



**Unauthorized Practice of Law:
A Review of Practice in the Navajo Nation and
the States of Arizona, New Mexico and Utah**

The views expressed are those of the participants and do not represent or reflect those of the Navajo Nation



**Unauthorized Practice of Law:
A Review of Practice in the Navajo Nation and the States of Arizona,
New Mexico and Utah**

**Kimberly A. Dutcher
April E. Olson
Michelle Brown- Yazzie
Daniel Moquin**

September 2021

The views expressed are those of the participants and do not represent or reflect those of the Navajo Nation



The Navajo Nation is a federally recognized tribe with its own tribal courts, law, rules of procedure, ethics rules and rules of professional conduct.

Similarly, the states in which the Navajo Nation is located, Arizona, New Mexico, and Utah, also have their own respective laws, rules of procedure, ethics rules and rules of professional conduct.

This presentation will provide an overview of the Navajo Nation law and a moderated discussion among panelists who are licensed practitioners from each state who will discuss issues pertinent to those licensed in both the Navajo Nation and each state.

Navajo Nation Code 7 N.N.C. § 606:

A. **Legal counsel shall be allowed to appear in any proceedings before the Courts of the Navajo Nation** provided that the legal counsel is a member in active status and in good standing of the Navajo Nation Bar Association. Every defendant in a criminal case shall have the right to representation by legal counsel and in the event he has no such representation, he may proceed without legal counsel or a legal counsel may be appointed by the Judge.

B. Only persons who are members in good standing of the Navajo Nation Bar Association shall provide legal representation in the Courts of the Navajo Nation, quasi-judicial, legislative, and administrative law forums, and other legal services within the territorial jurisdiction of the Navajo Nation. Persons who are not members in active status and in good standing of the Navajo Nation Bar Association and who provide legal representation or other legal services within the territorial jurisdiction of the Navajo Nation, and who are not duly associated with members in good standing of the Navajo Nation Bar Association, shall be deemed to be conducting the **unauthorized practice of law**, and shall be subject to civil and/or criminal sanctions under Navajo Nation law.

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

D. **Judges of the Navajo Nation Courts**, administrative law judges, hearing officers, and the presiding officials of quasi-judicial or legislative bodies **shall have the authority to determine, relative to matters heard before them**, whether a person is a member in active status and in good standing of the Navajo Nation Bar Association, or duly associated with members in active status and in good standing of the Navajo Nation Bar Association, **and the power to impose any of the civil sanctions set forth in Subsection (C) above.**

E. Persons conducting the unauthorized practice of law shall be liable for both **actual and consequential damages** suffered by persons with whom they have contracted for the provision of legal representation or other legal services. Civil actions alleging the unauthorized practice of law shall be brought in the District Courts of the Navajo Nation.



2 N.N.C. § 206 (A): Rule for Navajo Nation government attorneys:

No employee or official of the Navajo Nation, federal or state government shall obstruct, interfere with or control the functions of any Court of the Navajo Nation or attempt to influence such functions in any manner except as permitted by Navajo Nation laws or regulations or in response to a request for advice or information from the Court.


The Supreme Court elaborated: “a government lawyer for the Navajo Nation has a duty not to obstruct, interfere or influence the functions of our courts. Such a provision is not in our statutes for show. It shows how vital it is that the government is accountable to all the laws of the Navajo Nation— statutes, court rulings, rules and regulations.”

In re Seanez, No. SC-CV-58-10, 2010 WL 4182751 (Navajo Oct. 18, 2010), on reconsideration (Nov. 24, 2010)



The Navajo Nation Supreme Court has the exclusive regulatory authority in the regulation of the **practice of law** within the Navajo Nation.

See Eriacho v. Ramah Dist. Ct., 8 Nav. R. 598, 5 Am. Tribal Law 469 (Nav.Sup.Ct.2004); Navajo Nation v. MacDonald, 6 Nav. R. 222 (Nav.Sup.Ct.1990); Boos v. Yazzie, 6 Nav. R. 211 (Nav.Sup.Ct.1990); In re Practice of Law by Avalos, 6 Nav. R. 191 (Nav.Sup.Ct.1990); In re Practice of Law in the Courts of the Navajo Nation, 4 Nav. R. 75 (Nav.Ct.App.1983); In re Battles, 3 Nav. R. 92 (Nav.Ct.App.1982).



Furthermore, “Members of the NNBA are officers of the court and have a special responsibility to ensure the integrity of the Navajo legal system”.

Perry v. Navajo Nation Labor Commission, No. SC–CV–50–05, 6 Am. Tribal Law 780 (Nav.Sup.Ct. August 7, 2006).



The Navajo Nation Rules of Professional Conduct:

On May 17, 1993 through [Court Order A-CV-41-92](#), the Navajo Nation Supreme Court adopted the American Bar Association's Model Rules of Professional Conduct with some amendments, additions, and exceptions.

Rule 5.5 Unauthorized Practice of Law provides

A lawyer shall not:

- (a) **practice law** in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of **activity that constitutes the unauthorized practice of law.**

Comment: The definition of the **practice of law** is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

The Navajo Nation does not have a definition of the “practice of law” .



Arizona Rules of Supreme Court, Rule 31 (pre-2021)

"Practice of law" means providing legal advice or services to or for another by: (1) preparing or expressing legal opinions to or for another person or entity; (2) representing a person or entity in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration or mediation; (3) preparing a document, in any medium, on behalf of a specific person or entity for filing in any court, administrative agency, or tribunal; (4) negotiating legal rights or responsibilities on behalf of a specific person or entity; or (5) preparing a document, in any medium, intended to affect or secure a specific person's or entity's legal rights.



Arizona Rules of Supreme Court, Rule 31 (pre-2021)

“Unauthorized practice of law” includes but is not limited to: (1) engaging in the practice of law by persons or entities not authorized to practice pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 38(a); or (2) using the designations “lawyer,” “attorney at law,” “counselor at law,” “law,” “law office,” “J.D.,” “Esq.,” or other equivalent words by any person or entity who is not authorized to practice in this state pursuant to paragraphs (b) and (c) or specially admitted pursuant to Rule 38(a), the use of which is reasonably likely to induce others to believe that this person or entity is authorized to engage in the practice of law in this state.



Arizona (pre-January 2021)

“We hold that a person who presents himself as an attorney based in an Arizona office engages in unauthorized practice of law unless he has been admitted to practice before the Arizona Supreme Court, even if he has been admitted to practice in a tribal court within the boundaries of Arizona.” *State v. Lang*, 323 P.3d 740 (Ariz. App. 2014).

“An Arizona attorney may permit his non-lawyer paralegal, who is a licensed tribal advocate, to represent clients in tribal court if that court’s rules so permit, because that court’s rules govern the conduct. Such representations will not run afoul of the Arizona lawyer’s duty to not assist unauthorized practice of law as long as the paralegal representation is limited to tribal court.” Ariz. Bar Opinion 99-13.

Petition to Amend Rules, Supreme Court No. R-20-0034

04.27.20

Dave Byers¹
Administrative Director, Administrative Office of Courts
Member, Task Force on the Delivery of Legal Services
State Courts Building
1501 West Washington
Phoenix, Arizona 85007
Telephone: (602) 452-3301
Projects2@courts.az.gov

IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of)	
)	
)	Supreme Court No. R-20-0034
PETITION TO AMEND)	
RULES 31, 32, 41, 42 (ERs 1.0-5.7),)	
46-51, 54-58, 60, 75 and 76, ARIZ. R.))	
SUP. CT., and ADOPT NEW RULE)	Response and Amended Petition
33.1, ARIZ. R. SUP. CT.)	
)	

Order No. R-20-0034 (filed 8/27/2020)

SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
) No. R-20-0034
)
RESTYLE AND AMEND RULE 31; ADOPT)
NEW RULE 33.1; AMEND RULES 32,)
41, 42 (VARIOUS ERs FROM 1.0 TO)
5.7), 46-51, 54-58, 60 AND 75-76)
)
) FILED: 8/27/2020
)
)
_____)

**ORDER AMENDING
THE ARIZONA RULES OF THE SUPREME COURT
AND THE ARIZONA RULES OF EVIDENCE**

Petitioner Dave Byers, on behalf of the Task Force on the Delivery of Legal Services, has filed a rule petition and amended rule petition proposing to: (a) abrogate Arizona Supreme Court Rule 31 (and associated items following the rule) and replace them with proposed new Rules 31, 31.1, 31.2, and 31.3; (b) amend Supreme Court Rules 32, 41, 42 (and certain ethics rules and comments set forth in that rule), 43, 46-51, 54-58, 60, 63, 66, 67, 75 and 76; and (c) adopt a new Supreme Court Rule 33.1. Having considered the petition, comments submitted in response to the petition, and Petitioner's reply to those comments,

IT IS ORDERED:

(a) abrogating current Supreme Court Rule 31 and the Oath of Admission and the Lawyer's Creed of Professionalism that follow the rule, and replacing them with the adoption of new Rules 31, 31.1, 31.2, and 31.3 in accordance with Attachment #1 to this order, effective January 1, 2021;

(b) adopting new Supreme Court Rule 33.1 in accordance with Attachment #2 to this order, effective January 1, 2021;

(c) amending or abrogating ERs 1.0, 1.5, 1.6, 1.7, 1.8, 1.10, 1.17, 5.1, 5.3, 5.4, 5.7 and 8.3 in Supreme Court Rule 42 and those rules' associated rule comments, in accordance with Attachment #3 to this order, effective January 1, 2021;

(d) amending Supreme Court Rules 32, 41, 43, 46-51, 54-58, 60, 63, 66, 67, 75 and 76 in accordance with Attachment #4 to this order, effective January 1, 2021; and

(e) adopting new Arizona Rule of Evidence 513 in accordance with Attachment #5 to this order, effective January 1, 2021.

DATED this 27th day of August, 2020.

_____/s/
ROBERT BRUTINEL
Chief Justice



Arizona Rules of Supreme Court, Rule 31.1 (effective January 1, 2021)

(a) Requirement. A person may engage in the practice of law in Arizona, or represent that he or she is authorized to engage in the practice of law in Arizona, only if:

- (1) the person is an active member in good standing of the State Bar of Arizona under Rule 32; or
- (2) the person is specifically authorized to do so under Rules 31.3, 38, or 39.

(b) Lack of Good Standing. A person who is currently suspended or has been disbarred from the State Bar of Arizona, or is currently on disability inactive status, is not a member in good standing of the State Bar of Arizona under Rule 31.1(a)(1).

(c) Alternative Business Structure (ABS). An entity that includes nonlawyers who have an economic interest or decision-making authority as defined in ACJA 7-209 may employ, associate with, or engage a lawyer or lawyers to provide legal services to third parties only if:

- (1) it employs at least one person who is an active member in good standing of the State Bar of Arizona under Rule 32 who supervises the practice of law under ER 5.3;
- (2) it is licensed pursuant to ACJA § 7-209; and
- (3) legal services are only provided by persons authorized to do so and in compliance with the Rules of Supreme Court.



Arizona Rules of Supreme Court, Rule 31.2 (effective January 1, 2021)

Except as provided in Rule 31.3, a person, entity, or ABS who is not authorized to practice law in Arizona under Rule 31.1(a), (c), or Rule 31.3 must not:

- (a) engage in the practice of law or provide legal services in Arizona; or
- (b) use the designations “lawyer,” “attorney at law,” “counselor at law,” “law,” “law office,” “J.D.,” “Esq.,” “alternative business structure (ABS),” or other equivalent words that are reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law or provide legal services in Arizona



Arizona Rules of Supreme Court, Rule 31.3

(effective January 1, 2021)

(a) Generally.

(1) Notwithstanding Rule 31.2, a person or entity may engage in the practice of law in a limited manner as authorized in Rule 31.3 (b) through (e), but the person or entity who engages in such an activity is subject to the Arizona Supreme Court's jurisdiction concerning that activity.

(2) A person who is currently suspended or has been disbarred from the State Bar of Arizona, or is currently on disability inactive status, may not engage in any of the activities specified in this Rule 31.3 unless this rule authorizes a specific activity.

(3) An ABS whose license has been suspended or revoked may not engage in any of the activities specified in this rule, except an ABS whose license has been suspended may engage in activities as expressly authorized by judgment or order of the Arizona Supreme Court, the presiding disciplinary judge, or a hearing panel.

(b) Governmental Activities and Court Forms.

(c) Legal Entities

(d) Tax-Related Activities and Proceedings

(e) Other



New Mexico's Definition of Practice of Law:

No person shall **practice law** in a court of this state, except a magistrate court, nor shall a person commence, conduct or defend an action or proceeding unless he has been granted a certificate of admission to the bar under the provisions of Chapter 36 NMSA 1978. No person not licensed as provided in that chapter shall advertise or display any matter or writing whereby the impression may be gained that he is an attorney or counselor at law or hold himself out as an attorney or counselor at law, and all persons violating the provisions of that chapter shall be deemed guilty of contempt of the court in which the violation occurred, as well as of the supreme court of the state; provided, however, that nothing in this section shall be construed to prohibit persons residing beyond the limits of this state, otherwise qualified, from assisting resident counsel in participating in an action or proceeding.

NM Stat § 36-2-27. Practice without admission; contempt of court; foreign attorneys



New Mexico Rule of Professional Conduct:

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

NM R RPC Rule 16-505

Includes provisions for pro hac vice practice

New Mexico case law:

Moreover, this Court has declined to adopt a definition of the practice of law that is limited to signing pleadings or appearing in court on another's behalf. Instead, **we have determined what constitutes the practice of law in each case by conducting a fact-specific inquiry that takes several different indicators into consideration.** See *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 526, 514 P.2d 40, 45 (1973); *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 439, 575 P.2d 943, 948 (1978). Under this approach, “[t]he practice of law is not restricted to appearances in court; it also encompasses giving legal advice and counsel.” *Telford*, 707 N.E.2d at 463; see also *State ex rel. Disciplinary Comm'n of the Supreme Court v. Owen*, 486 N.E.2d 1012, 1013 (Ind.1986) (“[T]he core element of practicing law is the giving of legal advice to a client. Merely entering into such a relationship constitutes the practice of law.”); *Kennedy v. Bar Association of Montgomery County, Inc.*, 316 Md. 646, 561 A.2d 200, 210 (1989) (concluding that “the very acts of interview, analysis and explanation of legal rights constitute practicing law”); *In re Conduct of Devers*, 328 Or. 230, 974 P.2d 191, 196 (1999) (concluding that act of revising and redrafting settlement agreement for client “is the work of a lawyer, not a scrivener”). Thus, we have held that an unlicensed person “was engaging in the practice of law by providing [a] client with legal advice and assistance” even though the unlicensed person had not entered an appearance or otherwise disclosed his participation in the case to the court or opposing counsel. *Herkenhoff II*, 1997–NMSC–007, ¶ 14, 122 N.M. 766, 931 P.2d 1382.

In re Chavez, 2000-NMSC-015, ¶ 26, 129 N.M. 35, 42, 1 P.3d 417, 424



New Mexico Children's Court Rule 10-324:

- In addition to parties and their attorneys, Subparagraph (A)(1) excludes a representative of a child's Indian tribe or tribes from the definition of "general public" in a case in which the Indian Child Welfare Act may apply. Therefore, that **tribal representative shall be permitted under Paragraph B to attend all hearings in an abuse and neglect proceeding** unless it is determined that the Indian Child Welfare Act does not apply. **The tribal representative also should be permitted to monitor the proceedings in order to keep the tribe informed of the progress of the case, to participate in the proceedings to the extent reasonably necessary to inform the court of the tribe's concerns, and to provide additional resources, including, for example, services, placement options, financial support, and cultural connections. A tribe should not be required to formally intervene in the case unless the tribe seeks affirmative relief from the court.** See, e.g., 25 U.S.C. § 1911(c) (providing that an Indian child's tribe shall have a right to intervene at any point in a state court proceeding for the foster care of, or termination of parental rights to, an Indian child).
- *Rule 10-324 - Conduct of hearings*, N.M. R. Child. Ct. 10-324

Utah

(a) Application. Except as set forth in paragraphs (c) and (d), only persons who are active, licensed Bar members in good standing may engage in the practice of law in Utah.

(b) Definitions. For purposes of this rule:

(1) **“Practice of law”** means representing the interests of another person by informing, counseling, advising, assisting, advocating for, or drafting documents for that person through applying the law and associated legal principles to that person's facts and circumstances.

Note: (c) and (d) reference Licensed Paralegal Practitioners and exclusions and exemptions. The practice of Licensed Paralegal Practitioners is limited to areas historically underserved such as providing legal representation for forcible entry and detainer and domestic violence related issues.

UT R SUP CT Rule 14-802



Utah Rules of Professional Conduct:

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

UT R RPC Rule 5.5

Note: same language as NM rule; includes provisions for pro hac vice practice

Fun fact: Pro hac vice means: for or on this occasion only.



Pro Hac Vice or Special Circumstances

At least 9 states now allow out-of-state attorneys in ICWA cases to practice under special Pro Hac Vice rules. Under these rules, attorneys do not need to pay the fees or associate with local counsel.

Navajo Special Prosecutor, 2 N.N.C. § 2023(B) and *Acothley v. Perry, No. SC-CV-08-11* (rejecting argument that Special Prosecutor was engaging in unauthorized practice of law and holding, based on Council's intent, that the special prosecutor statute "amounts to a *de jure* admission and authority for the SP to practice.")

In the Matter of a Petition to Permit Temporary Provision of Legal Services by Qualified Attorneys from Outside North Dakota, 2017 ND 1 (filed 1/18/17) (authorizing out of state attorneys to practice on a temporary basis if providing pro bono criminal defense services to parties arrested as part of Dakota Access Pipeline demonstrations)



Practice Pending Admission

Under Rule 14-809 of the Rules Governing the Utah State Bar, attorneys who meet certain qualifications may be eligible to practice while their application is pending.

Navajo Courts have allowed limited practice (associate status) pending admission. *See In the Matter of the Practice of Law in the Navajo Tribal Courts*, 4 Nav. R. 63 (Court of Appeal of Navajo Nation **1983**):

“Given the fact that the Justice Department has certified her competency and given the fact that the courts must support efforts for the Navajo Nation to obtain and be represented by competent counsel, this court hereby admits the petitioner to associate status under the rules of the bar association pending her bar examination.”

“The Court suggests to the Navajo Nation Bar Association that it consider seriously the problem of special exceptions for Navajo government employees as associate members pending their examination and admission to the bar.”



Kimberly A. Dutcher, Deputy Attorney General, kdutcher@nndoj.org

April E. Olson, Attorney at Law, aeolson@rothsteinlaw.com

Michelle Brown-Yazzie, Assistant Attorney General,
myazzie@nndoj.org

Daniel Moquin, Principal Attorney, dmoquin@nndoj.org