

No. SC-SP-02-19

SUPREME COURT OF THE NAVAJO NATION

In the Matter of Petition of:
Kimberly A. Dutcher.

OPINION

Before JAYNE, J., Chief Justice, and SHIRLEY, E., Associate Justice.

Original proceeding concerning bar association matters of exemption under the Navajo Nation Pro Bono Rules.

Kimberly Dutcher, Deputy Attorney General, Petitioner, Window Rock, Navajo Nation.

This case concerns claimed exemptions from pro bono appointment and service on behalf of employees of the Navajo Nation Department of Justice under Rule II.B.7 of the Navajo Nation Pro Bono Rules.

I

This matter is before the Court on a letter that this Court accepted as a petition.

On September 9, 2019, Kimberly A. Dutcher, as Acting Deputy Attorney General (“Petitioner”), sent a memorandum addressed to the Office of Pro Bono Services (“OPBS”) and Supreme Court to the Administrative Director of Courts. In the signed memorandum, Petitioner concluded that the staff named in the memorandum and employed by Navajo Nation Department of Justice (“DOJ”) “are to be exempt from pro bono appointment and service pursuant to Navajo Pro Bono Rules, Rule II.B.7.” *Petition*, September 9, 2019.

The memorandum lists thirty-six (36) persons employed by DOJ as attorneys or tribal court advocates. Among these names are four (4) persons not admitted by this Court to practice law in the Navajo Nation, including the Petitioner. The list also included Attorney General

Doreen McPaul, whose change in status to active member of the Navajo Nation Bar Association began on April 2, 2019.

The Court is certain that Petitioner is unlicensed in this jurisdiction because on October 21, 2019, the Navajo Nation Bar Association on behalf of the Petitioner filed a petition for admission to practice law in the Navajo Nation. On November 1, 2019, this Court issued an order placing that matter on hold until this case was resolved. The petition for admission is pending consideration by this Court.

Petitioner also provided a list of individuals who have left employment with DOJ and asserted that those persons are no longer exempt pursuant to Rule II.B.7.

The Administrative Director of Courts forwarded a copy of Petitioner's memorandum to Supreme Court Clerk. The Clerk of the Supreme Court docketed this matter for review.

On the day that this Court prepared to issue this opinion, November 4, 2019, Attorney General McPaul filed an Expedited Motion to Dismiss the pending petition filed with this Court.

II

As a preliminary matter, we deny the Attorney General's motion to dismiss. This petition implicates two (2) of the core functions of the Navajo Nation courts: attorney regulation and practice, and pro bono appointment and service. Moreover, the petition presents an issue which has been the subject of correspondence concerning the unauthorized practice of law for nearly 40 years and the subject of judicial decisions for more than 20 years. Therefore, we seek to definitively resolve the matter presented here in the interest of finality and clarity.

III

The petition presents four (4) major issues. First, whether the determination of exemption from pro bono appointment and service pursuant to the Navajo Nation Pro Bono Rules is a legal

decision. Second, whether all attorneys employed by the Navajo Nation Department of Justice are prosecutors and presenting officers, and therefore entitled to a blanket exemption under Rule II.B.7 of the Navajo Nation Pro Bono Rules. Third, whether named staff at the Navajo Nation Department of Justice are exempt from pro bono appointment and service. Finally, whether the submission of a petition that makes legal determinations of exemption by the Petitioner who is not admitted to practice law in the Navajo Nation constitutes the unauthorized practice of law.

IV

The Court addresses the question of whether the determination of exemption from pro bono appointment and service pursuant to the Navajo Nation Pro Bono Rules is a legal decision. We conclude it is, and further, that it is a legal decision solely within the scope of the Navajo Nation Supreme Court.

“The Navajo Nation government is comprised of three co-equal branches, each with its own area of responsibility and limitations of power.” *Tuba City Judicial Dist. v. Sloan*, 8 Nav. R. 159, 166 (Nav. Sup. Ct. 2001). “The Courts of the Navajo Nation have the full and sole authority to regulate the practice of law within the Navajo Nation, without limitation” including rulemaking authority. *In re Practice of Battles*, 3 Nav. R. 92, 96 (Nav. Ct. App. 1982). This includes compliance and enforcement with the Navajo Nation Pro Bono Rules. Therefore, it is the courts that have the exclusive power to make the legal determination that a person is exempt from pro bono appointment or service.

The Court has long taken correspondences asserting exemption from pro bono appointments and service as petitions, which require a Supreme Court decision. *See, e.g. In re Shirley*, SC-SP-01-19, slip op. at 3 (Nav. Sup. Ct. September 18, 2019). Thus, only the Navajo Nation Supreme Court can make the legal determination of an exemption.

In order to make a determination that a person is exempt, the Court examines the facts of the petition and applies them to the Navajo Nation Pro Bono Rules in order to come to a conclusion as to the eligibility of a particular person under the rules. The OPBS, which was created by rule within the Supreme Court, is responsible for maintaining the list of persons eligible for pro bono appointment, receiving correspondence, and maintaining pro bono service plans. *See Navajo Nation Pro Bono Rule, Rule VII, see also, Shirley, supra*, at 4. The determination of exemption is a legal decision that rests solely with the Judicial Branch, specifically with the Navajo Nation Supreme Court.

V

The Court now addresses whether all attorneys employed by the Navajo Nation Department of Justice are prosecutors and presenting officers, and therefore entitled to a blanket exemption under Rule II.B.7 of the Navajo Nation Pro Bono Rules.

As a general rule, “All regular members of the NNBA and other persons permitted to practice in the Navajo Nation courts are subject to and shall accept pro bono appointments.” Navajo Nation Pro Bono Rule II.A. This comports with Navajo thought that a *naat’áanii* as a leader, *see In re Seanez*, 9 Nav. R. 433, 438 (Nav. Sup. Ct. 2010) and *Begay v. Begay*, 8 Nav. R. 893 (W.R. Fam. Ct. 2006) (counsel’s role within the client relationship is that of a *naat’áanii*, and as such her words and actions carry great weight and are persuasive), is expected to be of assistance to the people.

Certain persons or positions are exempt from pro bono appointment and service under Rule II.B. As to this case, Rule II.B.7 of the Navajo Nation Pro Bono Rules provides:

B. The following persons or positions are exempt from pro bono appointments and service:

...
7. All Navajo Nation Prosecutors and Presenting Officers.

Only members of the NNBA and other persons permitted to practice before the Navajo Nation courts (including but not limited to *pro hac vice* attorneys) are subject to the requirements of the Navajo Nation Pro Bono Rules. Accordingly, only members of the NNBA can seek an exemption.

A plain reading of the rules provides no exception for DOJ attorneys. Instead, the rules provide for two specific exemptions within the DOJ. The Attorney General, as head of the Navajo Nation Department of Justice including the Office of the Chief Prosecutor, is exempt under Rule II.B.4. As to the Attorney General's staff, only Navajo Nation Prosecutors and Presenting Officers are exempt under Rule II.B.7. The rules are silent as to all other staff of the DOJ. We therefore hold that all attorneys employed by the Navajo Nation Department of Justice are not prosecutors and presenting officers, and therefore not entitled to a blanket exemption under Rule II.B.7 of the Navajo Nation Pro Bono Rules.

VI

The Court now addresses whether the named staff of the Navajo Nation Department of Justice are exempt from pro bono appointments and service.

Traditionally, the Office of the Prosecutor provides an annual list with the names of the prosecutors and presenting officers. On March 6, 2019, former Chief Prosecutor submitted a list of names of prosecutors and presenting officers to the OPBS. The list was accepted by this Court and the names were denoted as exempt from pro bono appointment.

The Chief Prosecutor's list does not compare with that of Petitioner's list. None of the individuals on Chief Prosecutor's list are included in Petitioner's list and none of the individuals in Petitioner's list are prosecutors nor presenting officers.

Additionally, one individual on the current petition, the Attorney General, is eligible for exemption under Rule II.B.4 rather than Rule II.B.7. Some individuals on Petitioner's list, including the Petitioner, were not members of the Navajo Nation Bar Association.

Petitioner provides no basis for the conclusion that the persons named on the list are either prosecutors or presenting officers, other than they are employed by DOJ. Here, the distinction between Petitioner's memorandum and Chief Prosecutor's list becomes more stark. The Chief Prosecutor provided the names of persons employed with the Office of the Prosecutor, and in a capacity as a prosecutor or presenting officer. In contrast, the Petitioner provides the names of more than 30 attorneys employed across DOJ's many departments and excludes persons employed by the Office of the Prosecutor as prosecutors and presenting officers.

It is unclear by what reasons Petitioner believed that these persons were exempt as the memorandum contains only conclusions, citations to the Navajo Nation Pro Bono Rules, and two lists of names. In any event, we are without any basis to make the determination that the persons listed by the Petitioner are exempt as prosecutors or presenting officers and therefore, must deny this petition.

VII

Petitions for exemption from pro bono appointment and service are common; however, this Court cannot find record of another such petition filed on behalf of others by a non-member of the NNBA and a person not permitted to practice law in the Navajo Nation. Aside from the claimed exemptions, this Court is particularly concerned with the filing of this petition on behalf of others by an attorney not licensed in this jurisdiction.

Judges of the Navajo Nation Courts 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. 7 N.N.C. § 606(D).


The September 9, 2019 letter was not a joint filing as it was from the Attorney General or the Acting Deputy Attorney General. Petitioner signed alone and made conclusions of law as to application of the Navajo Nation Pro Bono Rules to herself and other DOJ staff. Petitioner is not admitted to practice law within this jurisdiction and is technically practicing law without a license in violation of Navajo law. This Court cannot condone legal advice by an unlicensed attorney, as the unauthorized practice of law undermines the integrity of our legal system. *Perry v. Navajo Nation Labor Commission*, 9 Nav. R. 55, 57 (Nav. Sup. Ct. 2006). We expect more from the deputy to the Nation's chief legal officer, recognizing a government attorney has a duty to the public trust as elaborated in *In re Seanez, supra* at 437-439. The Petitioner's submission of a document with legal determinations constitutes the unauthorized practice of law.

To avoid placing this Court in the unique position of having knowledge of a violation of Navajo law and not doing anything about it, the Court must deny this petition for exemption of DOJ Attorneys, and address this matter in the separately filed petition for admission.

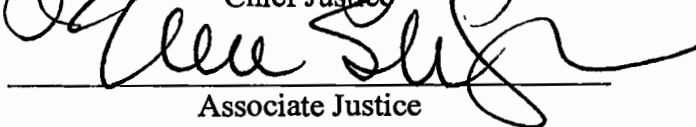
VIII

For the foregoing reasons, the Court hereby DENIES this petition.

Dated this 4 day of November, 2019.



Chief Justice



Associate Justice