembly of all Navajo clanship to address the state of affairs.
- ***Naat'aa'nii***: Leader who thinks, plans with direction, sustains life and brings a satisfied outcome for the people, and who depends on their consent.
- ***Diné Bi Beehaz'aanii Bitse Siléi***: The ultimate source of guiding principles by which life exists.

IV. Model Navajo Fundamental Law Exam Questions

The revised NNBA Exam would test candidates' ability to analyze legal questions from both a traditional *Diné* perspective as well as the Anglo-American approach taught in U.S. law schools. A series of model questions and answers will be developed so that students can learn both approaches and apply them to real-world scenarios. Analyzing questions from a traditional Navajo legal perspective means identifying and applying the Four Directions Process (*Nit'saá'kis*, *Nahat'á*, *Íiná*, *Sin'há'sen*) step by step:

- ***Nit'saá'kis* (Thinking)**: As to the facts of the case, critical thinking is essential to review, listen and reflect on what happen, why it happen and how should it be remedied. The more you know the more you can understand the nature of *ánaa'hóti* (the problem). How was *hózhq* (harmony of life) disrupted? What was the cause? What Navajo guiding cultural principles would help advise the thought process?

What are the positive and negative thoughts that may affect the thinking element to the problems at hand? Note: The individuals from both sides of the case may have relatives who can make a difference as to whether the atmosphere of the process maybe friendly or hostile.

- ***Nahat'a (Planning)***: *Nahat'a* is a “talking things out” process of looking at the problem from different sides and create options of how the victim can be healed. “Talking things out” involves the persons who caused the injury and other relatives and interested people affected by victim’s injury may help to generate a well-thought out and practical solution. A medicine man or woman may say that *Nahat'a* in this case is a useful tool for diagnosis and healing purposes.
- ***Íiná (life)***: The approach here is to focus on life and what makes it possible. This includes identifying and implementing potential solutions after carefully evaluating all possible options, working always toward a practical result.
- ***Sin'há'sen (perseverance)***: It is not sufficient to fashion a remedy without also considering effective ways to sustain it over time. For instance, if a person is injured in an accident, he or she might ask the person or company responsible for the injury: “How will you restore me to my original self?” To the extent that such restoration might be possible, it must be considered from different perspectives – physically, mentally, emotionally and spiritually – and achieved in a manner so that it endures. As a practical matter, the desired outcomes may not be ideal or perfect, and that too is a reality of *sin'há'sen*.

A. Sample Exam Question to Test Navajo Fundamental Law

1. The Scenario: The Bull at Shiprock Fair

Mr. Charlie B. was enjoying himself at the annual Shiprock Fair, selling jewelry at a stand he rented from the Rodeo Board. Mr. Wilson, owner of a livestock company, provides some personnel and livestock for the rodeo held in conjunction with the Fair. At the place where livestock is

held, there are fences for entry and exit. One fence was poorly maintained, through which a bull escaped the arena.

While being pursued by two employees of Mr. Wilson, the bull crossed U.S. Highway 491 and struck Mr. B, who was walking in the concessions area, causing serious physical injury. The Rodeo Board had hired the person in charge of opening the stripping gate, who was hardly trained. The bull was not immediately recaptured to minimize the danger to other Fair attendees.

2. Exam Instructions for the Bull at Shiprock Fair

Analyze the above scenario by applying traditional Navajo thinking. Assume that the parties, including Mr. B, Mr. Wilson, and the Rodeo Board, have all agreed to *Diné* peacemaking for resolution. Use the Four Directions Process and identify and seek to resolve the matter using the Navajo cultural concepts discussed above.

3. Model Answer for the Bull at Shiprock Fair

During peacemaking, Mr. Charlie B wishes to be compensated for his injury pursuant to *Nal'yeeh* method of payment for all the injuries sustained.

The Four Direction Process starts with *Nit'saá'kis* (thinking) to define the *ánaa'hóti* (problem). The people engaged in the peacemaking process may ask: "What happened?" "How did it happen?" "Why did it happen?". This context provides the harm that constitutes the *Hóchxó* (causation) for disharmony.

The more you know the nature of the problem, the better you can be informed to deal with the option of how to remedy the situation, as a matter of *Nahat'a* (planning). *Nahat'a* means to identify all possible options to address the harm to restore harmony. The *Nahat'a* would be to look at the injury from different sides and how serious it is, which would determine the amount for *Nal'yeeh*.

Here the parties would *Nabik'íyati'* (talk things out) out to determine what happened and look at how the Rodeo Board is connected to the victim's injury. In this process, *K'e* establishes the duty of the Rodeo Board to ensure that the fence is adequately maintained, including the area for entry and exit

to prevent the escape of the bull. Due to the bull escaping because of the poorly maintained fence, this constitutes a violation of *K'e* on the part of the Rodeo Board, who would therefore be responsible. The *Nal'yeeh* is necessary to restore Mr. B in the state of *Hózhq*.

Mr. Wilson, as the owner of the livestock, should have called for the immediate recapture of the bull to avoid danger to the public. Yet he failed to do so, which led to the serious injury of Mr. B.

With the Four Direction process, the victim may not always be 100 percent satisfied, due to the nature of a thorough process that encompasses the element of *Nahat'a* (Planning) to address the problem. The primary question is "what is it that will fix the problem?" Problems that can't be fixed can sometimes be mitigated in other ways – by supporting Mr. B's longer-term physical therapy, for instance, with the goal of perhaps offering him employment or, if that is not possible due to his injuries, to a member of his family. The creativity to fashion an acceptable remedy that seeks *Hózhq*, and which sustains it over time, comes from applying the *Íiná* and *Sin'há'sen* elements of the Four Directions Process.

V. Other Elements of the New Exam

A. Short Answer and Multiple-Choice Questions

In addition to analyzing real-world scenarios, the revised Exam would contain a series of short answer and multiple-choice questions on some foundational principles of Federal Indian law and codified Navajo law (including the Treaty of 1968, Title II of the Navajo Nation Code, the Navajo Bill of Rights, Navajo Sovereign Immunity Act, and so on). To demonstrate familiarity with *K'é* and *K'éí*, candidates seeking admission to the NNBA should be taught the fundamentals of the Navajo clan system, including how to properly introduce oneself on the Nation and how different clans relate to each other.

B. Measure Performance Test

The revised NNBA Exam might also include a Measure Performance Test or "MPT" portion – a standard approach on many other bar examinations for more than 20 years. MPT is designed to test basic "lawyer

thinking” skills by tasking the candidate with writing a memo, motion or brief based on a set of materials provided along with the Exam question itself. This approach is similar to the writing sample that the Navajo Nation Judicial Conduct Commission currently uses to test the analytical skills of finalists for Navajo Nation Supreme Court Justices and District Court Judges. There would be a short factual scenario, a set of laws to apply, and a practical work product (such as a court order) that must be produced in order for the candidate to gain the requisite points for answering the MPT portion of the Exam.

VI. Epilogue: Other Potential Reforms

In addition to reforming the Exam as described above, the NNBA should develop a plan to address the pressing need to recruit, train and retain tribal court advocates to serve the Nation and its citizens.

A. Creating a Limited Family Law Bar License

To strengthen the tribal advocate corps at Navajo, the NNBA should revisit the idea of providing a limited NNBA license to those tribal court advocates whose practice is limited to family law on the Nation. Such a limited license would reflect the large and growing docket of family law matters where the parties may lack affordable access to either an attorney or tribal advocate – and the reality that the number of tribal court advocates at Navajo has severely declined in recent years. A limited law license bar exam might be designed specifically to address this situation.

B. Improving Training Opportunities for Tribal Advocates

NNBA should consider developing a plan, perhaps supported by a grant application to the U.S. Department of Justice-Office of Justice Services or other federal entity or corporate non-profit foundation, to develop a training academy (“Training Academy”) specifically for tribal court advocates. One or more six-week courses could be held twice annually at one or more locations on the Nation to prepare candidates for the NNBA Exam.

