2018 Sutin, Thayer & Brown Conference

Fact Pattern One

Nathan Smedley is a non-Indian attorney who is a long-time member of the Navajo Nation Bar Association. Smedley is also licensed to practice law by the State of Arizona. During his lengthy career, Smedley has gone through the customary jobs for an attorney on the Navajo Nation. He started as an attorney at the DNA office in Greasewood and, after a few years, moved on to the Navajo Nation Department of Justice. After many glorious years at NNDOJ, Smedley took a job with one of the regional private firms with an Indian law practice. Finally, Smedley’s contacts and reputation within Navajo Indian Country brought him an offer to work as in-house counsel for a very well-financed private Navajo corporation, Diné Corp, which operates solely within the Navajo Nation. Diné Corp offered Smedley an extremely generous salary and he jumped at the chance to begin work at their luxurious corporate offices in Pinon.

Life was great for the first two years at Smedley’s new job while he worked under the supervision of CEO John Bossman, the corporate employee who originally hired him. This is an ideal situation for Smedley, as the CEO of Diné Corp. has absolute discretion to hire and fire the attorneys who represent the corporation. But after two years, Mr. Bossman decided to retire to a secluded island in Lake Powell. He was replaced by CEO Frank Newman. Things did not go well.

Smedley had concerns about Newman’s operational policies and often expressed his frustrations to CEO Newman. On the other hand, Newman began to doubt the soundness of Smedley’s legal advice and frequently sought out second opinions from outside counsel. There wasn’t anything obviously wrong or erroneous in the legal advice provided by Smedley, but it seemed to Newman that Smedley gave advice that cut against the operational discretion of Newman in ways that weren’t absolutely required by Navajo law. The second opinions from outside counsel backed up Newman’s belief that Smedley was now giving advice that, while not obviously wrong, made discretionary cuts against the interests of Diné Corp.

Early one Monday morning, CEO Newman calls Smedley into his office and lets him know that, although Newman can point to no obvious errors on the part of Smedley, he no longer trusts the legal advice Smedley is providing. Newman asks Smedley to resign. Smedley refuses. He also tells Newman that, as a regular status employee of Diné Corp., he cannot be terminated “without just cause” as required by 15 NNC 604(8), and that Newman’s mere distrust of Smedley’s legal advice does not constitute just cause for termination.

Newman is now backed into a corner: he is uncomfortable with the legal advice provided by Smedley, but can cite no action on Smedley’s part constituting just cause for termination other than his generalized distrust of Smedley’s advice. Newman calls you and poses two questions:

1. Does 15 NNC 604(8) trump the traditional right of a client to terminate an attorney at will?

2. Is it an ethics violation for an attorney to use 15 NNC 604(8) to impose continued representation by that attorney on a client who has made if unequivocally clear that the client wants to change attorneys?

During your research, you find the following:

**NEW MEXICO**:

“The client has the inherent right to terminate the lawyer; the lawyer should always counsel the client regarding the consequences of termination.”  1.16.210; State Bar Advisory Opinion 1995-1.

*See Guest v. Allstate Ins. Co.*, 2010-NMSC-047, 149 N.M. 74, 83 (2010):

“At the foundation of every attorney-client relationship is the client's unqualified right to discharge an attorney at any time, with or without cause. Rule 16–116 NMRA committee cmt. [4]; *see also* 23 Richard A. Lord, *Williston on Contracts* § 62:6, at 301–02 (2002) (“Most courts have consistently held that the right of the client to dismiss an attorney is an absolute and essential incident to the attorney-client relationship, since the association is predicated upon mutual trust and respect. This right is unconditional, and may be exercised at any time, whether or not there is just cause for the dismissal.” (footnote omitted)).”

**COLORADO:**

*Olsen & Brown v. City of Englewood*, 889 P.2d 673, 676 (Colo. 1995)”

“In order to assure no compulsion to retain an attorney where trust between attorney and client has been broken, and to further guarantee a client may always be confident with such representation, a client must, and does, have the right to discharge the attorney at any time and for whatever reason. *See Thompson v. McCormick,* 138 Colo. 434, 440, 335 P.2d 265, 269 (Colo.1959). An attorney may not rely upon an indefinite continuation of employment but instead, enters an attorney-client relationship with knowledge that the relationship may be terminated at any time and for any reason.”

In Colorado, the attorney-client relationship is not viewed as an ordinary contract because of the fiduciary nature of the relationship. *Olsen and Brown* at 676. The right to terminate is an implied term in the contract based on public policy considerations. *Id.* Even more importantly, “any contractual provision which constrains a client from exercising the right freely to discharge his or her attorney is unenforceable.” *Olsen & Brown v. City of Englewood*, 867 P.2d 96, 99 (Colo. App. 1993), *aff'd,* 889 P.2d 673 (Colo. 1995).

**ARIZONA:**

Rules of professional conduct refer to an absolute right to discharge a lawyer. For example, “All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.” Comment [9] to Arizona Rule of Professional Conduct 1.17.

What are your answers to Newman’s questions?

After receiving your advice, Newman terminates Smedley. Smedley files an Individual Charge with the Office of Navajo Labor Relations. Attached to the Individual Charge there is a single-spaced, 50-page factual narrative that form the basis of Smedley’s claim. Within the body of that narrative, Smedley includes many statements concerning legal advice that he has given to Diné Corp over the years. No one at Dine Corp has authorized him to disclose this information.

Does the Individual Charge violate any provisions of the Model Rules? Which ones?