No. SC-CV-58-10

IN THE SUPREME COURT OF THE NAVAJO NATION

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In the Matter of Frank Seanez

**OPINION**
**AND ORDER ON RECONSIDERATION**

Before YAZZIE, Chief Justice, and SHIRLEY, Associate Justice.[1]

Reconsideration of the opinion of this Court in exercising its regulatory authority over the practice of law within the Navajo Nation and concerning Mr. Frank Seanez, a practitioner and member of the Navajo Nation Bar Association.

Levon B. Henry, Tohatchi, Navajo Nation, for Respondent.

This matter comes before the Court following the timely filing of a *Petition for Reconsideration* on November 12, 2010 by Respondent, Mr. Seanez. Mr. Seanez asks that the Court reduce the sanction of disbarment, refer the matter to the Navajo Nation Bar Association's Disciplinary Committee, or for what the Court deems just and proper.

Legal arguments aside, Mr. Seanez urges the Court to take into account his 19 years of loyal service and the effect of disbarment on his Navajo family and legal community. He further urges this Court to "take this opportunity to bring the Nation together after the struggles that have plagued the Navajo Nation over the past two years, and restore the harmony so badly needed at this time."

We must note that Mr. Seanez only very briefly mentioned his family, and almost as an aside during his hearing, and failed to introduce his wife. Additionally, since our decisions of May 28, 2010 affirming the primacy of the People and reduction of the Council, the Navajo

[1] The Court is not restricted in issuing a two-justice opinion where "necessary and proper" as long as the Chief Justice or his or her designate presides in the case. *Benally v. Mobil Oil Corp.*, 8 Nav. R. 365, 368 (Nav. Sup. Ct. 2003).

Nation Council has maintained prolonged non-engagement with the other branches while pursuing new laws that restrict or eliminate the core functions and personnel of the branches. We also note that Mr. Seanez fails to offer any words of personal commitment towards healing and takes no responsibility as the Chief Legislative Counsel (CLC) for any role in our present governmental strife. Mr. Seanez does not acknowledge his role in the full extent of damage that is being done to our tribal government, nor offer apologies. We emphasize that Navajos will not require apologies that are not freely given. However, we affirm that Mr. Seanez's selective and erroneous legal advice to the Council has caused grave harms to the whole Navajo Nation government that have not abated.

For reasons set forth in this opinion, we are unwavering in our finding that Mr. Seanez's actions constituted gross misconduct necessitating serious sanction and furthermore, violated 7 N.N.C. § 206. However, upon reconsideration, the Court feels that his permanent disbarment serves no healing purpose when one arm of government views this disbarment as akin to banishment for political reasons of one of its own members, in this case, a *hadane*. Instead, it deepens the destructive governmental divide. Additionally, this Court assumes that Mr. Seanez's family wishes him to practice within the Navajo community rather than permanently pursue his state-licensed profession in non-Navajo communities away from his family. Recognizing that this Court has very limited ability to bring the Nation together under the above circumstances, this Court will play its part in diminishing the chaos that has been going on long enough. Inharmonious words have been exchanged and actions performed, but this Court will do what it can in an effort to turn such things into positive dew or corn pollen.

Applying the principle of *baa hojoo bá'í yee'* for Mr. Seanez's family and unilaterally playing what role we can in intra-governmental healing, this Court will grant Mr. Seanez's

petition for reconsideration solely on the bases of compassion and restoration. However, our finding of gross misconduct remains intact, and this requires accountability. Therefore, Mr. Seanez's disbarment shall be converted to suspension with strict conditions as set forth at the conclusion of this opinion.

I.

Jurisdictional bases, previously set forth in our October 22, 2010 opinion in this matter, are incorporated herein by reference.

Several legal arguments have been put forward in this petition, which will be dealt with in the sections below.

II.

DUE PROCESS

Mr. Seanez asserts that he had insufficient time to prepare and was not told that disbarment was a possible disciplinary sanction. We note that Mr. Seanez had made no objections on these bases either during the hearing or in his 14-page written response. As we further explain *infra,* Mr. Seanez's actions had direct bearing on the enforcement authority of this Court and necessitated our swift response, therefore was similar to direct contemptuous behavior requiring the immediate issuance of a contempt order. Furthermore, he had specifically asked the Court not to disbar him during his presentation, showing that he was fully aware of the range of possible sanctions for the conduct being defended. Therefore, we reject this argument.

Mr. Seanez also asserts that his actions are insufficient in quantity to qualify as gross misconduct. We note that there is no requirement that gross misconduct result from cumulative behavior, nor are there Navajo Nation regulations defining gross misconduct. Additionally, the existing regulations in the various state and federal bars do not contain defined categories of

gross misconduct. Courts sitting in judgment over bar disciplinary matters generally approach the issue on a case-by-case basis, determining whether behavior is deserving of serious punishment based on the standard of duty and the harm resulting from the failure of that duty. We have found gross misconduct here and confirm our finding.

Mr. Seanez next asks that this matter should properly be referred to the Navajo Nation Bar Association Disciplinary Committee for preliminary action. We decline to do so. This Court is the ultimate authority over the legal profession on the Navajo Nation.[2] We may initiate a disciplinary proceeding when conduct of a bar member directly confronts the authority of Navajo Nation Courts, here the enforcement of court orders intended to give full faith to promises made by the Council to the Navajo People regarding the People as the source of government power and the character of sound government. *See In re Bowman*, 6 Nav. R. 101 (Nav. Sup. Ct. 1989). We note that intentionally disobeying or disregarding court orders, as in this case, amounts to contemptuous behavior that brings the authority and administration of justice itself into disrespect. *See, e.g., Ex parte Stone v. Reddix-Smalls,* 295 S.C. 514, 516 (1980). For the above reasons, these proceedings are properly initiated by the Court.

Mr. Seanez quotes from *Tuba City District Court v. Sloan* as follows (in excerpt): "It is not acceptable for one medicine person to tell another how to conduct a ceremony . . . when a medicine man or woman oversteps his or her authority and does not perform a ceremony properly, that ceremony is ruined irreparably." *Tuba City,* 8 Nav. R. 159, 167 (Nav. Sup. Ct. 2001). Mr. Seanez clearly asks this Court to interpret *Tuba City* as limiting our ability to govern the legal practice of a lawyer working for a separate governmental branch. He also implies that,

[2] *Preamble: A Lawyer's Responsibilities* in the ABA Model Rules of Professional Conduct, adopted with exceptions by the Navajo Nation Supreme Court on May 17, 1993 (version adopted by the House of Delegates of the American Bar Association on August 2, 1984).

if this Court exercises its authority, it will do irreparable damage. We do not adopt this interpretation, as this would leave government lawyers without effective oversight by the very body invested with ultimate authority over the legal profession.

Even so, *Tuba City* does bear on this case.

When applied in the comprehensive spirit evolved over generations rather than fragmentarily used, as is customarily done with the very specific rules and provisions of Anglo laws, Diné bi beenahaz'áanii leads to fundamental fairness for the whole. Episodes from our journey narratives teach broad lessons that should be subtly applied to individualized matters that impact our People today. The lessons will have layered ramifications for our communities, and such lessons should not be argued to serve purely individual purposes. Navajos understand that there are lessons for each subtle situation which teach communally beneficial behavior.

As applied to our government, the example used by the Court in *Tuba City* teaches non-interference with properly conducted governmental activity when there are no errors, omissions, or wrongfulness. This is in keeping with the doctrine of separation of functions. We note that when lapses do occur in a ceremony, participants will address the matter through performance of specific remedial measures, such as *sindáahaazt'i',* for the shortcomings of human beings; thus, there is no irreparable destruction of the ceremony. The Court's language in *Tuba City* is not to be interpreted to encompass situations for which it was not intended.

III.

MERITORIOUS CONTENTION

Finally, Mr. Seanez asserts that the legal advice as he has provided to his client is protected as "meritorious contentions" under the Navajo Nation Rules of Professional Conduct and does not constitute violation of 7 N.N.C. §206. We disagree for reasons set forth below.

Mr. Seanez cites opinions of the United States Supreme Court in *Roe v. Wade, Brown v. Board of Education, U.S. v. Montana,* and *Nevada v. Hicks* which have given rise to ongoing debates in the federal arena over abortion, school desegregation, and the extent of tribal jurisdiction over non-members. We find that Mr. Seanez's cites to the above ongoing federal debates are not well taken. While debates regarding the above opinions do continue and take place in a wide range of forums and media, these opinions cited by Mr. Seanez remain indisputably the ultimate law of the land. If such debate is contained in a formal legal opinion issued by the top lawyer of a coordinate branch, it is unthinkable that the lawyer's opinion not also acknowledge that, notwithstanding the debate, the Supreme Court opinions are the law and must be followed. In this case, there is no acknowledgement of the authority of our opinions in *Shirley v. Morgan, infra,* in either Mr. Seanez's Opinion No. CLC-04-10 (September 13, 2010) and his August 4, 2010 Memorandum to the Speaker. Mr. Seanez's legal advice having been issued extra-judicially with no appeal sought, this Court had no opportunity to respond.

We have interpreted the promises of the Council in the Title 2 Amendments of 1989 to mean that the Council has binded its own hands and deferred to the People to make further changes to government, particularly in regard to important doctrines of sound government – separation of powers, checks and balances, accountability to the People, and service of the anti-corruption principle. *Shirley v. Morgan,* SC-CV-02-10 (Nav. Sup. Ct. May 28, 2010)*(Shirley 1)* and (Nav. Sup. Ct. July 16, 2010) *(Shirley 2)*. The Council has since made clear its opposition to these opinions and made clear that they continue to acknowledge themselves, and not the People, are the source of governmental power. Mr. Seanez supports the preference of the Council in his legal advice. In his August 4, 2010 memorandum, he asserts that the Court lacked authority and exceeded its jurisdiction to reach its finding because the Court lacked authority to address issues

not previously raised in a lower tribunal. He stated that as courts of "limited jurisdiction" we may only address issues permitted by the Council. In CLC-04-10 subsequently issued in September, Mr. Seanez concluded that the Council has "unquestioned" authority to amend Titles 2, 7 and 11, unless the Council itself chooses to surrender that right. CLC-04-10 operates to immunize Council members from liability for actions taken in reliance on Mr. Seanez's conclusion. Since its issuance, the Council has persisted in proposing amendments to Navajo statutes and policies that impact the above doctrines notwithstanding our court orders. The atmosphere of strife between the branches continues.

Mr. Seanez relies on 7 N.N.C. § 803 in concluding that the Navajo Nation Supreme Court may not address new issues. Section 803 states, "Appeals shall be limited to the issues of law raised in the record on appeal." However, this Court has long read this provision as constraining issues that may be raised by parties in an appeal, but not constraining whatsoever issues the Court may further address at its discretion.[3] Where we have described ourselves as a court of "limited jurisdiction," the reference is made either in reference to administrative law matters or statutory requirements that a case appealed be fully adjudicated on the merits with the entry of the final decision in the lower tribunal. *Chuska Energy Co. v. The Navajo Tax Comm'n et al.,* 5 Nav. R. 98, 99 (1986). "Limited jurisdiction" in no way applies to our original jurisdiction over extraordinary writs or the authority of this court to address all issues necessary in cases before us in order to achieve substantial justice. Our interpretation is in keeping with Section 851 which requires Title 7 to be "so construed as to effectuate its general purposes and in such a manner as to assure judicial independence, the right of access to fair and independent remedies, the observance of Diné bi beenahaz'áanii, and the protection of the rights guaranteed by the Navajo

[3] We note here that administrative law appellate matters are further governed by other provisions in the Navajo Nation Code.

Nation Bill of Rights."

In *Shirley 1, supra,* we told an episode from our Emergence describing the hero journeys of four potential leaders, each returning with different gifts for their community, and each finally accepted as mutual leaders by a community at first adamant on selecting a single leader and that leader's gifts over the others. *Id.* at 21-23. We also told of the timeless need for a disciplinarian, a role presently represented by the courts. *Id.* at 25. Diné bi beenahaz'áanii teaches that human beings, who have always been imperfect, need that disciplinarian and cannot realistically be expected to set the parameters for their own discipline. In the same way, our authority to address ancillary issues necessary to achieve substantial justice cannot simply be a matter of narrow statutory construction. This concept is mirrored in the Anglo world where governmental entities must be given independent external oversight due to the inherent conflict of interest in asking any fiduciary body to police itself. The concept is well in keeping with the doctrine of separation of functions exemplified by the above episode.

The lengthy record of the exercise of our power to address new issues is readily accessible to practitioners. Recently, we provided a summary of this record in *Nelson v. Initiative Committee to Reduce Navajo Nation Council,* SC-CV-03-10, slip op. at 4 - 10 (Nav. Sup. Ct. October 18, 2010). We emphasize that unlike the federal courts, the Navajo Nation Courts are not constrained by the "cases and controversies" clause in the U.S. Constitution and there is no corresponding constraint in our own statutes. *See In re Mental Health Services for Bizaardi*, 8 Nav. R. 593 (Nav. Sup. Ct. 2004). We have, instead, exercised self-constraint in issuing advisory opinions in which the parties lack any tangible interest. *APS v. ONLR*, 6 Nav. R. 246 (Nav. Sup. Ct. 1990). Following the Council's acknowledgement of Diné bi beenahaz'áanii in 2002, we began permitting issues based on fundamental law to be addressed

for the first time on appeal. *Judy v. White,* 8 Nav. R. 510 (Nav. Sup. Ct. 2004). We later formulated the comprehensiveness test for the inclusion of new substantive issues. *Shirley 1, supra*. In *Shirley 1*, the parties were coordinate branches of the Navajo Nation in which new issues involving the interpretation of government doctrines were addressed in order to reach finality for the parties.

As the lengthy record of our decisions show, alternative readings have been made by Navajo Nation courts over many decades in which new issues pertaining to the interests of the parties have been included *sua sponte* in appellate cases. In denying the ability of this Court to address issues not raised by the parties, Mr. Seanez substituted his staunch personal reading of Section 803 as law without reference to other possible interpretations At the very least, Mr. Seanez was not thorough in his research into alternative interpretations of this provision.

Without doubt, Mr. Seanez' advice justified the Council's defiance of our orders, and operated to provide immunity for that defiance to his client Council members. The enforcement of our orders is an essential function of this Court, covered under 7 N.N.C. §206. Therefore, we affirm our finding that Mr. Seanez has violated Section 206. In addition, we declare that Opinion No. CLC-04-10 and Mr. Seanez' August 4, 2010 memorandum are incorrect as to the extent of our jurisdiction, may not be relied on and may not absolve government actors from liability in reliance upon them.

## IV.

## THE GOVERNMENT LAWYER

Mr. Seanez's assertions fail to comprehend the distinction between private lawyers engaged in zealous advocacy in an adversarial proceeding, and government lawyers issuing opinions without the balance of an adversary, and whose opinions are essentially advance

pardons for government action.

The government lawyer[4] has a duty "to exercise independent professional judgment and render candid advice" under Rule 2.1 of the Navajo Nation Rules of Professional Conduct. We note that the Federal Bar Association has taken the position that while the client is the agency where the lawyer is employed, the government attorney has a duty to the public trust.[5] Such a duty is consistent with our opinion in *Shirley 1*, *supra,* which noted that the Navajo Nation government is accountable to the People because the Council, in Whereas Clause 8 to the Title 2 Amendments of 1989, recognized the People as the source of governmental power. *Id.* At 25. The government lawyer must be independent, candid and *neutral* rather than partisan in order that the public trust is protected. For those like the Chief Legislative Counsel, whose formal opinions indemnify government action, the adoption of the adversarial approach accepted in litigation would be improper in every respect because of the duty to the public trust. Because the CLC and AG are in positions to issue binding opinions to branch players, it is imperative that their opinions be clear, accurate, thoroughly researched, soundly reasoned, and primarily in service of the public trust. Therefore, the government lawyer is not just an advisor but a gatekeeper as well.

In a government arena where entities frequently disagree on policy, it is the responsibility of government lawyers to focus on the public trust when rendering advice. This duty distinguishes the work of a government lawyer from legal advice given to private clients. While the private practitioner zealously advocates for his client, the government lawyer advocates for the public trust and is constrained by the public trust from wholesale support of any governmental client's pursuit of desired policies. The advocacy model of lawyering, in which

[4] "Government lawyer" as used herein also includes government advocates.
[5] Federal Bar Ass'n Professional Ethics Commission, Opinions, No. 73-1 at 72 (1973)

lawyers might craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the obligation to the public trust. *See, e.g., Principles to Guide the Office of Legal Counsel, U.S. Department of Justice,* December 21, 2004, at 1. Government lawyers should take their client's goals into account and "assist their accomplishments within the law" without seeking "simply to legitimate the policy preferences of the administration of which it is a part." *Id.* at 5.

The obligation to comply with the entirety of our laws apply with special force in instances where advice is unlikely to be subject to review by this Court, and where such advice bestows on government officials what is effectively an advance pardon, as in formal legal opinions issued by the CLC or Attorney General. We note that the federal courts have frequently observed that government has an overriding obligation to see that justice is done, and that such an overriding obligation imposes an expectation of even greater candor on government counsel than attorneys representing private parties. *See, e.g., Berger v. United States,* 295 U.S. 78, 88 (1935). Guidance with respect to the special priorities of a government lawyer is further provided by the Harvard Law Review Association in *Conflicts of Interest and Government Attorneys,* 94 Harv. L. Rev. 1413 (1981), which continues to influence government ethics today. Otherwise, the legal standards, including the rules of professional responsibility that apply to all Navajo Nation practitioners, also apply to government lawyers.

> A lawyer working for the People is a leader who should be further guided as follows:
>
> Diné bá nijigháao, bá naat'áanii jílįįgo éł bá dóó bił nidajilnishígíí Diné bibeenahaz'áanii bee bich'į' yájíłti' dóó bee nazhnitin dooleeł; azhąshįį doo yídínéelnáada ndi, áko Diné binant'a'í dóó bá bee agha'diit'aahii jílįįgo ei Diné t'áá náhwiist'áánt'éé bibeenahaz'áanii hoł nilįįgo baan tsíjíkees dooleeł.
>
> As a representative of the People, a leader for the People, and also for those you work with, you must advise and teach them of the laws of the Diné, even though they might not

> agree with the law; therefore, to be a leader and lawyer for the People, one must use and respect the laws of all the People.

Government lawyers in upper level positions such as the CLC who are directly engaged in governmental policymaking must deal daily with political pressures from his or her client in a setting where institutional opinions, unlike mere legal advice, serve as get-out-of-jail free cards for government action. There will be many times when policymakers will bear on their lawyers to arrive at results that support their positions, to exclude from the results laws or provisions conflicting with the policymaker's positions, or otherwise to come forward with reasons to justify defiance of those laws. Such political pressures do not relieve government lawyers of their duty "to exercise independent professional judgment and render candid advice" under Rule 2.1 of the Navajo Nation Rules of Professional Conduct. We note also that the ABA Committee on Ethics and Professional Responsibility has written, in Formal Op. 85-352 (1985) that "in the role of advisor, the lawyer should counsel the client as to whether the position is likely to be sustained by a court if challenged." This ABA opinion dovetails with 7 N.N.C. §206 which requires that government cooperate with the courts and do not obstruct, interfere with, control, or influence court functions. Omitting likely issues to be faced in court, including the consequences of defiance of court orders, opens the door to unnecessary conflict and bears on the respect of the justice system as a whole, particularly when binding advice is issued extra-judicially through the assistance of government lawyers. Under all circumstances, it is the heightened duty of the government lawyer to be independent, candid, neutral rather than partisan because of their duty to the public trust, and most of all thorough in their analysis.

We note collaterally two recent instances, involving Mr. Seanez, in which lack of thoroughness in formal legal opinions helped create or prolong situations of intra-governmental

conflict. We refer to these instances here in order to emphasize the need for thoroughness in the work of government lawyers, especially the work of the CLC, whose work product is not checked by anyone prior to issuance as formal opinions. The two situations set forth below have played no part in this Court's determinations in this case and are included here as cautionary illustrations.

The first instance concerns recent upheavels at Diné College. 10 N.N.C. §2003(A) prohibits government officials from interrupting the day-to-day activities of the Board of Regents of Diné College. However, on May 5, 2010, Mr. Seanez issued Opinion No. CLC-02-10 which concluded that the Government Services Committee of the Navajo Nation Council has near absolute power of removal over members of the Diné College Board of Regents without accountability, even when exercise of the removal power effectively disables the board. Mr. Seanez's opinion entirely failed to reference Section 2003(A) above. *See Ferlin Clark v. Diné College*, SC-CV-25-10, slip op. at 9 (Nav. Sup. Ct. October 27, 2010). The harms flowing from this situation are evident to the Navajo People, with unrest at the College continuing to the present day and with a new generation of students apparently convinced that strong arm methods as used by the Council are proper, rather than our traditional methods of talking things out.

The second instance concerns the process required for measures to be referred to the public for approval. Mr. Seanez issued Opinion No. CLC-04-10 which caused the law of referendum measures suddenly to appear unsettled following many years of settled practice of the Council that such measures must first be reviewed by the President. On November 1, 2010, Mr. Seanez's opinion was effectively overruled by the Window Rock District Court on the basis that our statutory laws, read comprehensively, clearly require the President's review. *Office of the Navajo Nation President and Vice-President v. Navajo Nation Council and NBEA,* WR-CV-

304-2010 (W.R. Dist. Ct. November 1, 2010). Reliance on Mr. Seanez's opinion caused public confusion, undue and great expense, and more intra-governmental litigation.

V.

CONCLUSION

As we have stated earlier, Mr. Seanez's Petition for Reconsideration is GRANTED by application of the principle of *baa hojoo bá'í yee'* solely on the bases of compassion and restoration. By so doing, this Court is looking ahead in the long-term to protect the integrity and mutual cooperative workings of the three branches. Our finding of gross misconduct remains intact, as is our finding that 7 N.N.C. § 206 was violated. For these lapses, a level of accountability is necessary. Furthermore, a length of time in suspension is necessary in order to protect the public trust. The slate cannot simply be wiped clean.

As this situation shows, there is a need for our practitioners to be taught the ethics and responsibilities of government lawyers in the public trust. This has been an unmet need thus far.

Accordingly, IT IS ORDERED that the record shall permanently reflect that Respondent Frank Seanez was effectively disbarred between October 22, 2010 through November 24, 2010, and said disbarment was lifted this day for reasons of compassion and restoration.

It is FURTHER ORDERED that Respondent's license to practice law in the Navajo Nation shall be suspended for a minimum period of forty-nine (49) months effective the date of this Order. Respondent may apply to this Court for reinstatement of his bar license upon completion of the suspension term and upon fulfillment of the following conditions:

A. In consultation with an Associate Justice, Chief Legislative Counsel, and Attorney General, Respondent shall have developed a course for Navajo Nation Bar Members, including syllabus and course materials, on the ethical standards and special

responsibilities of Navajo Nation government lawyers consistent with this opinion; and

B. Said course and syllabus has been approved for use in a mandatory annual course for government lawyers, after any necessary revisions, by the Navajo Nation Bar Association (NNBA) Training Committee and this Court; and

C. The NNBA Disciplinary Committee has submitted a recommendation for Respondent's reinstatement.

It is FURTHER ORDERED that upon reinstatement, Respondent shall teach said course in good faith to practitioners for no less than three (3) consecutive years. Such teaching duties may count towards his annual bar membership requirement for pro bono service.

It is FURTHER ORDERED that upon reinstatement, Respondent may be employed only in capacities where he is not called upon to issue formal legal opinions.

The Navajo Nation Bar Association is directed to notify the members of the Bar, the district courts, and administrative agencies of this Court's decision.

Dated this 24th day of November, 2010.

Chief Justice

Associate Justice Shirley