

Rules of Professional Conduct

ANNOTATIONS

Compiler's notes. — Pursuant to a court order dated June 26, 1986, the Rules of Professional Conduct became effective January 1, 1987.

Preamble — A Lawyer's Responsibilities

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 16-112 and 16-204 NMRA of the Rules of Professional Conduct. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 16-804 NMRA of the Rules of Professional Conduct.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not". These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may", are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the committee commentaries use the term "should". Commentaries do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The commentaries are sometimes used to alert lawyers to their responsibilities under such other law.

Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 16-106 NMRA of the Rules of Professional Conduct, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 16-118 NMRA of the Rules of Professional Conduct. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct.

The committee commentary accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and Scope provide general orientation. The commentaries are intended as guides to interpretation, but the text of each rule is authoritative.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in the second paragraph, deleted language describing a lawyer's role as intermediary between clients; added the third paragraph; in the sixth paragraph, added language to require lawyers to improve access to the legal system and to further the public's understanding of and confidence in the rule of law and the judicial system; added the last sentence in the ninth paragraph to require a lawyer to zealously protect and pursue a client's legitimate interests; added the last sentence in the fifteenth paragraph; in the eighteenth paragraph, deleted the sentence which permitted government lawyers to represent the "public interest"; in the twentieth paragraph, deleted the sentence which provided that nothing in the Rules of Professional Conduct augment any substantive legal duty of lawyers or extra-disciplinary consequences of violating such a duty, and added the last sentence; deleted the former twenty-first and twenty-second paragraphs which concerned the application of the Rules of Professional Conduct to the attorney-client or work product privilege and the lawyer's exercise of discretion not to disclose information under Rule 16-106; in the twenty-first paragraph, deleted the sentences which stated that research notes compare counterparts of the ABA Model Code of Professional Responsibility and that research notes do not affect the application or interpretation of the Rules of Professional Conduct and the comments; and deleted the former section on Terminology which defined terms and phrases used in the Rules of Professional Conduct.

Scope

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not". These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may", are permissive and define areas under the rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should". Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific

obligations of lawyers and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 16-106, and they may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer from a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties

as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the lawyer-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 16-106 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on Scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative. Research notes were prepared to compare counterparts in the ABA Model Code of Professional Responsibility (adopted 1969, as amended) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the model rules, and are not intended to affect the application or interpretation of the rules and comments.

Terminology

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 16-110.

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly", "Known" or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

ARTICLE 1

Client-Lawyer Relationship

16-100. Terminology.

For purposes of these rules:

A. "Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

B. "Confirmed in writing", when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See Paragraph E of Terminology for the definition of "informed consent". If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

C. "Firm" or "Law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

D. "Fraud" or "Fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

E. "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

F. "Knowingly", "Known" or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

G. "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation or a member of an association authorized to practice law.

H. "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

I. "Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

J. "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

K. "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

L. "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

M. "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

N. "Writing" or "Written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A signed writing

includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

COMMITTEE COMMENTARY.

[1] The Terminology section was previously placed with the Preamble and Scope but has been moved here as Rule 16-100 NMRA to make it more accessible and convenient for the user.

Confirmed in Writing

[2] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[3] Whether two or more lawyers constitute a firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

[4] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[5] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

Fraud

[6] When used in these rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[7] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Paragraph C of Rule 16-102 NMRA, Paragraph A of Rule 16-106 NMRA and Paragraph B of Rule 16-107 NMRA of the Rules of Professional Conduct. The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[8] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client

or other person who has reasonably adequate information about the matter. A number of rules require that a person's consent be confirmed in writing. See Paragraph B of Rule 16-107 NMRA and Paragraph A of Rule 16-109 NMRA of the Rules of Professional Conduct. Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Paragraphs A and G of Rule 16-108 NMRA of the Rules of Professional Conduct.

Screened

[9] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 16-110, 16-111, 16-112 or 16-118 NMRA of the Rules of Professional Conduct.

[10] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[11] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-101. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See *also* Rule 16-602 NMRA of the Rules of Professional Conduct.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Paragraph C of Rule 16-102 NMRA of the Rules of Professional Conduct.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

Failure to investigate constitutes incompetent representation. — An attorney's failure to investigate the factual basis of his client's case, the legal basis for the claim or the applicable statute of limitations violated this rule and constituted incompetent representation warranting public censure pursuant to Rule 17-206(A)(4) NMRA. In re Reid, 116 N.M. 38, 859 P.2d 1065 (1993).

Defense counsel's failure to tender proper jury instructions amounted to ineffective assistance of counsel. State v. Talley, 103 N.M. 33, 702 P.2d 353 (Ct. App. 1985).

Abandonment of client warrants suspension. — If an attorney abandons his client and the case, despite his having been paid a substantial fee, he violates this rule (former Rule 6-101) and warrants suspension. In re Chowning, 100 N.M. 375, 671 P.2d 36 (1983).

Attorney was publicly censured and placed on probation for one year for his failure to file client's claim prior to running of statute of limitations, for his subsequent frivolous appeal, and for mishandling sale of former client's real property. In re Markley, 101 N.M. 565, 686 P.2d 255 (1984).

Suspension warranted where conflicting interests impair independent judgment. — If a lawyer allows his independent professional judgment on his client's behalf to be impaired by his representation of conflicting interests and, through negligence and acceptance of undue influence and instructions from others, he unintentionally aids an embezzlement scheme in which his client is the victim, such conduct warrants suspension from practice of law for a 30-day period and thereafter until reinstated as provided by the rules of the supreme court. In re Dilts, 93 N.M. 131, 597 P.2d 316 (1979).

Psychiatric condition asserted as defense. — In a disciplinary proceeding in which the attorney's psychiatric condition is asserted as a defense, in weighing the appropriateness of suspension versus disbarment, the court must consider whether it has been shown that the psychiatric condition is amenable to treatment and whether the prognosis for full rehabilitation has been established. In re Stewart, 104 N.M. 337, 721 P.2d 405 (1986).

An attorney's inaction and incompetence in representing a client in divorce action violated Rules 6-101 and 7-101 of the Code of Professional Responsibility (now see Rules 16-101 and 16-103 of the Rules of Professional Conduct). In re Gallegos, 104 N.M. 496, 723 P.2d 967 (1986).

One-year suspension warranted. — Attorney's actions warranted a one-year suspension since he made misrepresentations to a court, failed to return unearned fees, failed to render an accounting to a client and acted otherwise to prejudice the administration of justice. In re Arrieta, 104 N.M. 389, 722 P.2d 640 (1986).

Attorney's conduct involving two frivolous claims resulting in violation of Rule 16-301 and several other provisions of the Rules of Professional Conduct warranted a one-year suspension. In re Richards, 1999-NMSC-030, 127 N.M. 716, 986 P.2d 1117.

Attorney was suspended from practice for one year for engaging in conduct that adversely reflected upon his fitness to practice law, for neglecting a legal matter entrusted to him, for engaging in conduct involving dishonesty or misrepresentation, and for failure to give his full cooperation and assistance to counsel for the disciplinary board. In re Laughlin, 104 N.M. 630, 725 P.2d 830 (1986).

Indefinite suspension warranted. — Sixteen violations of nine rules governing professional responsibility, involving misrepresentation, neglect, improper fee-splitting, disrespect to various tribunals, and other conduct prejudicial to the administration of justice resulted in the defendant's being suspended indefinitely from the practice of law. In re Quintana, 104 N.M. 511, 724 P.2d 220 (1986).

Indefinite suspension was warranted because of an attorney's violation of this rule and other provisions, such as Rule 16-103, by failing to act with diligence and promptness in representing a client; Rule 16-104, by failing to keep his client informed about the status of a matter and failing to respond to requests for information; Rule 16-116(D), by failing to surrender papers and property to which the client was entitled at the termination of the representation; Rule 16-302, by failing to expedite litigation consistent with the interests of his client; and Rule 16-804(C),(D) and (H), by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, engaging in conduct prejudicial to the administration of justice, and by engaging in conduct that adversely reflects on his fitness to practice law. In re Lally, 1999-NMSC-003, 126 N.M. 566, 973 P.2d 243.

Indefinite suspension was warranted because of attorney's violation of this rule and other provisions, such as Rule 16-105, by charging an excessive fee; Rule 16-302, by failing to expedite litigation; Rule 16-303(A)(1), by making an untrue statement of material fact to a tribunal; Rule 16-304(D), by failing to comply with a discovery request; Rule 16-505(A), by practicing law in a jurisdiction where doing so violates regulations; and Rule 16-804(C),(D) and (H), by engaging in conduct involving dishonesty, deceit, and misrepresentation, by engaging in conduct prejudicial to the administration of justice, and by engaging in conduct that adversely reflects upon his fitness to practice law. In re Righter, 1999-NMSC-009, 126 N.M. 730, 975 P.2d 343.

Indefinite suspension was warranted because an attorney violated of this rule by failing to provide competent representation. The attorney also violated the following rules: Rule 16-102A NMRA, by failing to abide by a client's decisions concerning the objectives of the representation; Rule 16-103 NMRA, by failing to act with reasonable diligence and promptness in representing a client; Rule 16-104A NMRA, by failing to keep a client reasonably informed about the status of a matter and by failing to promptly comply with reasonable requests for information; Rule 16-116D NMRA, by failing to timely surrender papers and property to which a client was entitled and by failing to timely refund any advance payment of fee that had not been earned; Rule 16-804D and H NMRA, by engaging in conduct that is prejudicial to the administration of justice and conduct that adversely reflects on his fitness to practice law; Rule 16-801B NMRA, by failing to respond to lawful requests for information from the office of disciplinary counsel; and Rule 16-803D NMRA, by failing to cooperate with disciplinary counsel in the course of the investigation. In re Carlton, 2000-NMSC-001, 128 N.M. 419, 993 P.2d 736.

An attorney's apparent failure to complete several cases, to take steps to insure that the interests of her clients were protected upon her withdrawal from their cases, and to promptly refund any unearned portions of fees paid in advance, as well as her lack of cooperation with the disciplinary counsel, constitute conduct violative of the professional rules warranting an indefinite suspension from the practice of law. In re Roth, 105 N.M. 255, 731 P.2d 951 (1987); In re Tapia, 110 N.M. 693, 799 P.2d 129 (1990).

Sixty-day suspension warranted. — Counsel's failure to appear for a deposition, to file for an amended complaint, to file for a redetermination on behalf of his client, or to respond to disciplinary counsel, warranted a 60-day suspension. In re Allred, 106 N.M. 227, 741 P.2d 830 (1987).

Disbarment warranted. — Disbarment was justified because of the inadequacy of an attorney's representation of clients in violation of this rule and Rules 16-102(A), 16-103 and 16-104(A) NMRA, by his business transaction and trust account violations of Rules 16-108, 16-115 and 16-116(D) NMRA, and violations of Rule 16-801 NMRA and other rules relating to disciplinary proceedings. In re Darnell, 1997-NMSC-025, 123 N.M. 323, 940 P.2d 171.

Code not basis for civil liability. — Former Code of Professional Responsibility was established to discipline attorneys. It was not intended to provide a foundation for civil liability. Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 106 N.M. 757, 750 P.2d 118 (1988).

Failure to comply with the Rules of Appellate Procedure constituted a violation of this rule. In re Dawson, 2000-NMSC-024, 129 N.M. 369, 8 P.3d 856.

Attorney's failure to docket an appeal and lying to his client for seven years about the status of the appeal violated numerous rules and warranted indefinite suspension from practice. In re Roberts, 119 N.M. 769, 895 P.2d 669 (1995).

Bankruptcy practice. — An attorney's failure to address a potential secured claim against his client in a bankruptcy proceeding was a violation of Rules 16-101 and 16-804. *In re Elmore*, 1997-NMSC-020, 123 N.M. 79, 934 P.2d 273.

Rule violated. — See *In re Cutter*, 118 N.M. 152, 879 P.2d 784 (1994).

Incompetent representation. — In a personal injury action for damages resulting from a pharmacist filling a child's prescription for Ritalin with methadone, where attorney, despite having prior knowledge that records showed a discrepancy between the number of methadone tablets prescribed and those dispensed, denied plaintiff's request for admission of the existence of records indicating a shortage of methadone tablets, failed to produce a report filed with the Board of Pharmacy, and failed to verify the authenticity of a forged prescription for methadone that was introduced into evidence, the attorney's actions demonstrated incompetence, because they showed a lack of thoroughness in preparing for trial. *In re Estrada*, 2006-NMSC-047, 140 N.M. 492, 143 P.3d 731.

Law reviews. — For note, "Legal Malpractice - Liability for Failure to Warn: First National Bank of Clovis v. Diane, Inc.," see 16 N.M.L. Rev. 395 (1986).

For article, "Attorney as Interpreter: A Return to Babble," 20 N.M.L. Rev. 1 (1990).

For note, "Professional Responsibility - Attorneys Are Not Liable to Their Clients' Adversaries: *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*," see 20 N.M.L. Rev. 737 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 67 to 73.

Legal malpractice by permitting statutory time limitation to run against client's claim, 90 A.L.R.3d 293.

What statute of limitations governs damage action against attorney for malpractice, 2 A.L.R.4th 284.

Adequacy of defense counsel's representation of criminal client regarding argument, 6 A.L.R.4th 16.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters, 6 A.L.R.4th 1208.

Adequacy of defense counsel's representation of criminal client regarding hypnosis and truth tests, 9 A.L.R.4th 354.

Adequacy of defense counsel's representation of criminal client regarding guilty pleas, 10 A.L.R.4th 8.

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies, 13 A.L.R.4th 533.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies, 15 A.L.R.4th 582.

Adequacy of defense counsel's representation of criminal client regarding incompetency, insanity and related issues, 17 A.L.R.4th 575.

Incompetence of counsel as ground for relief from state court civil judgment, 64 A.L.R.4th 323.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in matters involving real estate transactions as ground for disciplinary action - modern cases, 65 A.L.R.4th 24.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in tax matters as ground for disciplinary action - modern cases, 66 A.L.R.4th 314.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in estate or probate matters as ground for disciplinary action - modern cases, 66 A.L.R.4th 342.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in family law matters as ground for disciplinary action - modern cases, 67 A.L.R.4th 415.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in personal injury or property damage actions as ground for disciplinary action - modern cases, 68 A.L.R.4th 694.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in criminal matters as ground for disciplinary action - modern cases, 69 A.L.R.4th 410.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in bankruptcy matters as ground for disciplinary action - modern cases, 70 A.L.R.4th 786.

Legal malpractice in handling or defending medical malpractice claim, 78 A.L.R.4th 725.

Misconduct involving intoxication as ground for disciplinary action against attorney, 1 A.L.R.5th 874.

Legal malpractice in defense of criminal prosecution, 4 A.L.R.5th 273.

Ineffective assistance of counsel: compulsion, duress, necessity, or "hostage syndrome" defense, 8 A.L.R.5th 713.

Legal malpractice: negligence or fault of client as defense, 10 A.L.R.5th 828.

Ineffective assistance of counsel: Right of attorney to withdraw, as appointed defense counsel, due to self-avowed incompetence, 16 A.L.R.5th 118.

Admissibility and effect of evidence of professional ethics rules in legal malpractice action, 50 A.L.R.5th 301.

7 C.J.S. Attorney and Client §§ 77 to 87; 7A C.J.S. Attorney and Client §§ 254 to 262.

16-102. Scope of representation and allocation of authority between client and lawyer.

A. **Client's decisions.** Subject to Paragraphs C and D of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 16-104 NMRA of the Rules of Professional Conduct, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

B. **Representation not endorsement of client's views.** A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

C. **Limitation of representation.** A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

D. **Course of conduct.** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or misleads the tribunal. A lawyer may, however, discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

[As amended, effective March 15, 2001; as amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

Allocation of Authority between Client and Lawyer

[1] Paragraph A confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in Paragraph A, such as whether to settle a civil matter, must also be made by the client. See Subparagraph (1) of Paragraph A of Rule 16-104 NMRA of the Rules of Professional Conduct for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Subparagraph (2) of Paragraph A of Rule 16-104 NMRA of the Rules of Professional Conduct and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Subparagraph (4) of Paragraph B of Rule 16-116 NMRA of the Rules of Professional Conduct. Conversely, the client may resolve the disagreement by discharging the lawyer. See Subparagraph (3) of Paragraph A of Rule 16-116 NMRA of the Rules of Professional Conduct.

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 16-104 NMRA of the Rules of Professional Conduct, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 16-114 NMRA of the Rules of Professional Conduct.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 16-101 NMRA of the Rules of Professional Conduct.

[8] With regard to Paragraph C, limitations on the scope of representation may include drafting specific, discrete pleadings or other documents to be used in the course of representation without taking on the responsibility for drafting all documents needed to carry the representation to completion. For example, a lawyer may be retained by a client during the course of an appeal for the sole purpose of drafting a specific document, such as a docketing statement, memorandum in opposition, or brief. A lawyer who agrees to prepare a discrete document under a limited representation agreement must competently prepare such a document and fully advise the client with respect to that document, which includes informing the client of any significant problems that may be associated with the limited representation arrangement. However, by agreeing to prepare a specific, discrete document the lawyer does not also assume the responsibility for taking later actions or preparing subsequent documents that may be necessary to continue to pursue the representation. While limitations on the scope of representation are permitted under this rule, the lawyer must explain the benefits and risks of such an arrangement and obtain the client's informed consent to the limited representation. Upon expiration of the limited representation arrangement, the lawyer

should advise the client of any impending deadlines, pending tasks, or other consequences flowing from the termination of the limited representation. See Rule 16-303 NMRA.

[9] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 16-101, 16-108 and 16-506 NMRA of the Rules of Professional Conduct.

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph D prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Paragraph A of Rule 16-116 NMRA of the Rules of Professional Conduct. In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 16-401 NMRA of the Rules of Professional Conduct.

[12] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph D applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph D does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of Paragraph D recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with

the client regarding the limitations on the lawyer's conduct. See Subparagraph (5) of Paragraph A of Rule 16-104 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2001 amendment, effective March 15, 2001, rewrote Paragraph C which read "A lawyer may limit the objectives of the representation if the client consents after consultation".

The 2005 amendment of the Code of Professional Conduct Comment, effective January 20, 2005, added the comment to Paragraph E.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added "and allocation of authority between client and lawyer" in the title; in Paragraph A, added "Subject to Paragraphs C and D of this rule", added the reference to Rule 16-104 NMRA, and added the second sentence; in Paragraph D, changed "A lawyer shall not engage or counsel" to "A lawyer shall not counsel"; and deleted former Paragraph E which concerned consultation on limitations of assistance when the client expects assistance not permitted by the Rules of Professional Conduct.

Duty to take essential steps and consult with client. — When one contracts with an attorney for legal services, it is not the client's responsibility to initiate all inquiries to the attorney in order to insure that essential steps are being taken. Furthermore, it is within the scope of an attorney's obligations to a client to provide the information, advice, and reassurances necessary to allay unnecessary concerns that the client may have. Where attorney does none of these things, he violates this and other rules. *In re Carrasco*, 106 N.M. 294, 742 P.2d 506 (1987).

Attorney's failure to consult with his clients concerning the objectives of the representation and the means by which the objectives were to be pursued violated Paragraph A of this rule. *In re Houston*, 1999-NMSC-032, 127 N.M. 582, 985 P.2d 752.

Dual role of guardian ad litem. — The dual role of a guardian ad litem to represent the best interests of a child while also presenting the child's wishes to the court even if they conflict with the position of the guardian ad litem conforms to the requirements of the Rules of Professional Conduct. *State ex rel. Children, Youth & Families Dep't v. Esperanza M.*, 1998-NMCA-039, 124 N.M. 735, 955 P.2d 204.

Lawyers are officers of court and are always under obligation to be truthful to the court. *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 695 P.2d 483 (1985).

Public defenders are not excused from compliance with the Code of Professional Responsibility (now the Rules of Professional Conduct) even though they are paid with public funds. *State v. Martinez*, 97 N.M. 540, 641 P.2d 1087 (Ct. App. 1982).

Attorney's duty upon appeal. — An attorney representing a client on appeal should first seek to convince the client of the wisdom of the attorney's professional judgment, but, failing such persuasion, the client's contention should be presented. The manner of such presentation is solely for the attorney, subject, however, to Rule 7-102(A) (now Rules 16-102, 16-303 and 16-304 NMRA) which prohibits an attorney from knowingly advancing unwarranted claims and from knowingly making false statements of law or fact. *State v. Boyer*, 103 N.M. 655, 712 P.2d 1 (Ct. App. 1985).

Abandonment of issues on appeal. — The strict language of this rule and Rule 7-102 (now Rules 16-102, 16-303 and 16-304 NMRA) allows attorneys to abandon frivolous issues, or even non-frivolous issues, once the attorney has found one non-frivolous issue to argue with vigor on appeal. *State v. Boyer*, 103 N.M. 655, 712 P.2d 1 (Ct. App. 1985).

Abandonment of client warrants suspension. — Where an attorney abandons his client and the case, despite his having been paid a substantial fee, he violates this rule and warrants suspension. *In re Chowning*, 100 N.M. 375, 671 P.2d 36 (1983).

Six-month suspension and other penalties warranted since attorney accepted one-half of fee and failed to represent client, allowing default to be entered against client. *In re Trujillo*, 110 N.M. 180, 793 P.2d 862 (1990).

Suspension warranted where conflicting interests impair independent judgment. — If a lawyer allows his independent professional judgment on his client's behalf to be impaired by his representation of conflicting interests and, through negligence and acceptance of undue influence and instructions from others, he unintentionally aids an embezzlement scheme in which his client is the victim, such conduct warrants suspension from practice of law for a 30-day period and thereafter until reinstated as provided by the rules of the supreme court. *In re Dilts*, 93 N.M. 131, 597 P.2d 316 (1979).

Censure and fine for false and misleading brief. — An attorney was publicly censured and fined \$1,000 for knowingly making false, misleading and inaccurate statements in a brief to the court of appeals in violation of this rule (former Rule 7-102). *In re Chakeres*, 101 N.M. 684, 687 P.2d 741 (1984).

Restitution made only under pressure is entitled to no weight as a mitigating factor. *In re Stewart*, 104 N.M. 337, 721 P.2d 405 (1986).

Misappropriation of funds. — Attorney's conversion to his own use of money received from a client to have a liquor license transferred to her name violated Rules 1-102, 6-101, 7-101 and 9-102 of the Code of Professional Responsibility (now see Rules 16-102, 16-104, 16-115 and 16-804 of the Rules of Professional Conduct). *In re Gallegos*, 104 N.M. 496, 723 P.2d 967 (1986).

One-year suspension warranted. — Attorney's actions warranted a one-year suspension since he made misrepresentations to a court, failed to return unearned fees, failed to render an accounting to a client and acted otherwise to prejudice the administration of justice. In re Arrieta, 104 N.M. 389, 722 P.2d 640 (1986).

Indefinite suspension warranted. — Sixteen violations of nine rules governing professional responsibility, involving misrepresentation, neglect, improper fee-splitting, disrespect to various tribunals, and other conduct prejudicial to the administration of justice resulted in defendant's being suspended indefinitely from the practice of law. In re Quintana, 104 N.M. 511, 724 P.2d 220 (1986).

Indefinite suspension was warranted because an attorney violated of Paragraph A by failing to abide by a client's decisions concerning the objectives of the representation. The attorney also violated the following rules: Rule 16-101 NMRA, by failing to provide competent representation; Rule 16-103 NMRA, by failing to act with reasonable diligence and promptness in representing a client; Rule 16-104A NMRA, by failing to keep a client reasonably informed about the status of a matter and by failing to promptly comply with reasonable requests for information; Rule 16-116D NMRA, by failing to timely surrender papers and property to which a client was entitled and by failing to timely refund any advance payment of fee that had not been earned; Rule 16-804D and H NMRA, by engaging in conduct that is prejudicial to the administration of justice and conduct that adversely reflects on his fitness to practice law; Rule 16-801B NMRA, by failing to respond to lawful requests for information from the office of disciplinary counsel; and Rule 16-803D NMRA, by failing to cooperate with disciplinary counsel in the course of the investigation. In re Carlton, 2000-NMSC-001, 128 N.M. 419, 993 P.2d 736.

An attorney's apparent failure to complete several cases, to take steps to insure that the interests of her clients were protected upon her withdrawal from their cases, and to promptly refund any unearned portions of fees paid in advance, as well as her lack of cooperation with the disciplinary counsel, constitute conduct violative of the professional rules warranting an indefinite suspension from the practice of law. In re Roth, 105 N.M. 255, 731 P.2d 951 (1987).

Disbarment warranted. — Disbarment was justified because of the inadequacy of an attorney's representation of clients in violation of Paragraph A of this rule and Rules 16-101, 16-103 and 16-104(A) NMRA, by his business transaction and trust account violations of Rules 16-108, 16-115 and 16-116(D) NMRA, and violations of Rule 16-801 NMRA and other rules relating to disciplinary proceedings. In re Darnell, 1997-NMSC-025, 123 N.M. 323, 940 P.2d 171.

Rule violated. — See In re Cutter, 118 N.M. 152, 879 P.2d 784 (1994); In re Chavez, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417.

Misleading the court. — In a personal injury action for damages resulting from a pharmacist filling a child's prescription for Ritalin with methadone, where attorney, who

had prior knowledge that her client's records indicated that the prescription at issue had been mis-filled, who recommended that the client admit liability, who relied on representations from the pharmacist, pharmacy manager and out-of-state counsel for the pharmacy that the missing drugs could be accounted for and followed their advise to investigate other possible sources for the methadone that injured the plaintiff rather than using the attorney's independent judgment, and who proceeded to defend the case that was contrary to the evidence the attorney had found and that the attorney had not provided in discovery, the attorney misled the court. *In re Estrada*, 2006-NMSC-047, 140 N.M. 492, 143 P.3d 731.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 67 to 73.

Legal malpractice in settling or failing to settle client's case, 87 A.L.R.3d 168.

Method employed in collecting debt due client as ground for disciplinary action against attorney, 93 A.L.R.3d 880.

What statute of limitations governs damage action against attorney for malpractice, 2 A.L.R.4th 284.

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies, 13 A.L.R.4th 533.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies, 15 A.L.R.4th 582.

Attorney's delay in handling decedent's estate as ground for disciplinary action, 21 A.L.R.4th 75.

Disciplinary action against attorney based on communications to judge respecting merits of cause, 22 A.L.R.4th 917.

Legal malpractice liability for advising client to commit crime or unlawful act, 51 A.L.R.4th 1227.

Ratification of attorney's unauthorized compromise of action, 5 A.L.R.5th 56.

Admissibility, in prosecution of attorney for collaborating with client in criminal activities, of evidence as to attorney's duties under Code of Professional Responsibility, 111 A.L.R. Fed. 403.

16-103. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 16-102 NMRA of the Rules of Professional Conduct. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 16-116 NMRA of the Rules of Professional Conduct, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Subparagraph (2) of Paragraph A of Rule 16-104 NMRA of the Rules of Professional

Conduct. Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 16-102 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

Attorney's duty to initiate action on case. — When one contracts with an attorney for legal services, he or she is entitled to expect that the attorney will take action of some sort, and if more information is needed from the client in order to proceed, it is the attorney's responsibility to notify the client; it is not the client's responsibility to initiate all inquiries to the attorney in order to insure that essential steps are being taken. Failure of an attorney to do so constitutes a violation of this and other rules. In re Carrasco, 106 N.M. 294, 742 P.2d 506 (1987).

Failure to complete cases. — An attorney's apparent failure to complete several cases, to take steps to insure that the interests of her clients were protected upon her withdrawal from their cases, and to promptly refund any unearned portions of fees paid in advance, as well as her lack of cooperation with the disciplinary counsel, constitute conduct violative of the professional rules warranting an indefinite suspension from the practice of law. In re Roth, 105 N.M. 255, 731 P.2d 951 (1987); In re Tapia, 110 N.M. 693, 799 P.2d 129 (1990).

An attorney who failed to pursue representation of clients and who abandoned his office and all forms of communication with his clients was subject to a one year suspension. In re Fandey, 118 N.M. 590, 884 P.2d 481 (1994).

Attorney's failure to docket an appeal and lying to his client for seven years about the status of the appeal violated numerous rules and warranted indefinite suspension from practice. In re Roberts, 119 N.M. 769, 895 P.2d 669 (1995).

Six-month suspension and other penalties warranted since attorney accepted one-half of fee and failed to represent client, allowing default to be entered against client. In re Trujillo, 110 N.M. 180, 793 P.2d 862 (1990).

An attorney's inaction and incompetence in representing a client in a divorce action violated Rules 6-101 and 7-101 of the Code of Professional Responsibility (now see Rules 16-101 and 16-103 of the Rules of Professional Conduct). In re Gallegos, 104 N.M. 496, 723 P.2d 967 (1986).

Attorney's failure to file an answer to a URESA action filed against his client violated Rules 6-101(A)(3) and 7-101(A)(1)-(3) of the Code of Professional Responsibility (now see Rules 16-103 and 16-302 of the Rules of Professional Conduct). In re Gallegos, 104 N.M. 496, 723 P.2d 967 (1986).

Sixty-day suspension warranted. — Counsel's failure to appear for a deposition, to file for an amended complaint, to file for a redetermination on behalf of his client, or to

respond to disciplinary counsel, warranted a 60-day suspension. In re Allred, 106 N.M. 227, 741 P.2d 830 (1987).

Indefinite suspension warranted. — Indefinite suspension was warranted because of an attorney's violation of this rule and other provisions, such as Rule 16-101, by failing to provide competent representation; Rule 16-104, by failing to keep his client informed about the status of a matter and failing to respond to requests for information; Rule 16-116(D), by failing to surrender papers and property to which the client was entitled at the termination of the representation; Rule 16-302, by failing to expedite litigation consistent with the interests of his client; and Rule 16-804(C), (D) and (H), by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, engaging in conduct prejudicial to the administration of justice, and by engaging in conduct that adversely reflects on his fitness to practice law. In re Lally, 1999-NMSC-003, 126 N.M. 566, 973 P.2d 243.

Indefinite suspension was warranted because an attorney violated this rule by failing to act with reasonable diligence and promptness in representing a client. The attorney also violated the following rules: Rule 16-101 NMRA, by failing to provide competent representation; Rule 16-102A NMRA, by failing to abide by a client's decisions concerning the objectives of the representation; Rule 16-104A NMRA, by failing to keep a client reasonably informed about the status of a matter and by failing to promptly comply with reasonable requests for information; Rule 16-116D NMRA, by failing to timely surrender papers and property to which a client was entitled and by failing to timely refund any advance payment of fee that had not been earned; Rule 16-804D and H NMRA, by engaging in conduct that is prejudicial to the administration of justice and conduct that adversely reflects on his fitness to practice law; Rule 16-801B NMRA, by failing to respond to lawful requests for information from the office of disciplinary counsel; and Rule 16-803D NMRA, by failing to cooperate with disciplinary counsel in the course of the investigation. In re Carlton, 2000-NMSC-001, 128 N.M. 419, 993 P.2d 736.

Disbarment warranted. — Disbarment was justified because of the inadequacy of an attorney's representation of clients in violation of this rule and Rules 16-101, 16-102 and 16-104(A) NMRA, by his business transaction and trust account violations of Rules 16-108, 16-115 and 16-116(D) NMRA, and violations of Rule 16-801 NMRA and other rules relating to disciplinary proceedings. In re Darnell, 1997-NMSC-025, 123 N.M. 323, 940 P.2d 171.

Rule violated. — See In re Martinez, 107 N.M. 171, 754 P.2d 842 (1988); In re Cutter, 118 N.M. 152, 879 P.2d 784 (1994); In re Canevaro, 1997-NMSC-033, 123 N.M. 576, 943 P.2d 1029; In re Chavez, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417; In re Dawson, 2000-NMSC-024, 129 N.M. 369, 8 P.3d 856.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Negligence, inattention, or professional incompetence of attorney in handling client's affairs in matters involving real estate transactions as ground for disciplinary action - modern cases, 65 A.L.R.4th 24.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in tax matters as ground for disciplinary action - modern cases, 66 A.L.R.4th 314.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in estate or probate matters as ground for disciplinary action - modern cases, 66 A.L.R.4th 342.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in family law matters as ground for disciplinary action - modern cases, 67 A.L.R.4th 415.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in personal injury or property damage actions as ground for disciplinary action - modern cases, 68 A.L.R.4th 694.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in criminal matters as ground for disciplinary action - modern cases, 69 A.L.R.4th 410.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in bankruptcy matters as ground for disciplinary action - modern cases, 70 A.L.R.4th 786.

Legal malpractice in handling or defending medical malpractice claim, 78 A.L.R.4th 725.

Legal malpractice in defense of criminal prosecution, 4 A.L.R.5th 273.

16-104. Communication.

A. Status of matters. A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Paragraph E of Terminology of the Rules of Professional Conduct, is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

B. Client's informed decision-making. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

C. Disclosure of professional liability insurance.

(1) If, at the time of the client's formal engagement of a lawyer, the lawyer does not have a professional liability insurance policy with limits of at least one-hundred thousand dollars (\$100,000) per claim and three-hundred thousand dollars (\$300,000) in the aggregate, the lawyer shall inform the client in writing using the form of notice prescribed by this rule. If during the course of representation, an insurance policy in effect at the time of the client's engagement of the lawyer lapses, or is terminated, the lawyer shall provide notice to the client using the form prescribed by this rule.

(2) The form of notice and acknowledgment required under this Paragraph shall be:

NOTICE TO CLIENT

Pursuant to Rule 16-104(C) NMRA of the New Mexico Rules of Professional Conduct, I am required to notify you that ["I" or "this Firm"] [do not][does not][no longer] maintain[s] professional liability malpractice insurance of at least one-hundred thousand dollars (\$100,000) per occurrence and three-hundred thousand dollars (\$300,000) in the aggregate.

Attorney's signature

CLIENT ACKNOWLEDGMENT

I acknowledge receipt of the notice required by Rule 16-104(C) NMRA of the New Mexico Rules of Professional Conduct that [insert attorney or firm's name] does not maintain professional liability malpractice insurance of at least one-hundred thousand dollars (\$100,000) per occurrence and three-hundred thousand dollars (\$300,000) in the aggregate.

Client's signature

(3) As used in this Paragraph, "lawyer" includes a lawyer provisionally admitted under Rule 24-106 NMRA and Rules 26-101 through 26-106 NMRA; however it does not include a lawyer who is a full-time judge, in-house corporate counsel for a single corporate entity, or a lawyer who practices exclusively as an employee of a governmental agency.

(4) A lawyer shall maintain a record of the disclosures made pursuant to this rule for six (6) years after termination of the representation of the client by the lawyer.

(5) The minimum limits of insurance specified by this rule include any deductible or self-insured retention, which must be paid as a precondition to the payment of the coverage available under the professional liability insurance policy.

(6) A lawyer is in violation of this rule if the lawyer or the firm employing the lawyer maintain a professional liability policy with a deductible or self-insured retention that the lawyer knows or has reason to know cannot be paid by the lawyer or the lawyer's firm in the event of a loss.

[Amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008; by Supreme Court Order No. 09-8300-029, effective November 2, 2009.]

Committee Commentary. — [1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, Subparagraph (1) of Paragraph A of this rule requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Paragraph A of Rule 16-102 NMRA of the Rules of Professional Conduct.

[3] Subparagraph (2) of Paragraph A requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, Paragraph A(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, Paragraph A(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the

lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Paragraph E of Terminology of the Rules of Professional Conduct.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 16-114 NMRA of the Rules of Professional Conduct. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 16-113 NMRA of the Rules of Professional Conduct. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Paragraph C of Rule 16-304 NMRA of the Rules of Professional Conduct directs compliance with such rules or orders.

Disclosure of Professional Liability Insurance

[8] Paragraph C of this rule requires a lawyer to disclose to the clients whether the lawyer has professional liability insurance satisfying the minimum limits of coverage set forth in the rule. Subparagraph (3) of Paragraph C defines “lawyer” to include lawyers provisionally admitted under Rule 24-106 NMRA and Rules 26-101 to 26-106 NMRA. Rule 24-106 NMRA applies to out-of-state lawyers who petition to be allowed to appear before the New Mexico courts. Rules 26-101 to 26-106 NMRA apply to foreign legal consultants. Subparagraph (4) of Paragraph C requires a lawyer to maintain a record of disclosures made under this rule for six (6) years after termination of the representation of the client by the lawyer. In this regard, the lawyer should note that trust account records must be kept for five (5) years but the statute of limitations for a breach of contract claim is six (6) years. Subparagraph (5) of Paragraph C provides that the minimum limits of insurance specified by the rule includes any deductible or self-insured retention. In this regard, the use of the term “deductible” includes a claims expense deductible. The professional liability insurance carrier must agree to pay, subject to exclusions set forth in the policy, all amounts that an insured becomes legally obligated to pay in excess of the deductible or self-insured retention shown on the declarations page of the policy.

[Adopted by Supreme Court Order 08-8300-26, effective November 3, 2008; amended by Supreme Court Order 09-8300-029, effective November 2, 2009.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph A, in the prefatory sentence, deleted "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information" and added Subparagraphs (1) through (5) of Paragraph A.

The 2009 amendment, approved by Supreme Court Order No. 09-8300-029, effective November 2, 2009, added the paragraph letter and title for Paragraph C, and Subparagraphs (1), (2), and (3); and added Paragraph [8] of the Committee Commentary.

Explanation of duty. — When one contracts with an attorney for legal services, he or she is entitled to expect that the attorney will take action of some sort, and if more information is needed from the client in order to proceed, it is the attorney's responsibility to notify the client; it is not the client's responsibility to initiate all inquiries to the attorney in order to insure that essential steps are being taken. Furthermore, it is within the scope of an attorney's obligations to a client to provide the information, advice, and reassurances necessary to allay unnecessary concerns that the client may

have. Failure to do so violates this and other rules. In re Carrasco, 106 N.M. 294, 742 P.2d 506 (1987).

Uninformed client. — Since the client's lack of understanding was the direct result of the attorney's failure to adequately inform his client as evidenced by attorney's own admission that he failed adequately to communicate to his client her right to a hearing in a neglect and abuse case, the attorney had violated this rule. In re Cutter, 118 N.M. 152, 879 P.2d 784 (1994).

Failure to communicate. — An attorney who failed to pursue representation of clients and who abandoned his office and all forms of communication with his clients was subject to a one year suspension. In re Fandey, 118 N.M. 590, 884 P.2d 481 (1994).

Misappropriation of funds. — Attorney's conversion to his own use of money received from a client to have a liquor license transferred to her name violated Rules 1-102, 6-101, 7-101 and 9-102 of the Code of Professional Responsibility (now see Rules 16-102, 16-104, 16-115 and 16-804 of the Rules of Professional Conduct). In re Gallegos, 104 N.M. 496, 723 P.2d 967 (1986).

Attorney's failure to docket an appeal and lying to his client for seven years about the status of the appeal violated numerous rules and warranted indefinite suspension from practice. In re Roberts, 119 N.M. 769, 895 P.2d 669 (1995).

Indefinite suspension warranted. — Since additional acts of misconduct and failure to communicate came to light after suspension had been imposed, and the attorney failed to cooperate with disciplinary proceedings, the additional matters warranted adding time to the suspension from the practice of law previously imposed. In re Tapia, 110 N.M. 693, 799 P.2d 129 (1990).

Indefinite suspension was warranted because of an attorney's violation of this rule and other provisions, such as Rule 16-101, by failing to provide competent representation; Rule 16-103, by failing to act with diligence and promptness in representing a client; Rule 16-116(D), by failing to surrender papers and property to which the client was entitled at the termination of the representation; Rule 16-302, by failing to expedite litigation consistent with the interests of his client; and Rule 16-804(C),(D) and (H), by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, engaging in conduct prejudicial to the administration of justice, and by engaging in conduct that adversely reflects on his fitness to practice law. In re Lally, 1999-NMSC-003, 126 N.M. 566, 973 P.2d 243.

Indefinite suspension was warranted because an attorney violated Paragraph A by failing to keep a client reasonably informed about the status of a matter and by failing to promptly comply with reasonable requests for information. The attorney also violated the following rules: Rule 16-101 NMRA, by failing to provide competent representation; Rule 16-102A NMRA, by failing to abide by a client's decisions concerning the objectives of the representation; Rule 16-103 NMRA, by failing to act with reasonable

diligence and promptness in representing a client; Rule 16-116D NMRA, by failing to timely surrender papers and property to which a client was entitled and by failing to timely refund any advance payment of fee that had not been earned; Rule 16-804D and H NMRA, by engaging in conduct that is prejudicial to the administration of justice and conduct that adversely reflects on his fitness to practice law; Rule 16-801B NMRA, by failing to respond to lawful requests for information from the office of disciplinary counsel; and Rule 16-803D NMRA, by failing to cooperate with disciplinary counsel in the course of the investigation. In re Carlton, 2000-NMSC-001, 128 N.M. 419, 993 P.2d 736.

Disbarment was warranted, despite mitigating factors, since the attorney converted client funds; engaged in conduct involving deceit, dishonesty and misrepresentation; failed to hold clients' funds separate from his own; failed to notify clients of the receipt of funds belonging to them; failed to maintain required trust account records; failed to protect clients' interests at the termination of the representation; failed to advise clients of the status of their legal matters; engaged in conduct prejudicial to the administration of justice; and engaged in conduct adversely affecting his fitness to practice law. In re Kelly, 119 N.M. 807, 896 P.2d 487 (1995).

Disbarment was justified because of the inadequacy of an attorney's representation of clients in violation of Paragraph A of this rule and Rules 16-101, 16-102 and 16-103 NMRA, by his business transaction and trust account violations of Rules 16-108, 16-115 and 16-116(D) NMRA, and violations of Rule 16-801 NMRA and other rules relating to disciplinary proceedings. In re Darnell, 1997-NMSC-025, 123 N.M. 323, 940 P.2d 171.

Rule violated. — See In re Canevaro, 1997-NMSC-033, 123 N.M. 576, 943 P.2d 1029; In re Houston, 1999-NMSC-032, 127 N.M. 582, 985 P.2d 752; In re Chavez, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417; In re Dawson, 2000-NMSC-024, 129 N.M. 369, 8 P.3d 856.

Law reviews. — For note, "Legal Malpractice - Liability for Failure to Warn: First National Bank of Clovis v. Diane, Inc.", see 16 N.M.L. Rev. 395 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Negligence, inattention, or professional incompetence of attorney in handling client's affairs in family law matters as ground for disciplinary action - modern cases, 67 A.L.R.4th 415.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in bankruptcy matters as ground for disciplinary action - modern cases, 70 A.L.R.4th 786.

16-105. Fees.

A. **Determination of reasonableness.** A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The

factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

B. Basis or rate of fees. The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

C. Contingency fees. A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Paragraph D or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

D. Prohibited fee arrangements. A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

E. Fee splitting. A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

Reasonableness of Fee and Expenses

[1] Paragraph A requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in Subparagraphs (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph A also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, the lawyer and client ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to

what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of Paragraph A of this rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Paragraph D of Rule 16-116 NMRA of the Rules of Professional Conduct. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Paragraph A of Rule 16-108 NMRA of the Rules of Professional Conduct. However, a fee paid in property instead of money may be subject to the requirements of Paragraph A of Rule 16-108 NMRA of the Rules of Professional Conduct because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph D prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph E permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with Paragraph C of this rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 16-101 NMRA of the Rules of Professional Conduct.

[8] Paragraph E does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Laws may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph A, deleted the sentence "A lawyer's fee shall be reasonable.", and added the first sentence; in Paragraph B, deleted "When the lawyer has not regularly represented the client"; added "The scope of the representation and" and "and expenses for which the client shall be responsible"; added the exception at the end of the first sentence; and added the last sentence; in Paragraph C, added the phrase "signed by the client" in the second sentence and added the third sentence; in Subparagraph (1) of Paragraph E, changed "services performed by each lawyer or, by written agreement with the client, each lawyer" to "services performed by each lawyer or each lawyer"; and in Subparagraph (2) of Paragraph E, deleted "is advised of and does not object to the participation of all the lawyers involved" and added "agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing".

A flat fee for future legal services cannot be considered as earned when paid and must be held in trust until earned. In the Matter of Yalkut, 2008-NMSC-009, 143 N.M. 387, 176 P.3d 1119.

Enforcement of rule. — While it is not within the jurisdiction of the disciplinary board or the office of disciplinary counsel to regulate fees charged by attorneys, it is within their jurisdiction to enforce the Rules of Professional Conduct; therefore, when the fee charged by an attorney is illegal or grossly excessive, it is appropriate for the disciplinary board to take action. In re Jones, 119 N.M. 229, 889 P.2d 837 (1995).

Attorney has burden of proving value of services rendered by him and for which he claims payment or credit. Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 N.M. 119, 452 P.2d 188 (1969).

Contingency fee arrangement of 33 1/3% of recovery is not excessively unreasonable or unconscionable in taking an appeal when the parties deal at arm's length, the risk is great, the fee arrangement is clear and unambiguous and it is supported by expert testimony that the percentage is reasonable. Citizens Bank v. C & H Constr. & Paving Co., 93 N.M. 422, 600 P.2d 1212 (Ct. App. 1979).

Unwritten fee agreement. — Unwritten contingency fee contracts will not be enforced because they violate the Rules of Professional Conduct, and an attorney's recovery in such cases will be limited to a reasonable fee under the circumstances. United States v. 36.06 Acres of Land, 70 F. Supp. 2d 1272 (D.N.M. 1999).

Attempt to collect fees awarded and fees due under contingency agreement. — The fees awarded to an attorney by a federal judge in a civil rights action were far in excess of what he could have collected from his client under the terms of a contingency agreement, and represented complete payment for his services. The attorney's subsequent efforts to collect amounted to a clearly excessive double fee and violated this rule. In re Atencio, 106 N.M. 334, 742 P.2d 1039 (1987).

Abandonment of client warrants suspension. — If an attorney abandons his client and the case, despite his having been paid a substantial fee, he violates this rule and warrants suspension. In re Chowning, 100 N.M. 375, 671 P.2d 36 (1983).

Six-month suspension and other penalties warranted since attorney accepted one-half of fee and failed to represent client, allowing default to be entered against client. In re Trujillo, 110 N.M. 180, 793 P.2d 862 (1990).

Promise to probate upon death of clients. — Attorney defrauded his clients when he suggested that if they would each pay him \$1,000 plus tax, he would probate their estates at the time of their deaths. In re Gallegos, 104 N.M. 496, 723 P.2d 967 (1986).

Excessive fee since no services provided. — By accepting a \$5,000 retainer and taking no discernible action apart from filing a complaint, the attorney charged a clearly

excessive fee in violation of this rule. While the fee agreement provided for a reasonable fee for the services to be performed, even a minimal fee becomes excessive when no service is provided. In re Roberts-Hohl, 116 N.M. 700, 866 P.2d 1167 (1994).

Any fee is excessive when absolutely no services are provided. In re Jones, 119 N.M. 229, 889 P.2d 837 (1995).

Indefinite suspension warranted where excessive fee involved. — See In re Quintana, 103 N.M. 458, 709 P.2d 180 (1985); In re Martinez, 107 N.M. 171, 754 P.2d 842 (1988).

An attorney who collected a fee to represent a client in a criminal matter and who failed to return the fee even though the charge was dismissed without any action by the lawyer, who subsequently contended, knowingly and dishonestly, that he was entitled to the fee in disciplinary proceedings, and who forged a physician's signature on a fitness to practice law form on an application to the Arizona bar, was suspended indefinitely. In re Cherryhomes, 115 N.M. 734, 858 P.2d 401 (1993).

Indefinite suspension was warranted because of attorney's violation of this rule and other provisions, such as Rule 16-101, by failing to provide competent representation; Rule 16-302, by failing to expedite litigation; Rule 16-303(A)(1), by making an untrue statement of material fact to a tribunal; Rule 16-304(D), by failing to comply with a discovery request; Rule 16-505(A), by practicing law in a jurisdiction where doing so violates regulations; and Rule 16-804(C),(D) and (H), by engaging in conduct involving dishonesty, deceit, and misrepresentation, by engaging in conduct prejudicial to the administration of justice, and by engaging in conduct that adversely reflects upon his fitness to practice law. In re Righter, 1999-NMSC-009, 126 N.M. 730, 975 P.2d 343.

Actions deemed violations of this rule. — See In re Horton, 100 N.M. 13, 665 P.2d 275 (1983); In re Martinez, 107 N.M. 171, 754 P.2d 842 (1988); In re Tapia, 110 N.M. 693, 799 P.2d 129 (1990); In re Hamar, 1997-NMSC-048, 123 N.M. 795, 945 P.2d 1013; In re Chavez, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417.

Law reviews. — For article, "Ethics and the Settlement of Civil Rights Cases: Can Attorneys Keep Their Virtue and Their Fees?", see 16 N.M.L. Rev. 283 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 237 to 314.

Division of fees or compensation between cooperating attorneys, 73 A.L.R.2d 991.

Attorney's splitting fees with other attorney or layman as ground for disciplinary proceeding, 6 A.L.R.3d 1446.

What constitutes contract between husband or wife and third person promotive of divorce or separation, 93 A.L.R.3d 523.

Validity, construction, and effect of contract providing for contingent fee to defendant's attorney, 9 A.L.R.4th 191.

Attorney's charging excessive fee as ground for disciplinary action, 11 A.L.R.4th 133.

Validity of statute or rule providing for arbitration of fee disputes between attorneys and their clients, 17 A.L.R.4th 993.

Attorney's charging lien as including services rendered or disbursements made in other than instant action or proceeding, 23 A.L.R.4th 336.

Attorney's retaining lien as affected by action to collect legal fees, 45 A.L.R.4th 198.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court, 73 A.L.R.4th 938.

Validity and construction of agreement between attorney and client to arbitrate disputes arising between them, 26 A.L.R.5th 107.

Divorce and separation: Attorney's contingent fee contracts as marital property subject to distribution, 44 A.L.R.5th 671.

Alimony or child-support awards as subject to attorneys' liens, 49 A.L.R. 5th 595.

Circumstances under which attorney retains right to compensation notwithstanding voluntary withdrawal from case, 53 A.L.R.5th 287.

Limitation to quantum meruit recovery, where attorney employed under contingent-fee contract is discharge without cause, 56 A.L.R.5th 1.

Method of calculating attorneys' fees awarded in common-fund or common-benefit cases-state cases, 56 A.L.R.5th 107.

Construction and application of "common fund" doctrine in allocating attorneys' fees among multiple attorneys whose efforts were unequal in benefiting multiple claimants, 42 A.L.R. Fed. 134.

Legal services provided by law students as basis for award of attorneys' fees or other litigation costs in action under Freedom of Information Act (5 USCS § 552(a)(4)(E), 73 A.L.R. Fed. 732.

Effect of contingent fee contract on fee award authorized by federal statute, 76 A.L.R. Fed. 347.

Award of attorneys' fees in excess of \$75 per hour under Equal Access to Justice Act (EAJA) provision (28 USCS § 2412(d)(A)(2)(ii)) authorizing higher award - cases involving social security law, 113 A.L.R. Fed. 267.

Award of attorney's fees in excess of \$75 per hour under Equal Access to Justice Act (EAJA) (28 USCS § 2412(d)(2)(A)(ii)) authorizing higher awards - cases involving law other than social security law, 119 A.L.R. Fed. 1

7A C.J.S. Attorney and Client §§ 281, 283, 294.

16-106. Confidentiality of information.

A. Disclosure of information generally. A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by Paragraph B of this rule.

B. Disclosure of information; specific circumstances. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] The New Mexico Supreme Court Code of Professional Conduct Committee considered the circumstances where an insurer, having retained a defense lawyer to represent an insured, imposes a requirement that the lawyer's bills be submitted to a third-party auditor for review, approval and payment. Billing statements may contain information that is covered by the work product doctrine and attorney-client privilege. The committee believes that a lawyer can legitimately disclose billing information but when the information involves work product or attorney-client privileged information, such information should not be disclosed to a third-party auditor unless informed consent is first obtained from the insured or unless the lawyer is otherwise ordered by a court to produce the billing information.

[2] As of November 7, 1999, this opinion is in accord with the ethics committee opinions of Alabama, Alaska, District of Columbia, Florida, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia and Washington. Only Nebraska's Ethics Advisory Committee has taken a contrary view but nevertheless recommends that lawyers should prepare bills carefully to protect against undue disclosures.

[3] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 16-118 NMRA of the Rules of Professional Conduct for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Subparagraph (2) of Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Paragraph B of Rule 16-108 NMRA and Subparagraph (1) of Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[4] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Paragraph E of Terminology of the Rules of Professional Conduct for the definition of "informed consent". This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be

legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[5] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See *also* Scope of the Rules of Professional Conduct.

[6] Paragraph A prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[7] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[8] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Subparagraph (1) of Paragraph B recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial

risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[9] Subparagraph (2) of Paragraph B is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Paragraph D of Terminology of the Rules of Professional Conduct, that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although Subparagraph (2) of Paragraph B does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Paragraph B of Rule 16-102 NMRA of the Rules of Professional Conduct. See *also* Rule 16-116 NMRA of the Rules of Professional Conduct with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Paragraph C of Rule 16-113 NMRA of the Rules of Professional Conduct, which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[10] Subparagraph (3) of Paragraph B addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Subparagraph (3) of Paragraph B does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[11] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, Subparagraph (4) of Paragraph B permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[12] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary

or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made.

Subparagraph (5) of Paragraph B does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[13] A lawyer entitled to a fee is permitted by Subparagraph (5) of Paragraph B to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[14] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 16-106 NMRA of the Rules of Professional Conduct is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 16-104 NMRA of the Rules of Professional Conduct. If, however, the other law supersedes this rule and requires disclosure, Subparagraph (6) of Paragraph B permits the lawyer to make such disclosures as are necessary to comply with the law.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 16-104 NMRA of the Rules of Professional Conduct. Unless review is sought, however, Subparagraph (6) of Paragraph B permits the lawyer to comply with the court's order.

[16] Paragraph B permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph B permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in Subparagraphs (1) through (6) of Paragraph B. In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by Paragraph B does not violate this rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by Paragraph B. See Paragraph D of Rule 16-102 NMRA, Paragraph B of Rule 16-401 NMRA, Rule 16-801 NMRA and Rule 16-803 NMRA of the Rules of Professional Conduct, Rule 16-303 NMRA of the Rules of Professional Conduct, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this rule. See Paragraph C of Rule 16-303 NMRA of the Rules of Professional Conduct.

Acting Competently to Preserve Confidentiality

[18] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 16-101, 16-501 and 16-503 NMRA of the Rules of Professional Conduct.

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Subparagraph (2) of Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct. See Subparagraph (1) of Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct for the prohibition against using such information to the disadvantage of the former client.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

RULES OF PROFESSIONAL CONDUCT COMMITTEE COMMENT:

The New Mexico Supreme Court Code of Professional Conduct Committee considered the circumstances where an insurer, having retained a defense attorney to represent an insured, imposes a requirement that the attorney's bills be submitted to a third-party auditor for review, approval and payment. Billing statements may contain information that is covered by the work product doctrine and attorney-client privilege. The committee believes that an attorney can legitimately disclose billing information but when the information involves work-product or attorney-client privileged information, such information should not be disclosed to a third-party auditor unless informed consent is first obtained from the insured or unless the attorney is otherwise ordered by a court to produce the billing information.

As of November 7, 1999, this opinion is in accord with the ethics committee opinions of Alabama, Alaska, District of Columbia, Florida, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia and Washington. Only Nebraska's Ethics Advisory Committee has taken a contrary view but nevertheless recommends that lawyers should prepare bills carefully to protect against undue disclosures.

Cross references. — For privileged communication between attorney and client, see 38-6-6 NMSA 1978.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph A, changed "consents after consultation, except for disclosures that are" to "gives informed consent, the disclosure is" and changed "except as stated in Paragraphs B, C and D" to "or the disclosure is permitted by Paragraph B of this rule"; in Paragraph B, in the title, deleted "to prevent harm to others" and added "specific circumstances"; deleted the former rule which provided for disclosure of information to prevent imminent death or substantial bodily harm and added the prefatory sentence and Subparagraphs (1) through (6); deleted former Paragraph C which provided for disclosure of information to prevent financial or property harm; and deleted former Paragraph D which provided for disclosure of information in a lawyer-client controversy.

When duty of confidentiality attaches. — The duty of confidentiality under this rule may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. In re Lichtenberg, 117 N.M. 325, 871 P.2d 981 (1994).

"Substantial relationship" test, as applied to one's former attorney in prior litigation serving as counsel for one's opponent in present litigation, requires a three-tiered analysis: (1) A factual reconstruction of the scope of the prior legal representation; (2) a determination of whether it is reasonable to presume that the lawyer would have received confidential information of the type alleged by his former client; and (3) a determination of whether the alleged confidential information is relevant to the issues raised in the litigation pending against the former client. *Leon, Ltd. v. Carver*, 104 N.M. 29, 715 P.2d 1080 (1986)(decided under former rules).

Substantial relationship standard requires disqualification if an attorney represents a party in a matter in which the adverse party is that attorney's former client, and the subject matter of the two representations are substantially related. *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980) appeal dismissed; 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981) (decided under former rules).

Law reviews. — For article, "Attorney as Interpreter: A Return to Babble," 20 N.M.L. Rev. 1 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 119, 120.

Propriety of attorney who has represented corporation acting for corporation in controversy with officer, director, or stockholder, 1 A.L.R.4th 1124.

Applicability of attorney-client privilege to evidence or testimony in subsequent action between parties originally represented contemporaneously by same attorney, with reference to communication to or from one party, 4 A.L.R.4th 765.

Applicability of attorney-client privilege to communications made in presence of or solely to or by third person, 14 A.L.R.4th 594.

Attorney-client privilege as extending to communications relating to contemplated civil fraud, 31 A.L.R.4th 458.

Attorney's work product privilege, under Rule 26(b)(3) of the Federal Rules of Civil Procedure, as applicable to documents prepared in anticipation of terminated litigation, 41 A.L.R. Fed. 123.

Propriety of law firm's representation of client in federal court where lawyer affiliated with firm is disqualified from representing client, 51 A.L.R. Fed. 678.

Attorney-client privilege and the reporting of cash transactions in excess of \$10,000, as required by § 6050I of Internal Revenue Code (26 USCA § 6050I), 152 A.L.R. Fed. 459.

7A C.J.S. Attorney and Client §§ 234, 237.

16-107. Conflict of interest; current clients.

A. **Representation involving concurrent conflict of interest.** Except as provided in Paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

B. Permissible representation when concurrent conflict exists. Notwithstanding the existence of a concurrent conflict of interest under Paragraph A of this rule, a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific rules regarding certain concurrent conflicts of interest, see Rule 16-108 NMRA of the Rules of Professional Conduct. For former client conflicts of interest, see Rule 16-109 NMRA of the Rules of Professional Conduct. For conflicts of interest involving prospective clients, see Rule 16-118 NMRA of the Rules of Professional Conduct. For definitions of "confirmed in writing" and "informed consent", see Paragraphs B and E of Terminology of the Rules of Professional Conduct.

[2] Resolution of a conflict of interest problem under this rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients

affected under Paragraph A and obtain their informed consent, confirmed in writing. The clients affected under Paragraph A include both of the clients referred to in Subparagraph (1) of Paragraph A and the one or more clients whose representation might be materially limited under Subparagraph (2) of Paragraph A.

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of Paragraph B. To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See *also* Committee Commentary to Rule 16-501 NMRA of the Rules of Professional Conduct. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Committee Commentary to Rule 16-103 NMRA and Scope of the Rules of Professional Conduct.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of Paragraph B. See Rule 16-116 NMRA of the Rules of Professional Conduct. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 16-109 NMRA of the Rules of Professional Conduct.

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 16-116 NMRA of the Rules of Professional Conduct. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct.

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client

effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 16-109 NMRA of the Rules of Professional Conduct or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a

transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 16-108 NMRA of the Rules of Professional Conduct for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See *also* Rule 16-110 NMRA of the Rules of Professional Conduct (personal interest conflicts under Rule 16-107 NMRA of the Rules of Professional Conduct ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 16-110 NMRA of the Rules of Professional Conduct.

[12] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Paragraph F of Rule 16-108 NMRA of the Rules of Professional Conduct. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of Paragraph B before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in Paragraph B, some conflicts are non-consentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under Subparagraph (1) of Paragraph B, representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 16-101 NMRA (Competence) and Rule 16-103 NMRA (Diligence) of the Rules of Professional Conduct.

[16] Subparagraph (2) of Paragraph B describes conflicts that are non-consentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Subparagraph (3) of Paragraph B describes conflicts that are non-consentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Paragraph M of Terminology of the Rules of Professional Conduct), such representation may be precluded by Subparagraph (1) of Paragraph B of this rule.

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Paragraph E of Terminology of the Rules of Professional Conduct (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects

on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Special Considerations in Common Representation, below.

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph B requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Paragraph B of Terminology of the Rules of Professional Conduct; see *also* Paragraph N of Terminology of the Rules of Professional Conduct (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Paragraph B of Terminology of the Rules of Professional Conduct. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of Paragraph B. The effectiveness of such waivers is

generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict non-consentable under Paragraph B.

Conflicts in Litigation

[23] Subparagraph (3) of Paragraph B prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by Subparagraph (2) of Paragraph A. A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of Paragraph B are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant

risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying Subparagraph (1) of Paragraph A of this rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Non-litigation Conflicts

[26] Conflicts of interest under Subparagraphs (1) and (2) of Paragraph A arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Committee Commentary above, Identifying Conflicts of Interest: Directly Adverse. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. *Id.*

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 16-104 NMRA of the Rules of Professional Conduct. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater

responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Paragraph C of Rule 16-102 NMRA of the Rules of Professional Conduct.

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 16-109 NMRA of the Rules of Professional Conduct concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 16-116 NMRA of the Rules of Professional Conduct.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Paragraph A of Rule 16-113 NMRA of the Rules of Professional Conduct. Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in the title to the rule, changed "general rule" to "current clients"; in Paragraph A, in the title, changed "adverse to other client considered" to "involving

concurrent conflict of interest"; added "Except as provided in Paragraph B of this rule" at the beginning of the sentence; and changed "of that client will be directly or substantially adverse to another client, and" to "involves a concurrent conflict of interest. A concurrent conflict of interest exists if:"; in Subparagraph (1) of Paragraph A, replaced the former language which provided that "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client" with the current language; and in Subparagraph (2) of Paragraph A, replaced the former language which provided for client consent after consultation and for consultation that included an explanation of the implications of the common representation and the advantages and risks involved with the current language; in Paragraph B, replaced former the title "Lawyer's other responsibilities considered" with the current title; deleted the former prefatory language of the rule which prohibited a lawyer from representing a client if the representation may be materially limited by the lawyer's responsibilities to another client, a third party, or the lawyer's interests by the current prefatory language; in Subparagraph (1) of Paragraph B, replaced the former language which provided that "the lawyer reasonably believes the representation will not be adversely affected" with the current language; in Subparagraph (2) of Paragraph B, replaced the language which provided for client consent after consultation and for consultation with multiple clients in a single matter that included an explanation of the implications of the common representation and the advantages and risks involved by the current language; and added Subparagraphs (3) and (4) of Paragraph B.

Threats against a prosecutor. — A defendant does not create a disqualifying interest and cannot choose his or her prosecutor for an underlying offense by the use of threats against prosecutors and an entire district attorney's office is not subject to disqualification unless an individual prosecutor is disqualified and there is a danger that the prosecutor's bias or disqualifying interest will taint the remaining attorneys in the office or give the appearance of impropriety to continued prosecution by other attorneys. *State v. Robinson*, 2008-NMCA-036, 143 N.M. 646, 179 P.3d 1254, cert. denied, 2008-NMCERT-002.

Attorney's dual relationship with child—as guardian ad litem during abuse and neglect proceedings, and then as her defense attorney during delinquency proceedings—had potential to become actual, active conflict of interest, but record did not demonstrate actual conflict so as to lay sufficient foundation for ineffective assistance of counsel claim on which to base motion to withdraw plea. *State v. Joanna V.*, 2004-NMSC-024, 136 N.M. 40, 94 P.3d 783.

No per se conflict of interest exists when Post Conviction Conflict Division of Public Defender Department represents individual arguing ineffective assistance of counsel by attorney from Department's Trial Division, but each potential conflict must be reviewed on case-by-case basis, and individual may waive any such conflict by knowingly and intelligently signing waiver after proper advisement. *Morales v. Bridgforth*, 2004-NMSC-034, 136 N.M. 511, 100 P.3d 668.

Attorney cannot represent two clients with possible conflicting interests. *State v. Aguilar*, 87 N.M. 503, 536 P.2d 263 (Ct. App. 1975).

Representation of two defendants by lawyers who became partners. — While two defendants were, in effect, represented by the same attorney since their lawyers became partners, nothing prohibited this dual representation as long as there was no actual conflict of interest adversely affecting the lawyers' performance. *State v. Martinez*, 102 N.M. 94, 691 P.2d 887 (1984).

Office-sharing agreement with former partner of former prosecutor not conflict. — A defendant is not entitled to the disqualification of his appointed counsel on the grounds of appearance of impropriety or potential conflict of interest where the counsel has an office-sharing arrangement with a former partner of a former prosecutor who had prosecuted defendant on a prior conviction. *State v. Martinez*, 100 N.M. 532, 673 P.2d 509 (Ct. App. 1983).

Attorney general's prosecution of officer he formerly represented. — The appointment of the New Mexico attorney general, and a deputy attorney general, to act as special assistant United States attorneys for prosecution of criminal charges against the state investment officer and an assistant state treasurer alleging a conspiracy to extort a political contribution, involved no inherent or actual conflict of interest under former Canons 4 or 9 (now see this rule) or 8-5-2 NMSA 1978. An inherent conflict of interests does not arise merely because a state attorney general prosecutes a state office whom he formerly represented. *United States v. Troutman*, 814 F.2d 1428 (10th Cir. 1987).

Representation of wife in domestic relations case. — In a domestic relations case, the wife's second husband, an attorney, was not disqualified from representing her on the basis of an alleged conflict of interest since the attorney represented to the court that his representation would not be affected by any responsibilities he might have to the wife's children, and the wife explicitly manifested her consent to such representation. *Sanders v. Rosenberg*, 119 N.M. 811, 896 P.2d 491 (Ct. App. 1995).

Rule applies to participation as counsel rather than as witness; thus testimony for the state by assistant district attorney, the immediate supervisor of the state's trial counsel, did not violate former Canon 5, regarding the exercise of independent professional judgment. *State v. Martinez*, 89 N.M. 729, 557 P.2d 578 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976), 430 U.S. 973, 97 S. Ct. 1663, 52 L. Ed. 2d 367 (1977).

Representation of conflicting parties violated Subdivision A of DR 5-105 (now see Paragraph A of this rule). *In re Arrieta*, 105 N.M. 418, 733 P.2d 866 (1987).

Attorney's representation of conflicting interests of a husband and wife in related divorce, domestic violence, and criminal proceedings violated Paragraphs A and B of this rule. *In re Houston*, 1999-NMSC-032, 127 N.M. 582, 985 P.2d 752.

Suspension warranted if conflicting interests impair independent judgment. — If a lawyer allows his independent professional judgment on his client's behalf to be impaired by his representation of conflicting interests and, through negligence and acceptance of undue influence and instructions from others, he unintentionally aids an embezzlement scheme in which his client is the victim, such conduct warrants suspension from practice of law for a 30-day period and thereafter until reinstated as provided by the rules of the supreme court. *In re Dilts*, 93 N.M. 131, 597 P.2d 316 (1979).

Constitutional rights violation requires "actual" conflict. — A conflict of interest violation of these rules will not in itself constitute a violation of constitutional rights because under case law an "actual" conflict must be established. See *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 2052, 64 L. Ed. 2d 333. *United States v. Gallegos*, 39 F.3d 276 (10th Cir. 1994).

One-year suspension warranted. — Actions by an attorney involving false statements of material fact to a bankruptcy court, representation of a client in bankruptcy when owed money by the client, deposit of monies in his operating account instead of his trust account, failure to produce required records for his trust account, and misrepresentations to the Internal Revenue Service when acting in his capacity as a CPA, warranted suspension. *In re Archuleta*, 1996-NMSC-039, 122 N.M. 52, 920 P.2d 517.

Rule violated. — See *In re Chavez*, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417.

Law reviews. — For article, "Ethics and the Settlement of Civil Rights Cases: Can Attorneys Keep Their Virtue and Their Fees?", see 16 N.M.L. Rev. 183 (1986).

For article, "Attorney as Interpreter: A Return to Babble," 20 N.M.L. Rev. 1 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 121, 184 to 189.

Attorney's representation of parties adversely interested as affecting judgment or estoppel in respect thereof, 154 A.L.R. 501.

Propriety and effect of attorney representing interest adverse to that of former client, 52 A.L.R.2d 1243.

What constitutes representation of conflicting interests subjecting attorney to disciplinary action, 17 A.L.R.3d 835.

Propriety of attorney who has represented corporation acting for corporation in controversy with officer, director, or stockholder, 1 A.L.R.4th 1124.

Disqualification of attorney because member of his firm is or ought to be witness in case - modern cases, 5 A.L.R.4th 574.

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel - state cases, 18 A.L.R.4th 360.

Propriety of attorney acting as both counsel and class member or representative, 37 A.L.R.4th 751.

Disqualification of member of law firm as requiring disqualification of entire firm - state cases, 6 A.L.R.5th 242.

Propriety of law firm's representation of client in federal court where lawyer affiliated with firm is disqualified from representing client, 51 A.L.R. Fed. 678.

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel - federal cases, 53 A.L.R. Fed. 140.

Disqualification of law firm from representing party in federal civil suit involving former client of that firm, 56 A.L.R. Fed. 189.

Sufficiency of screening measures (Chinese Wall) designed to prevent disqualification of law firm, member of which is disqualified for conflict of interest, 68 A.L.R. Fed. 687.

7 C.J.S. Attorney and Client §§ 77 to 87; 7A C.J.S. Attorney and Client §§ 150 to 159.

16-108. Conflict of interest; current clients; specific rules.

A. Business transactions with or adverse to client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

B. Use of information limited. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.

C. Client gifts. A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

D. Literary or media rights. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

E. Financial assistance. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

F. Compensation from third party. A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 16-106 NMRA of the Rules of Professional Conduct.

G. Representation of two or more clients. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

H. Prospective malpractice liability limitation. A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

I. **Proprietary interest in cause of action.** A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

J. **Lawyer association.** While lawyers are associated in a firm, a prohibition in the foregoing Paragraphs A through I that applies to any one of them shall apply to all of them.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of Paragraph A must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 16-507 NMRA of the Rules of Professional Conduct. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 16-105 NMRA of the Rules of Professional

Conduct, although its requirements must be met when the lawyer accepts an interest in the client's business or other non-monetary property as payment of all or part of a fee. In addition, the rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in Paragraph A are unnecessary and impracticable.

[2] Subparagraph (1) of Paragraph A requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Subparagraph (2) of Paragraph A requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Subparagraph (3) of Paragraph A requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Paragraph E of Terminology of the Rules of Professional Conduct (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of Paragraph A, but also with the requirements of Rule 16-107 NMRA of the Rules of Professional Conduct. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 16-107 NMRA of the Rules of Professional Conduct will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, Subparagraph (2) of Paragraph A of this rule is inapplicable, and the Subparagraph (1) of Paragraph A requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as Subparagraph (1) of Paragraph A further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph B applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph B prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these rules. See Paragraph D of Rule 16-102 NMRA, Rule 16-106 NMRA, Paragraph C of Rule 16-109 NMRA, Rule 16-303 NMRA, Paragraph B of Rule 16-401 NMRA, Rule 16-801 NMRA and Rule 16-803 NMRA of the Rules of Professional Conduct.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, Paragraph C does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in Paragraph C.

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this rule is where the client is a relative of the donee.

[8] This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 16-107 NMRA of the Rules of Professional Conduct when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and

the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph D does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 16-105 NMRA of the Rules of Professional Conduct and Paragraphs A and I of this rule.

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See *also* Paragraph C of Rule 16-504 NMRA of the Rules of Professional Conduct (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 16-107 NMRA of the Rules of Professional Conduct. The lawyer must also conform to the requirements of Rule 16-106 NMRA of the Rules of Professional Conduct concerning confidentiality. Under Paragraph A of Rule 16-107 NMRA of the Rules of Professional Conduct, a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under

Paragraph B of Rule 16-107 NMRA of the Rules of Professional Conduct, the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non-consentable under that paragraph. Under Paragraph B of Rule 16-107 NMRA of the Rules of Professional Conduct, the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 16-107 NMRA of the Rules of Professional Conduct, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Paragraph A of Rule 16-102 NMRA of the Rules of Professional Conduct protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both of those rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See *also* Paragraph E of Terminology of the Rules of Professional Conduct (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 16-102 NMRA of the Rules of Professional Conduct that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph I states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like Paragraph E, the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The rule is subject to specific exceptions developed in decisional law and continued in these rules. The exception for certain advances of the costs of litigation is set forth in Paragraph E. In addition, Paragraph I sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of Paragraph A. Contracts for contingent fees in civil cases are governed by Rule 16-105 NMRA of the Rules of Professional Conduct.

Imputation of Prohibitions

[17] Under Paragraph J, a prohibition on conduct by an individual lawyer in Paragraphs A through I also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with Paragraph A, even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in Paragraph J is personal and is not applied to associated lawyers.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in the title of the rule, changed the phrase "prohibited transactions" to "current clients; specific rules"; in Subparagraph (2) of Paragraph A, changed "the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction" to the current language; in Subparagraph (3) of Paragraph A, changed "the client consents in writing thereto" to the current language; in Paragraph B, deleted "Unless otherwise required by these rules, a" at the beginning of the sentence and

changed "consents after consultation" to "gives informed consent, except as permitted or required by these rules"; in Paragraph C, replaced the former language of the rule which prohibited a lawyer from preparing an instrument which would give the lawyer or a person related to the lawyer a gift from a client by the current language; in Subparagraph (1) of Paragraph E, changed "provided the client remain ultimately liable for such costs and expense" to "the repayment of which may be contingent on the outcome of the matter"; in Subparagraph (1) of Paragraph F, changed "consents after consultation" to "gives informed consent"; in Paragraph G, changed "consents after consultation, including" to "gives informed consent, in writing signed by the client. The lawyer's"; in Subparagraph (1) of Paragraph H, changed "permitted by law" to "the client"; in Subparagraph (2) of Paragraph H, changed "settle a claim for which liability" to "settle a claim or potential claim for such liability" and changed "without first advising that person in writing that independent representation is appropriate" to the current language which prohibits a settlement unless the person is advised in writing of the desirability of seeking independent legal advice; deleted former Paragraph I which prohibited representation adverse to the representation by a related lawyer; relettered former Paragraph J as Paragraph I; and added a new Paragraph J.

Relation of attorney and client is one of highest trust and confidence, requiring the attorney to observe the utmost good faith towards his client, and not to allow his private interests to conflict with those of his client. Very strict and rigid rules have always been enforced under which an attorney could not maintain a purchase from his client unless he was able to clearly show that he had made a full communication to his client of all that he knew of advantage to the client regarding the subject of the negotiations. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 N.M. 119, 452 P.2d 188 (1969).

Information which attorney must convey to client. — An attorney has an affirmative duty to fully inform a client, not only of the attorney's interest in the transaction, but also how such interest might affect the attorney's personal judgment and that the client is free to seek outside legal advice regarding the transaction. *In re D'Angelo*, 105 N.M. 391, 733 P.2d 360 (1986).

Duty no less than real estate broker. — The duty owed by an attorney to his client is certainly no less exacting than that owed by a real estate broker to his principal. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 N.M. 119, 452 P.2d 188 (1969).

Property ownership between clients and attorney. — If the attorney had an interest in a client corporation and its real property, he violated this rule by failing to comply with the requirements for entering into a business transaction with a client since he failed to obtain the client's written consent to the alleged transaction. Of a more serious nature was the action taken by the attorney when he learned the property had been placed for sale since he resorted to issuing false and unauthorized deeds to protect an asserted interest in a client's property which is antithetical to a lawyer's duties to the client and the legal system. *In re Schmidt*, 118 N.M. 213, 880 P.2d 310 (1994).

Advances from attorney's own funds. — If costs are advanced, the advance must come from the attorney's own funds; thus, even though, because of commingling of personal and client funds in a trust fund, an attorney was saved from disbursing funds that did not belong to him, it was not proper for him to make advances from the fund. In re Cannain, 1997-NMSC-001, 122 N.M. 710, 930 P.2d 1162.

No conflict with statute. — The statute which an attorney jointly and severally liable with the client for the services of a court reporter (36-2-13.1 NMSA 1978) does not conflict with Subparagraph E(1) of this rule. Trambley v. Wyman, 1998-NMCA-035, 125 N.M. 13, 956 P.2d 144, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

Contracts between client and attorney will be closely scrutinized by the courts and when a client challenges the fairness of such a contract the attorney has the burden of showing not only that he used no undue influence but that in every particular he acted honestly and in good faith. Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 N.M. 119, 452 P.2d 188 (1969).

Factors in determining fairness. — Inadequacy of consideration is but one factor in determining whether a transaction between attorney and client is fair; others include a showing that the attorney made a full and frank disclosure of all relevant information that he had and that the client had independent advice before completing the transaction. Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 N.M. 119, 452 P.2d 188 (1969).

Agreement voidable. — The trial court's conclusion that an agreement was voidable may clearly be sustained upon the ground that the attorney failed to fully disclose all facts relating to the sale of the house which he was consummating, particularly with respect to the purchase price; furthermore, the client had no independent advice before signing the agreement and deed. Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 N.M. 119, 452 P.2d 188 (1969).

If the court finds that the transactions between the attorney and his client were not made in the best of faith and were not made without an advantage to the attorney or disadvantage to his client, that said transactions were not fair and not equitable and the client was not fully informed of her rights and interests, the attorney's actions are incompatible with the high fidelity he owed to his client as a member of the legal profession. Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 N.M. 119, 452 P.2d 188 (1969).

Exchange of service agreement not standard commercial transaction. — An attorney was required to disclose in writing the terms of an arrangement with his client, whereby the attorney received construction work from the client at a reduced rate and his payments were often deferred, since the agreement was not a standard commercial transaction excepted from this rule. Fowler Bros. v. Young, 91 F.3d 1367 (10th Cir. 1996).

Constitutional rights violation requires "actual" conflict. — A conflict of interest violation of these rules will not in itself constitute a violation of constitutional rights because under case law an "actual" conflict must be established. See *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 2052, 64 L. Ed. 2d 333. *United States v. Gallegos*, 39 F.3d 276 (10th Cir. 1994).

Disclosure provision of this rule does not place an attorney in the position of a trustee. *Fowler Bros. v. Young*, 91 F.3d 1367 (10th Cir. 1996).

Disbarment warranted. — Disbarment was justified because of the inadequacy of an attorney's representation of clients in violation of Rules 16-101, 16-102(A), 16-103 and 16-104(A) NMRA, by his business transaction and trust account violations of this rule and Rules 16-115 and 16-116(D) NMRA, and violations of Rule 16-801 NMRA and other rules relating to disciplinary proceedings. *In re Darnell*, 1997-NMSC-025, 123 N.M. 323, 940 P.2d 171.

Contingency arrangement. — Attorney who took case on a contingency arrangement sanctioned for fees and costs in the amount of \$26,769.80 for failing to settle a case at the request of client or withdraw as attorney in the case. *Vesco v. Snedecker*, 236 F. Supp. 2d 1272 (D.N.M. 2002).

Law reviews. — For article, "Ethics and the Settlement of Civil Rights Cases: Can Attorneys Keep Their Virtue and Their Fees?", see 16 N.M.L. Rev. 283 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 121, 199, 200, 263.

Fee collection practices as ground for disciplinary action, 91 A.L.R.3d 583.

Liability insurance coverage as extending to liability for punitive or exemplary damages, 16 A.L.R.4th 11.

Propriety of attorney acting as both counsel and class member or representative, 37 A.L.R.4th 751.

Liability of professional corporation of lawyers, or individual members thereof, for malpractice or other tort of another member, 39 A.L.R.4th 556.

Liability of attorney, acting for client, for malicious prosecution, 46 A.L.R.4th 249.

Attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct, 69 A.L.R.4th 974.

Attorney's retaining lien: what items of client's property or funds are not subject to lien, 70 A.L.R.4th 827.

7 C.J.S. Attorney and Client §§ 77 to 87.

16-109. Duties to former clients.

A. **Subsequent representation.** A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

B. **Subsequent representation; former law firm.** A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rule 16-106 NMRA and Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct that is material to the matter, unless the former client gives informed consent, confirmed in writing.

C. **Former representation.** A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this rule. Under this rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government

concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. Current and former government lawyers must comply with this rule to the extent required by Rule 16-111 NMRA of the Rules of Professional Conduct.

[2] The scope of a “matter” for purposes of this rule depends on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person’s spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing the neighbors seeking to oppose rezoning of the property on the basis of environmental considerations. However, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph B operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rule 16-106 NMRA and Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct. Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Paragraph B of Rule 16-110 NMRA of the Rules of Professional Conduct for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of Paragraph B of this rule depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs. It should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients. In the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve the confidentiality of information about a client formerly represented. See Rule 16-106 NMRA and Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct.

[8] Paragraph C of this rule provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a

client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under Paragraphs A and B. See Paragraph E of Terminology of the Rules of Professional Conduct. With regard to the effectiveness of an advance waiver, see Committee Commentary to Rule 16-107 NMRA of the Rules of Professional Conduct. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 16-110 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, changed the title from "Conflict of interest; former client" to the present title; added the title to Paragraph A; in Paragraph A, changed "consents after consultation" to "gives informed consent, confirmed in writing"; deleted former Paragraph B which prohibited a lawyer who has formerly represented a client to use information relating to the representation to the disadvantage of the former client except as permitted by Rule 16-106 NMRA or when the information is generally known; and added new Paragraphs B and C.

Establishing attorney-client relationship. — In determining whether there was an attorney-client relationship that would subject a lawyer to the ethical obligation of preserving confidential communications, a party must show that: (1) it submitted confidential information to a lawyer, and (2) it did so with the reasonable belief that the lawyer was acting as the party's attorney. Additionally, although the alleged client's subjective belief can be considered by the court, this belief is not sufficient to establish an attorney-client relationship. *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373 (10th Cir. 1994).

Prosecution of former criminal client. — Based on the totality of the circumstances, including the proximity of time between the past convictions and the present prosecution, the similarity of the offenses, and the fact that the past convictions had been plea bargained, there was conflict under this rule in the prosecution of a defendant by a prosecutor who had served as his defense counsel in the prior cases. *State v. Barnett*, 1998-NMCA-105, 125 N.M. 739, 965 P.2d 323.

Reasonably competent attorney standard. — Defense attorney who made no effort to discover scope of prosecutor's prior representation of defendant, or advise defendant as to his right to disqualify the prosecutor, failed to meet the standard of a reasonably competent attorney; however, defendant's right to relief was dependent upon whether he was prejudiced by his lack of competent counsel, a factual question to be determined on remand. *State v. Barnett*, 1998-NMCA-105, 125 N.M. 739, 965 P.2d 323.

Wrongful use of client information. — Attorney violated this rule when he wrongfully used information relating to his former representation of a client to her disadvantage and financial ruin. In re C'De Baca, 109 N.M. 151, 782 P.2d 1348 (1989).

16-110. Imputation of conflicts of interest; general rule.

A. Firm association. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 16-107 or 16-109 NMRA of the Rules of Professional Conduct, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

B. Terminated associations. When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rule 16-106 NMRA and Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct that is material to the matter.

C. Subsequent firm associations; screening. When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter in which that lawyer is disqualified under Paragraph A or B of Rule 16-109 NMRA of the Rules of Professional Conduct unless:

(1) the newly associated lawyer has no information protected by Rule 16-106 or 16-109 NMRA of the Rules of Professional Conduct that is material to the matter; or

(2) the newly associated lawyer did not have a substantial role in the matter, is timely screened from any participation in the matter and is apportioned no part of the fee therefrom, and written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this rule.

D. Waiver of disqualification. A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 16-107 NMRA of the Rules of Professional Conduct.

E. Other rules. The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 16-111 NMRA of the Rules of Professional Conduct, and the disqualification of lawyers associated in a firm with

former judges, arbitrators, mediators or other third-party neutrals is governed by Rule 16-112 NMRA of the Rules of Professional Conduct.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law, or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Paragraph C of Terminology of the Rules of Professional Conduct. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Committee Commentary to Terminology of the Rules of Professional Conduct.

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in Paragraph A gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph A operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Paragraph B of Rule 16-109 NMRA and Paragraph B of Rule 16-110 NMRA of the Rules of Professional Conduct.

[3] Paragraph A of this rule does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case was owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule stated in Paragraph A also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a non-lawyer,

such as a paralegal or legal secretary. Nor does Paragraph A prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the non-lawyers and the firm have a legal duty to protect. See Paragraph K of Terminology of the Rules of Professional Conduct.

[5] Paragraph B of Rule 16-110 NMRA of the Rules of Professional Conduct operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 16-107 NMRA of the Rules of Professional Conduct. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rule 16-106 NMRA and Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct.

[6] Where the conditions of Paragraph C of this rule are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Paragraph K of Terminology of the Rules of Professional Conduct. Subparagraph (2) of Paragraph C of this rule does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Paragraph D of Rule 16-110 NMRA of the Rules of Professional Conduct removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 16-107 NMRA of the Rules of Professional Conduct. The conditions stated in Rule 16-107 NMRA of the Rules of Professional Conduct require the lawyer to determine that the representation is not prohibited by Paragraph B of Rule 16-107 NMRA of the Rules of Professional Conduct and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Committee Commentary to Rule 16-107 NMRA of the

Rules of Professional Conduct. For a definition of "informed consent", see Paragraph E of Terminology of the Rules of Professional Conduct.

[10] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Paragraphs B and C of Rule 16-111 NMRA of the Rules of Professional Conduct, and is not governed by this rule. Under Paragraph D of Rule 16-111 NMRA of the Rules of Professional Conduct, where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[11] Where a lawyer is prohibited from engaging in certain transactions under Rule 16-108 NMRA of the Rules of Professional Conduct, Paragraph J of that rule, and not this rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, changed the title from "Imputed disqualification" to the current title; in Paragraph A, deleted references to Paragraph C of Rule 16-108 NMRA and Rule 16-202 NMRA and added the exception at the end of the sentence for prohibitions based a personal interest of the prohibited lawyer; deleted former Paragraph B which prohibited a firm from representing a person in a matter in which a lawyer who has joined the firm or in which another firm with which the lawyer was associated had represented the person; relettered former Paragraph C as Paragraph B; in Paragraph B, added "and not currently represented by the firm" and changed the reference in Subparagraph (2) from Paragraph B to Paragraph C of Rule 16-109; and added new Paragraphs C and E.

Constitutional rights violation requires "actual" conflict. — A conflict of interest violation of these rules will not in itself constitute a violation of constitutional rights because under case law an "actual" conflict must be established. See *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 2052, 64 L. Ed. 2d 333. *United States v. Gallegos*, 39 F.3d 276 (10th Cir. 1994).

Conflict found. — In a criminal prosecution, the trial court erred in denying the motion of the defendant's attorney to withdraw when the attorney had discovered on the eve of trial that his law firm was prosecuting the defendant in municipal court for a traffic offense. *State v. Almanza*, 1996-NMCA-013, 121 N.M. 300, 910 P.2d 934.

16-111. Special conflicts of interest for former and current government officers and employees.

A. **Subsequent representation.** Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct; and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

B. Imputation of conflict to firm; screening. When a lawyer is disqualified from representation under Paragraph A, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

C. Confidential government information. Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

D. Subsequent government employment. Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 16-107 and 16-109 NMRA of the Rules of Professional Conduct; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally

and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Paragraph B of Rule 16-112 NMRA of the Rules of Professional Conduct and subject to the conditions stated in Paragraph B of Rule 16-112 NMRA.

E. **"Matter" defined.** As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 16-107 NMRA of the Rules of Professional Conduct. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this rule. See Paragraph E of Terminology of the Rules of Professional Conduct for the definition of "informed consent".

[2] Subparagraphs (1) and (2) of Paragraph A, and Subparagraph (1) of Paragraph D restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 16-110 NMRA of the Rules of Professional Conduct is not applicable to the conflicts of interest addressed by this rule. Rather, Paragraph B sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, Paragraph D does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Subparagraph (2) of Paragraph A and Subparagraph (2) of Paragraph D apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office

for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under Paragraph A. Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by Paragraph D. As with Subparagraph (1) of Paragraph A and Subparagraph (1) of Paragraph D, Rule 16-110 NMRA of the Rules of Professional Conduct is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in Paragraph B are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in Subparagraph (2) of Paragraph A and Subparagraph (2) of Paragraph D to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by Paragraph D, the latter agency is not required to screen the lawyer as Paragraph B requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules. See Committee Commentary to Rule 16-113 NMRA of the Rules of Professional Conduct.

[6] Paragraphs B and C contemplate a screening arrangement. See Paragraph K of Terminology of the Rules of Professional Conduct (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph C operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs A and D do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 16-107 NMRA of the Rules of Professional Conduct and is not otherwise prohibited by law.

[10] For purposes of Paragraph E of this rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties and the time elapsed.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, changed the title from "Successive government and private employment" to the current title; in Paragraph A, deleted the provision which prohibited a lawyer from representing a private client in a matter in which the lawyer participated as a public officer or employee unless the government agency consented and added Subparagraphs (1) and (2); in Paragraph B, added the paragraph letter and title; added the introductory provision which applies Paragraph B to situations in which a lawyer is disqualified under Paragraph A; relettered former Paragraph B as Paragraph C; in Paragraph C, added the second sentence which defines "confidential government information"; relettered Paragraph C as Paragraph D; in Paragraph D, added Subparagraph (1); in Item (i) of Subparagraph (2) of Paragraph D, deleted the language which created an exception when under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter and added the exception when the government agency gives its informed consent in writing; in Item (ii) of Subparagraph (2) of Paragraph D, added the exception for a lawyer serving as a law clerk; relettered Paragraph D as Paragraph E; and deleted former Paragraph E which defined "confidential government information", Paragraph F which defined "screened", and Paragraph G which prohibited a lawyer in private practice from advocating before a governmental body at a time the lawyer is representing the governmental body.

Subsequent government employment. — *State v. Chambers*, 86 N.M. 383, 524 P.2d 999 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974) is expressly overruled to the extent that it can be read as always requiring disqualification of an entire district attorney's office from prosecuting a defendant solely on the ground that one employee of the office had worked for defendant on the same matter. When the disqualified employee is effectively screened from any participation in the prosecution of the

defendant, the district attorney's office may, in general, proceed with the prosecution. *State v. Pennington*, 115 N.M. 372, 851 P.2d 494 (Ct. App. 1993).

Application to prosecution of former criminal client. — This rule does not apply to a prosecutor prosecuting a defendant whom she previously defended while in private practice, unless the subject of the prosecution is the same matter for which she previously defended him; instead, Rule 16-109 applies to such a situation. *State v. Barnett*, 1998-NMCA-105, 125 N.M. 739, 965 P.2d 323.

Construction with 10-16-8 NMSA 1978. — This rule and Subsection C of 10-18-8 NMSA 1978, prohibiting an attorney, for a period of one year, from representing a client for pay in any matter in which the attorney appears before the attorney's former government agency employer, prohibit different types of conduct and are not in conflict. *Ortiz v. Taxation & Revenue Dep't*, 1998-NMCA-027, 124 N.M. 677, 954 P.2d 109.

16-112. Former judge, arbitrator, mediator or other third-party neutral.

A. Subsequent representation in related matters. Except as stated in Paragraph D, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

B. Negotiation for employment. A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer or arbitrator may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

C. Imputation of conflict to firm; screening. If a lawyer is disqualified by Paragraph A, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

D. Arbitrator. An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] This rule generally parallels Rule 16-111 NMRA of the Rules of Professional Conduct. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. *Compare* Committee Commentary to Rule 16-111 NMRA of the Rules of Professional Conduct. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other para-judicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto". Although phrased differently from this rule, those rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Paragraphs E and B of Terminology of the Rules of Professional Conduct. Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 16-204 NMRA of the Rules of Professional Conduct.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 16-106 NMRA of the Rules of Professional Conduct, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, Paragraph C provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Paragraph K of Terminology of the Rules of Professional Conduct. Subparagraph (1) of Paragraph C does not prohibit the screened lawyer from receiving a salary or partnership share

established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added "mediator or other third-party neutral" to the title; in Paragraph A, added the language which prohibits a lawyer from representing anyone in a matter in which the lawyer participated substantially as an arbitrator, mediator or other third-party neutral unless all parties consent in writing; in Paragraph B, added the language which prohibits a lawyer from negotiating for employment with any person who is involved in a matter in which the lawyer is participating as an arbitrator, mediator or other third-party neutral; changed the title of Paragraph D from "Representation by firm" to the current title; in Subparagraph (1) of Paragraph C, added "timely"; and in Subparagraph (2) of Paragraph C, added "parties and any" and "them".

16-113. Organization as client.

A. **Generally.** A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

B. **Acting in best interest of organization.** If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to a higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

C. **Authority to reveal information.** Except as provided in Paragraph D of this rule, if:

(1) despite the lawyer's efforts in accordance with Paragraph B the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law; and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 16-106 NMRA of the Rules of Professional Conduct permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

D. Exception to authority to reveal information. Paragraph C of this rule shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

E. Notice of discharge or withdrawal. A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraphs B or C of this rule, or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

F. Identity of client. In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

G. Personal representation of officer or employee. A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 16-107 NMRA of the Rules of Professional Conduct. If the organization's consent to the dual representation is required by Rule 16-107 NMRA of the Rules of Professional Conduct, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors,

employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Committee Commentary apply equally to unincorporated associations. "Other constituents" as used in this commentary means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 16-106 NMRA of the Rules of Professional Conduct. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 16-106 NMRA of the Rules of Professional Conduct. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 16-106 NMRA of the Rules of Professional Conduct.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph B makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Paragraph F of Terminology of the Rules of Professional Conduct, knowledge can be inferred from circumstances and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under Paragraph B, the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 16-113 NMRA of the

Rules of Professional Conduct to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph B also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this rule are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under Rules 16-108, 16-116, 16-303 or 16-401 NMRA of the Rules of Professional Conduct. Paragraph C of this rule supplements Paragraph B of Rule 16-106 NMRA of the Rules of Professional Conduct by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Subparagraphs (1) through (6) of Paragraph B of Rule 16-106 NMRA of the Rules of Professional Conduct. Under Paragraph C the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Subparagraphs (2) and (3) of Paragraph B of Rule 16-106 NMRA of the Rules of Professional Conduct may permit the lawyer to disclose confidential information. In such circumstances Paragraph D of Rule 16-102 NMRA of the Rules of Professional Conduct may also be applicable, in which event, withdrawal from the representation under Subparagraph (1) of Paragraph A of Rule 16-116 NMRA of the Rules of Professional Conduct may be required.

[7] Paragraph D makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in Paragraph C does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraph B or C, or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. See Scope of the Rules of Professional Conduct. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This rule does not limit that authority. See Scope of the Rules of Professional Conduct.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph G recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 16-107 NMRA of the Rules of Professional Conduct governs who should represent the directors and the organization.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph B, added the last sentence which requires a lawyer for an organization to report matters that are not in the best interest of the organization to the highest authority who can act on behalf of the organization; and deleted the former list of factors which the lawyer should consider in determining how to proceed and measures to be taken to minimize disruption of the organization and the risk of revealing information to persons outside the organization; deleted former Paragraph C which permitted the lawyer to resign from an organization when the highest authority in the organization insists on an act or refusal to act that is in violation of law and that is likely to injure the organization; added new Paragraphs C, D and E; relettered former Paragraph D as Paragraph F; in Paragraph F, changed "it is apparent" to "the lawyer knows or reasonably should know"; and relettered former Paragraph E as Paragraph G.

16-114. Client with diminished capacity.

A. **Client-lawyer relationship.** When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

B. **Protective action.** When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

C. Protected information. Information relating to the representation of a client with diminished capacity is protected by Rule 16-106 NMRA of the Rules of Professional Conduct. When taking protective action pursuant to Paragraph B of this rule, the lawyer is impliedly authorized under Paragraph A of Rule 16-106 NMRA of the Rules of Professional Conduct to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under Paragraph B, must look to the client and not family members to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward

and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Paragraph D of Rule 16-102 NMRA of the Rules of Professional Conduct.

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in Paragraph A because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then Paragraph B permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision, the substantive fairness of a decision and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to

the representation is protected by Rule 16-106 NMRA of the Rules of Professional Conduct. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to Paragraph B, the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, Paragraph C limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order 08-8300-29, effective November 3, 2008, changed the title from "Client under a disability" to the current title; deleted former Paragraph B which provided that a lawyer may seek appointment of a guardian or conservator or take other protective action when the lawyer believes the client cannot act in the client's own interest; and added new Paragraphs B and C.

Children's court's failure to appoint guardian not jurisdictional. — In a proceeding to terminate a minor mother's parental rights, the failure of the children's court to appoint a guardian ad litem for the mother did not deprive the court of jurisdiction since the court

appointed counsel to represent her pursuant to Rule 1-017C NMRA. State ex rel. Children, Youth & Families Dep't v. Lilli L., 1996-NMCA-014, 121 N.M. 376, 911 P.2d 884.

Dual role of guardian ad litem. — The dual role of a guardian ad litem to represent the best interests of a child while also presenting the child's wishes to the court even if they conflict with the position of the guardian ad litem conforms to the requirements of the Rules of Professional Conduct. State ex rel. Children, Youth & Families Dep't v. Esperanza M., 1998-NMCA-039, 124 N.M. 735, 955 P.2d 204.

16-115. Safekeeping property.

A. Holding another's property separately. A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five (5) years after termination of the representation.

B. Client trust account deposits; discretionary. A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

C. Client trust account deposits; mandatory. A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

D. Notification of receipt of funds or property. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

E. Severance of interest. When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

[As amended, effective February 15, 1988; and effective January 1, 1990; March 4, 1999; July 31, 2000; April 1, 2002; as amended by Supreme Court Order No. 08-8300-25, effective January 1, 2009.]

ANNOTATIONS

COMMITTEE COMMENTARY

[1] For recordkeeping requirements related to trust accounts, see Rule 17-204 NMRA. For specific requirements related to mandatory IOLTA accounts, see Rule 24-109 NMRA. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., Rule 17-204 NMRA of the Rules Governing Discipline and ABA Model Financial Recordkeeping Rule.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, Paragraph B provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds belongs to the lawyer.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph E also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

[Adopted by Supreme Court Order No. 08-8300-25, effective January 1, 2009.]

The 1999 amendment, effective March 4, 1999, substituted "Center for Civic Values ('center')" for "New Mexico State Bar Foundation ('foundation')" in Paragraph D(5)(a) and made related substitutions throughout Paragraph D.

The 2000 amendment, effective July 31, 2000, inserted "which shall hold such funds as trustee for the benefit of the programs set forth below" at the end of Paragraph D(5)(a).

The 2002 amendment, effective April 1, 2002, in Paragraph D, inserted the exception at the beginning and added the last sentence; in Paragraph D(1), substituted "interest income from an IOLTA" for "earning from such an"; added Paragraphs D(7) and D(8) and inserted references to "IOLTA" in Paragraphs D(2) through D(5).

The 2008 amendment, approved by Supreme Court Order No. 08-8300-25, effective January 1, 2009, in Paragraph A, deleted the former provision that records be kept in a manner that conforms to Rule 17-204 NMRA and the provision that records be kept for five years after termination of representation "of the client in the matter" or the termination of the fiduciary or trust relationship; added new Paragraphs B and C; relettered former Paragraph B as Paragraph D; relettered former Paragraph C as Paragraph E; in Paragraph E, changed "both the lawyer and another person" to "two or more persons (one of whom may be the lawyer)"; deleted the requirement that property be kept separate until there is an accounting and severance of interests; deleted the sentence which required a lawyer to keep separate any property that is the subject of a dispute until the dispute is settled and added the last sentence; and deleted former Paragraph D which provided for pooled interest-bearing trust accounts, former Paragraph E which provided for separate interest-bearing trust accounts, and former Paragraph F which provided for the determination of whether a client's funds are nominal amounts.

Misappropriation misuse of funds distinguished. — Both misappropriation and conversion of funds require intentional wrongdoing. Misuse of client funds occurs when a lawyer withdraws client funds for an improper purpose, but does so in error, without intent to deprive the client of the funds. In the Matter of Yalkut, 2008-NMSC-009, 143 N.M. 387, 176 P.3d 1119.

Misuse of funds. — Claim that a flat fee or retainer was charged that is nonrefundable will not suffice to justify a failure to deposit unearned client funds in a trust account, a withdrawal of client funds from a trust account to pay fees that have not yet been

earned, or a failure to promptly return unearned funds to a client upon termination of the representation. In re Dawson, 2000-NMSC-024, 129 N.M. 369, 8 P.3d 856.

Personal use of client's funds. — Attorney was subject to an indefinite period of suspension (of not less than five years) since he had used a client's funds as collateral for a personal loan and had invested client's funds in a corporation in which he had an ownership interest, even though he made full restitution and fully acknowledged his misconduct. In re Thompson, 105 N.M. 257, 731 P.2d 953 (1987).

Since attorney failed to pay complainant-physician certain funds reportedly withheld by attorney for physician from the settlement funds of three of attorney's clients, who were also physician's patients, and attorney later informed physician that he had spent the clients' funds but would be able to pay physician as soon as he received money in another settlement, and never paid physician, attorney violated this rule in that he failed to hold his clients' funds separately from his own and failed to appropriately safeguard such funds; failed to promptly notify a third person, the physician, of his receipt of the funds in which physician had an interest, and he failed to promptly deliver the funds physician was entitled to receive; and failed to keep the funds belonging to another separately, when both he and another person claimed an interest in those funds, until there was a proper resolution or severance of those interests. In re C'De Baca, 109 N.M. 151, 782 P.2d 1348 (1989).

Disbarment was the appropriate sanction since defendant commingled his own monies with a trust account, issued checks to clients for whom no monies were on deposit, issued checks against insufficient funds and transferred monies from the trust account to his own accounts. In re Rawson, 113 N.M. 758, 833 P.2d 235 (1992).

Removal of escrowed funds to own use constituted conversion of clients' funds in violation of this rule. In re Arrieta, 105 N.M. 418, 733 P.2d 866 (1987).

Attorney was guilty of misuse of trust funds when, for a short period of time, he withdrew client funds amounting to more than he had earned as of that date; a two-year deferred suspension, with supervised probation, was the appropriate sanction. In re Cannain, 1997-NMSC-001, 122 N.M. 710, 930 P.2d 1162.

Attorney who stole approximately \$62,500 from various clients by forging his clients' names on settlement checks and withdrawal slips on accounts maintained by clients was disbarred. In re Wilson, 108 N.M. 378, 772 P.2d 1301 (1989).

Fraud, deceit or misrepresentation and improperly withholding funds due client violated former Canon 9, regarding avoiding even the appearance of professional impropriety. In re Runyan, 89 N.M. 172, 548 P.2d 452 (1976).

Suspension from practice for gross mishandling of trust funds. — See In re Privette, 92 N.M. 32, 582 P.2d 804 (1978).

This rule and Rule 17-204 NMRA set forth in detail exactly what an attorney must do to be in compliance with the requirements for maintaining attorney trust accounts. An attorney who produced ledger sheets which did not contain the information required to be recorded and who refused to cooperate with disciplinary counsel in violation of Rule 16-803 NMRA was subject to suspension. An attorney's failure to properly maintain an attorney trust account will be viewed as a transgression of the most serious nature. In re Ruybalid, 118 N.M. 587, 884 P.2d 478 (1994); In re Martin, 1999-NMSC-022, 127 N.M. 321, 980 P.2d 646.

Failure to maintain trust account. — Failure of an attorney to properly maintain his trust account records constituted a violation of this rule and Rule 16-804H NMRA and, coupled with other violations, such failure warranted disbarment. In re Greenfield, 1996-NMSC-015, 121 N.M. 633, 916 P.2d 833.

Funds received for liquor license. — Attorney's conversion to his own use of money received from a client to have a liquor license transferred to her name violated Rules 1-102, 6-101, 7-101 and 9-102 of the Code of Professional Responsibility (now see Rules 16-102, 16-104, 16-115 and 16-804 of the Rules of Professional Conduct). In re Gallegos, 104 N.M. 496, 723 P.2d 967 (1986).

Misappropriation of funds warranted disbarment. — Attorney's misappropriation of client funds and failure to cooperate with disciplinary counsel warranted disbarment. In re Krob, 1997-NMSC-037, 123 N.M. 652, 944 P.2d 881.

Attorney was disbarred where he misappropriated client funds by means of an elaborate scheme involving the opening of a trust account in his own name without informing his firm or reporting the account to the disciplinary board. In re Reynolds, 2002-NMSC-002, 131 N.M. 471, 39 P.3d 136.

Assistant cashing check without documentation. — To allow one's assistant to simply cash a check made payable to a client with no documentation of the transaction is a violation of this rule. In re Martinez, 107 N.M. 171, 754 P.2d 842 (1988).

Attorney suspended indefinitely for failing to preserve identity of client's funds. — See In re Harrison, 103 N.M. 537, 710 P.2d 731 (1985).

Six-month suspension and other penalties warranted since attorney accepted one-half of fee and failed to represent client, allowing default to be entered against client. In re Trujillo, 110 N.M. 180, 793 P.2d 862 (1990).

One-year suspension warranted. — Actions of an attorney involving false statements of material fact to a bankruptcy court, representation of a client in bankruptcy when owed money by the client, deposit of monies in his operating account instead of his trust account, failure to produce required records for his trust account, and misrepresentations to the Internal Revenue Service when acting in his capacity as a

CPA, warranted suspension. In re Archuleta, 1996-NMSC-039, 122 N.M. 52, 920 P.2d 517.

Attorney's actions warranted a one-year suspension since he made misrepresentations to a court, failed to return unearned fees, failed to render an accounting to a client and acted otherwise to prejudice the administration of justice. In re Arrieta, 104 N.M. 389, 722 P.2d 640 (1986).

Probated suspension from practice of law warranted. — See In re Gabriel, 110 N.M. 691, 799 P.2d 127 (1990); In re Moore, 2000-NMSC-019, 129 N.M. 217, 4 P.3d 664.

Disbarment was warranted, despite mitigating factors, since the attorney converted client funds; engaged in conduct involving deceit, dishonesty and misrepresentation; failed to hold clients' funds separate from his own; failed to notify clients of the receipt of funds belonging to them; failed to maintain required trust account records; failed to protect clients' interests at the termination of the representation; failed to advise clients of the status of their legal matters; engaged in conduct prejudicial to the administration of justice; and engaged in conduct adversely affecting his fitness to practice law. In re Kelly, 119 N.M. 807, 896 P.2d 487 (1995).

Disbarment was justified because of the inadequacy of an attorney's representation of clients in violation of Rules 16-101, 16-102(A), 16-103 and 16-104(A) NMRA, by his business transaction and trust account violations of this rule and Rules 16-108 and 16-116(D) NMRA, and violations of Rule 16-801 NMRA and other rules relating to disciplinary proceedings. In re Darnell, 1997-NMSC-025, 123 N.M. 323, 940 P.2d 171.

Disbarment of an attorney for 20 months, with automatic reinstatement on a probationary basis, was warranted based on the necessary intervention in his law practice because he was abusing crack cocaine and on his admission that during his drug addiction he had misappropriated money from his attorney trust account in violation of Paragraph A of this rule, by failing to safeguard a client's property, and Paragraphs C and H of Rule 16-804, by engaging in conduct involving dishonesty, and conduct adversely reflecting upon one's fitness to practice law. In re Zamora, 2001-NMSC-011, 130 N.M. 161, 21 P.3d 30.

Disbarment is appropriate sanction for attorney's conversion of his clients' funds to his own use. — See In re Duffy, 102 N.M. 524, 697 P.2d 943 (1985).

Restitution generally irrelevant in determining punishment. — Generally, when an attorney engages in intentional conduct involving dishonesty, he or she is disbarred. This is true even where restitution has been made to persons injured by the lawyer's misconduct. In re Hartley, 107 N.M. 376, 758 P.2d 790 (1988).

Indefinite suspension warranted. In re Chavez, 1996-NMSC-059, 122 N.M. 504, 927 P.2d 1042.

Two-year suspension warranted. In re Reid, 1996-NMSC-060, 122 N.M. 517, 927 P.2d 1055.

Actions deemed violations of this rule. — See In re Hamar, 1997-NMSC-048, 123 N.M. 795, 945 P.2d 1013; In re Chavez, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct, 69 A.L.R.4th 974.

16-116. Declining or terminating representation.

A. Mandatory disqualification. Except as stated in Paragraph C, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

B. Permissive withdrawal. Except as stated in Paragraph C, a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

C. Representation required. A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

D. Orderly termination. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Paragraph C of Rule 16-102 NMRA, and Rule 16-605 NMRA of the Rules of Professional Conduct; see *also* Committee Commentary to Rule 16-103 NMRA of the Rules of Professional Conduct.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See *also* Rule 16-602 NMRA of the Rules of Professional Conduct. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be

mindful of their obligations both to clients and to the court under Rules 16-106 and 16-303 NMRA of the Rules of Professional Conduct.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 16-114 NMRA of the Rules of Professional Conduct.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 16-115 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Subparagraph (4) of Paragraph B, changed "pursuing an objective" to "taking action" and changed "imprudent" to "with which the lawyer has a fundamental disagreement" and added the first sentence in Paragraph C.

Protection of client upon withdrawal. — An attorney's apparent failure to complete several cases, to take steps to insure that the interests of her clients were protected upon her withdrawal from their cases, and to promptly refund any unearned portions of fees paid in advance, as well as her lack of cooperation with the disciplinary counsel, constitute conduct violative of the professional rules warranting an indefinite suspension from the practice of law. In re Roth, 105 N.M. 255, 731 P.2d 951 (1987).

If a physical condition is chronic and materially impairs the lawyer's ability to represent a client, the attorney is obligated by Paragraph A to decline to represent a potentially new client, or where representation has commenced, withdraw from representation, and if the lawyer fails to act appropriately, not only will the physical condition not be a defense to the charges or a mitigating factor, it may be part of the proof that ethical violations occurred. In re Martin, 1999-NMSC-022, 127 N.M. 321, 980 P.2d 646.

Abandoning office. — An attorney who failed to pursue representation of clients and who abandoned his office and all forms of communication with his clients was subject to a one year suspension. In re Fandey, 118 N.M. 590, 884 P.2d 481 (1994).

Rule violated. — See In re Martinez, 107 N.M. 171, 754 P.2d 842 (1988); In re Canevaro, 1997-NMSC-033, 123 N.M. 576, 943 P.2d 1029.

Failure to withdraw. — Attorney who took case on a contingency arrangement sanctioned for fees and costs in the amount of \$26,769.80 for failing to settle a case at the request of client or withdraw as attorney in the case. Vesco v. Snedecker, 236 F. Supp. 2d 1272 (D.N.M. 2002).

Indefinite suspension warranted. — Indefinite suspension was warranted because of an attorney's violation of Paragraph (D) of this rule and other provisions, such as Rule 16-101, by failing to provide competent representation; Rule 16-103, by failing to act with diligence and promptness in representing a client; Rule 16-104, by failing to keep his client informed about the status of a matter and failing to respond to requests for information; Rule 16-302, by failing to expedite litigation consistent with the interests of his client; and Rule 16-804(C), (D) and (H), by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, engaging in conduct prejudicial to the administration of justice, and by engaging in conduct that adversely reflects on his fitness to practice law. In re Lally, 1999-NMSC-003, 126 N.M. 566, 973 P.2d 243.

Indefinite suspension was warranted because an attorney violated Paragraph D by failing to timely surrender papers and property to which a client was entitled and by failing to timely refund any advance payment of fee that had not been earned. The attorney also violated the following rules: Rule 16-101 NMRA, by failing to provide

competent representation; Rule 16-102A NMRA, by failing to abide by a client's decisions concerning the objectives of the representation; Rule 16-103 NMRA, by failing to act with reasonable diligence and promptness in representing a client; Rule 16-104A NMRA, by failing to keep a client reasonably informed about the status of a matter and by failing to promptly comply with reasonable requests for information; Rule 16-804D and H NMRA, by engaging in conduct that is prejudicial to the administration of justice and conduct that adversely reflects on his fitness to practice law; Rule 16-801B NMRA, by failing to respond to lawful requests for information from the office of disciplinary counsel; and Rule 16-803D NMRA, by failing to cooperate with disciplinary counsel in the course of the investigation. In re Carlton, 2000-NMSC-001, 128 N.M. 419, 993 P.2d 736.

Disbarment was warranted, despite mitigating factors, since the attorney converted client funds; engaged in conduct involving deceit, dishonesty and misrepresentation; failed to hold clients' funds separate from his own; failed to notify clients of the receipt of funds belonging to them; failed to maintain required trust account records; failed to protect clients' interests at the termination of the representation; failed to advise clients of the status of their legal matters; engaged in conduct prejudicial to the administration of justice; and engaged in conduct adversely affecting his fitness to practice law. In re Kelly, 119 N.M. 807, 896 P.2d 487 (1995).

Disbarment was justified because of the inadequacy of an attorney's representation of clients in violation of Rules 16-101, 16-102(A), 16-103 and 16-104(A) NMRA, by his business transaction and trust account violations of Paragraph (D) of this rule and Rules 16-108 and 16-115 NMRA, and violations of Rule 16-801 NMRA and other rules relating to disciplinary proceedings. In re Darnell, 1997-NMSC-025, 123 N.M. 323, 940 P.2d 171.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 173 to 176.

Legal malpractice in connection with attorney's withdrawal as counsel, 6 A.L.R.4th 342.

Circumstances under which attorney retains right to compensation notwithstanding voluntary withdrawal from case, 53 A.L.R.5th 287.

7A C.J.S. Attorney and Client §§ 221, 222.

16-117. Sale of a law practice.

A lawyer or a law firm may sell or purchase a law practice or an area of practice, including good will, if the following conditions are satisfied:

A. The seller ceases to engage in the private practice of law or in the area of practice that has been sold in the jurisdiction in which the practice has been conducted;

B. The entire practice or the entire area of practice is sold to one or more lawyers or law firms;

C. The seller gives written "notice" to each of the seller's clients for whom the attorney is performing ongoing legal service at the time of the sale or for whom the attorney has performed any legal services within twelve (12) months prior to the date of sale regarding:

(1) the proposed sale and that the seller has ceased to engage in the private practice of law or in the area of practice that has been sold;

(2) the name and address of the purchaser;

(3) the client's right to retain other counsel or to take possession of the file;
and

(4) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of receipt of the notice;

D. If the client cannot be notified by written notice, the representation of that client may be transferred to the purchaser only:

(1) upon entry of an order authorizing the transfer by a court having jurisdiction; or

(2) by publishing notice once a week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the seller's principal office is located setting forth the matters specified in Subparagraphs (1), (2), (3) and (4) of Paragraph C of this rule, but not containing the name of the client. The published notice shall also contain the address where any person entitled to do so may object to the proposed transfer or claim the files within sixty (60) days after the final date of publication; and

E. The fees charged clients shall not be increased by reason of the sale.

[Approved, effective February 6, 2002; as amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this rule, when a lawyer or an entire firm ceases to practice or ceases to practice in an area of law and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice. See Rules 16-504 and 16-506 NMRA of the Rules of Professional Conduct.

Termination of Practice by the Seller

[2] The requirement that all of the private practice or all of an area of practice be sold is satisfied if the seller in good faith makes the entire practice or the area of practice available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of a change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The rule permits a sale of an entire practice upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

[5] This rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Paragraph E of Rule 16-105 NMRA of the Rules of Professional Conduct.

Sale of Entire Practice or Entire Area of Practice

[6] The rule requires that the seller's entire practice or an entire area of practice be sold. The prohibition against the sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 16-106 NMRA of the Rules of Professional Conduct than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within sixty (60) days. If nothing is heard from the client within that time, consent to the sale is presumed. If actual written notice cannot be given, the seller may file with the court or may publish a constructive notice. If no objection is received within sixty (60) days of the final publication, consent is presumed. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[8] A lawyer or law firm ceasing to practice or ceasing to practice in an area of law cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. The requirement of actual notice as well as constructive notice suffices.

[9] All the 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.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently, see Rule 16-101 NMRA of the Rules of Professional Conduct; the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to, see Rule 16-107 NMRA of the Rules of Professional Conduct (regarding conflicts) and Paragraph E of

Terminology of the Rules of Professional Conduct (for the definition of "informed consent"); and the obligation to protect information relating to the representation, see Rule 16-106 NMRA, Rule 16-109 NMRA and Paragraph B of Rule 16-108 NMRA of the Rules of Professional Conduct (regarding conflicts).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. See Rule 16-116 NMRA of the Rules of Professional Conduct.

Applicability of the Rule

[13] This rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements and a sale of tangible assets of a law practice do not constitute a sale or purchase governed by this rule.

[15] This rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, changed "or a portion thereof" to "or an area of practice" in the introductory sentence; deleted former Paragraph A which required 60 day notice of the sale to the seller's clients and which specified the content of the notice; deleted former Paragraph B which required the publication of a notice of the sale and specified the content of the notice; deleted former Paragraph C which provided for the fees that could be charged by the purchaser; deleted former Paragraph D which provided that the lawyers participating in the sale were subject to the Rules of Professional Conduct that apply when a lawyer terminates representation of a client or involves another lawyer in the representation; and added new Paragraphs A through E.

16-118. Duties to prospective client.

A. **Definition of "prospective client"**. A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

B. Confidential information. Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 16-109 NMRA of the Rules of Professional Conduct would permit with respect to information of a former client.

C. Certain representations prohibited. A lawyer subject to Paragraph B of this rule shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in Paragraph D of this rule. If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in Paragraph D.

D. When representation is permitted. When the lawyer has received disqualifying information as defined in Paragraph C, representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(a) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(b) written notice is promptly given to the prospective client.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

COMMITTEE COMMENTARY

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the

possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of Paragraph A.

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph B prohibits the lawyer from using or revealing that information, except as permitted by Rule 16-109 NMRA of the Rules of Professional Conduct, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 16-107 NMRA of the Rules of Professional Conduct, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Paragraph E of Terminology of the Rules of Professional Conduct for the definition of "informed consent". If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under Paragraph C, the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under Paragraph C, the prohibition in this rule is imputed to other lawyers as provided in Rule 16-110 NMRA of the Rules of Professional Conduct, but under Subparagraph (1) of Paragraph D, imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of Subparagraph (2) of Paragraph D are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Paragraph K of Terminology of the Rules of Professional Conduct (requirements for screening procedures). Sentence (a) of Subparagraph (2) of Paragraph D does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that

lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 16-101 NMRA of the Rules of Professional Conduct. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 16-115 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ARTICLE 2

Counselor

16-201. Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical

considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 16-104 NMRA of the Rules of Professional Conduct may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 16-104 NMRA of the Rules of Professional Conduct to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate an investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-202. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 08-8300-29, Rule 16-202 NMRA, relating to intermediaries between clients, was withdrawn effective November 3, 2008.

16-203. Evaluations for use by third persons.

A. **Limitations.** A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making

the evaluation is compatible with other aspects of the lawyer's relationship with the client.

B. Client consent required. When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

C. Protected information. Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 16-106 NMRA of the Rules of Professional Conduct.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 16-102 NMRA of the Rules of Professional Conduct. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties, for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency, for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer or by special counsel employed by the government is not an evaluation as that term is used in this rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to the client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the non-cooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this rule. See Rule 16-401 NMRA of the Rules of Professional Conduct.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 16-106 NMRA of the Rules of Professional Conduct. In many situations, providing an evaluation to a third party poses no significant risk to the client. Thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Paragraph A of Rule 16-106 NMRA of the Rules of Professional Conduct. Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Paragraph A of Rule 16-106 NMRA and Paragraph E of Terminology of the Rules of Professional Conduct.

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, deleted Subparagraph (2) of Paragraph A which required the client, after consultation, to consent to a lawyer providing an evaluation of a matter to someone other than the client; added a new Paragraph B; and relettered former Paragraph B as Paragraph C.

16-204. Lawyer serving as third-party neutral.

A. **Definition of "third-party neutral".** A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

B. **Explanation of lawyer's role.** A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

COMMITTEE COMMENTARY

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision-maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain

types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike non-lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, Paragraph B requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 16-112 NMRA of the Rules of Professional Conduct.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, see Paragraph M of Terminology of the Rules of Professional Conduct, the lawyer's duty of candor is governed by Rule 16-303 NMRA of the Rules of Professional Conduct. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 16-401 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ARTICLE 3

Advocate

16-300. Prohibition against invidious discrimination.

In the course of any judicial or quasi-judicial proceeding before a tribunal, a lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, age, or sexual orientation against the judge, court personnel, parties, witnesses, counsel or others. This rule does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age or sexual orientation is material to the issues in the proceeding.

[Adopted, effective January 1, 1994.]

ANNOTATIONS

Compiler's notes. — The old State Bar Commentary has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] For purposes of this rule, the term "judicial or quasi-judicial proceeding" shall refer to any and all courts, regardless of their jurisdiction or location, as well as any governmental agency, board, commission, or department before whom the lawyer is engaged in the practice of law. The rule also encompasses arbitration or mediation proceedings, whether or not court ordered.

[2] For purposes of this rule, the term "proceeding" shall mean any judicial or administrative process relating to the adjudication or resolution of legal disputes (including, but not limited to, discovery procedures, arbitration and mediation), rule making, licensing, lobbying, the imposition or withholding of sanctions or the granting or withholding of relief. For purposes of this rule, the term "sexual orientation" shall mean heterosexuality, bisexuality or homosexuality.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-301. Meritorious claims and contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added the requirement that a defense or claim must be based in law and fact.

Requirement of "good faith argument". — Although this rule recognizes that the law is not static, and that "account must be taken of the law's ambiguities and potential for change" a case upon which a lawyer relies to argue for the extension, modification, or reversal of existing law, must say what the lawyer says it says and, when relying upon an exception to a general rule of law, the position the lawyer asserts must either come within the exception, or provide a cogent argument for broadening the exception. In re Richards, 1999-NMSC-030, 127 N.M. 716, 986 P.2d 1117.

There is no exception to this rule for occasions when an attorney might wish to pursue an invalid claim simply to see whether the opposing party might offer something in the way of settlement. In re Bloomfield, 1996-NMSC-017, 121 N.M. 605, 916 P.2d 224.

Meritless defense. — In a personal injury action for damages resulting from a pharmacist filling a child's prescription for Ritalin with methadone, where attorney, who

had prior knowledge that her client's records indicated that the prescription at issue had been mis-filled, who recommended that the client admit liability, and who relied on representations from the pharmacist, pharmacy manager and out-of-state counsel for the pharmacy that the missing drugs could be accounted for and followed their advise to investigate other possible sources for the methadone that injured the plaintiff rather than using the attorney's independent judgment, and who proceeded to defend the case that was contrary to the evidence the attorney had found and that the attorney had not provided in discovery, the attorney pursued a meritless defense. *In re Estrada*, 2006-NMSC-047, 140 N.M. 492, 143 P.3d 731.

16-302. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

Duty of attorney to initiate essential steps in action. — When one contracts with an attorney for legal services, he or she is entitled to expect that the attorney will take action of some sort, and if more information is needed from the client in order to proceed, it is the attorney's responsibility to notify the client; it is not the client's responsibility to initiate all inquiries to the attorney in order to insure that essential steps are being taken. Failure by an attorney to do so violates this and other rules. *In re Carrasco*, 106 N.M. 294, 742 P.2d 506 (1987).

Attorney's failure to file an answer to a URESA action filed against his client violated Rules 6-101(A)(3) and 7-101(A)(1)-(3) of the Code of Professional Responsibility (now see Rules 16-103 and 16-302 of the Rules of Professional Conduct). *In re Gallegos*, 104 N.M. 496, 723 P.2d 967 (1986).

Attorney's failure to docket an appeal and lying to his client for seven years about the status of the appeal violated numerous rules and warranted indefinite suspension from practice. In re Roberts, 119 N.M. 769, 895 P.2d 669 (1995).

Indefinite suspension warranted. — Indefinite suspension was warranted because of an attorney's violation of this rule and other provisions, such as Rule 16-101, by failing to provide competent representation; Rule 16-103, by failing to act with reasonable diligence and promptness in representing a client; Rule 16-104, by failing to keep his client reasonably informed about the status of a matter and failing to respond to reasonable requests for information; Rule 16-116 D, by failing to surrender papers and property to which the client was entitled at the termination of the representation; and Rules 16-804 C, D and H, by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, engaging in conduct prejudicial to the administration of justice, and by engaging in conduct that adversely reflects on his fitness to practice law. In re Lally, 1999-NMSC-003, 126 N.M. 566, 973 P.2d 243.

Indefinite suspension was warranted because of attorney's violation of this rule and other provisions, such as Rule 16-101, by failing to provide competent representation; Rule 16-105, by charging an excessive fee; Rule 16-303 A(1), by making an untrue statement of material fact to a tribunal; Rule 16-304 D, by failing to comply with a discovery request by an opposing party; Rule 16-505 A, by practicing law in a jurisdiction where doing so violates regulations; and Rule 16-804 C, D and H, by engaging in conduct involving dishonesty, deceit, and misrepresentation, by engaging in conduct prejudicial to the administration of justice, and by engaging in conduct that adversely reflects upon his fitness to practice law. In re Righter, 1999-NMSC-009, 126 N.M. 730, 975 P.2d 343.

Rule violated. — See In re Dawson, 2000-NMSC-024, 129 N.M. 369, 8 P.3d 856.

Deferred suspension from practice for two years, subject to prescribed terms and conditions, was warranted for an attorney because his failure to properly pursue his client's criminal appeal violated this rule, by failing to make reasonable efforts to expedite the appeal, and the following rules: Rule 16-101, by failing to provide competent representation to his client; Rule 16-103, by failing to act diligently and promptly on his client's behalf; Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice; and Rule 16-804(H), by engaging in conduct which reflected adversely on his fitness to practice law. In re Neal, 2001-NMSC-007, 130 N.M. 139, 20 P.3d 121.

16-303. Candor toward the tribunal.

A. **Duties.** A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false; if a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal; a lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

B. Criminal conduct of client. A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

C. Compliance with rule. The duties stated in Paragraphs A and B continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 16-106 NMRA of the Rules of Professional Conduct.

D. Ex parte proceedings; lawyer's duty. In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

E. Limited entry of appearance; lawyer's duty. In all proceedings where a lawyer appears for a client in a limited manner, that lawyer shall disclose to the tribunal the scope of representation.

[As amended, effective March 15, 2001; as amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

CODE OF PROFESSIONAL CONDUCT COMMITTEE COMMENT

The purpose of Paragraph E of this rule is to permit lawyers to appear for clients in a limited manner and to alert the court and opposing counsel of that limited role.

In New Mexico courts, attorneys and self-represented litigants are held to the same standards. New Mexico courts are lenient with both attorneys and self-represented litigants when deemed appropriate so that cases may be decided on their merits. Attorneys may give technical assistance and, when not prohibited by the rules of the tribunal, may prepare, without attribution, papers for filing by a self-represented litigant without violating the duty of candor. Even though an attorney's role may be limited to drafting a single document, the attorney is, however, bound by all of the rules that

govern attorney conduct, including, but not limited to Rule 16-303(A)(1) NMRA (stating that an attorney shall not knowingly make a false statement of law or fact to a tribunal). *Caveat*: Current Federal practice prohibits the filing of anonymously drafted documents. See, e.g., *Duran v. Carris*, 238 F.3d 1268, 1271-73 (10th Cir. 2001).

[Revised, effective January 20, 2005.]

Compiler's notes. — The old ABA Committee Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Paragraph M of Terminology of the Rules of Professional Conduct for the definition of "tribunal". It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, Subparagraph (3) of Paragraph A requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. *Compare* Rule 16-301 NMRA of the Rules of Professional Conduct. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Paragraph D of Rule 16-102 NMRA of the Rules of Professional Conduct not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Paragraph D of Rule 16-102 NMRA, see the Committee Commentary to that rule. See *also* Committee

Commentary to Paragraph B of Rule 16-804 NMRA of the Rules of Professional Conduct.

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in Subparagraph (2) of Paragraph A, an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Subparagraph (3) of Paragraph A requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in Paragraphs A and B apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Paragraph F of Terminology of the Rules of Professional Conduct. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although Subparagraph (3) of Paragraph A only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony

or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 16-106 NMRA of the Rules of Professional Conduct. It is for the tribunal then to determine what should be done – making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process that the adversary system is designed to implement. See Paragraph D of Rule 16-102 NMRA of the Rules of Professional Conduct. Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, Paragraph B requires a lawyer to take reasonable

remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

***Ex Parte* Proceedings**

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision. The conflicting position is expected to be presented by the opposing party. However, in any *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Limited Entry of Appearance; Lawyer's Duty

[15] The purpose of Paragraph E of this rule is to permit lawyers to appear for clients in a limited manner and to alert the tribunal and opposing counsel of that limited role. In New Mexico courts, attorneys and self-represented litigants are held to the same standards. New Mexico courts are lenient with both attorneys and self-represented litigants when deemed appropriate so that cases may be decided on their merits. Attorneys may give technical assistance and, when not prohibited by the rules of the tribunal, may prepare, without attribution, papers for filing by a self-represented litigant without violating the duty of candor. Even though an attorney's role may be limited to drafting a single document, the attorney is, however, bound by all of the rules that govern attorney conduct, including, but not limited to Subparagraph (1) of Paragraph A of Rule 16-303 NMRA of the Rules of Professional Conduct, which states that an attorney shall not knowingly make a false statement of law or fact to a tribunal. Note, however, that current federal practice prohibits the filing of anonymously drafted documents. See, e.g., *Duran v. Carris*, 238 F.3d 1268, 1271-73 (10th Cir. 2001).

Withdrawal

[16] Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose

interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Paragraph A of Rule 16-116 NMRA of the Rules of Professional Conduct to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Paragraph B of Rule 16-116 NMRA of the Rules of Professional Conduct for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 16-106 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2001 amendment, effective March 15, 2001, added Paragraph E and added the Code of Professional Conduct Committee Comment preceding the ABA Comment.

The January 20, 2005 revision added the second paragraph of the Code of Professional Conduct Committee Comment.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Subparagraph (1) of Paragraph A, added the prohibition that a lawyer shall not fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; deleted former Subparagraph (2) of Paragraph A which provided that a lawyer shall not fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; relettered former Subparagraphs (3) and (4) of Paragraph A as Subparagraphs (2) and (3) respectively; in Subparagraph (3) of Paragraph A, added the provision that if the lawyer's client or a witness called by the lawyer has offered evidence and the lawyer knows the evidence to be false, the lawyer shall take reasonable remedial measures, including disclosure to the tribunal and the provision which permits a lawyer to refuse to offer evidence, other than the testimony of the defendant in a criminal matter, that the lawyer reasonably believes is false; added Paragraph B; relettered former Paragraph B as Paragraph C; in Paragraph C, added "and B"; and deleted former Paragraph C which permitted a lawyer to refuse to offer evidence the lawyer reasonably believes to be false.

Lawyers are officers of court and are always under obligation to be truthful to the court. *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 695 P.2d 483 (1985).

Public defenders are not excused from compliance with the Code of Professional Responsibility (now the Rules of Professional Conduct) even though paid with public funds. *State v. Martinez*, 97 N.M. 540, 641 P.2d 1087 (Ct. App. 1982).

Defense counsel's failure to call judge's attention to law not fundamental error. — The defense counsel's failure to call the judge's attention to law that would favor the

state if this were to be deemed a single, as opposed to a successive, prosecution, did not breach the defense counsel's professional duty of candor. This did not lead to fundamental error in the face of the prosecution's own nondisclosure of legal authority, when the state did not show the defense counsel was thinking in terms other than that of successive prosecution. *State v. Alingog*, 117 N.M. 756, 877 P.2d 562 (1994).

Disbarment for manufacturing evidence. — When an attorney, who is an officer of the court and whose duty is it to protect the integrity of the adversarial system, intentionally lies under oath and manufactures documents designed to achieve an advantage in litigation, he demonstrates a complete lack of fitness to practice law. *In re Gabell*, 115 N.M. 737, 858 P.2d 404 (1993).

Guidelines for conduct of trial by prosecutor. — See *State v. Diaz*, 100 N.M. 210, 668 P.2d 326 (Ct. App. 1983).

Comment during rebuttal argument held not improper. — Prosecutor's closing argument in rebuttal was not improper as asserting her opinion as to guilt of accused where prosecutor's argument was fair comment in rebuttal to defendant's argument. *State v. White*, 101 N.M. 310, 681 P.2d 736 (Ct. App. 1984).

Discussion of excluded conviction and possible federal offense constituted misconduct preventing fair trial. — When a prosecutor in jury argument brought up an excluded conviction and questioned about a possible federal offense involving credibility, such acts constituted misconduct. Inasmuch as the misconduct was purposeful and could not be considered as harmless or be rectified by admonitions from the trial court, the resultant error could not have been cured at the trial, and consequently defendant was denied a fair trial. *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct. App. 1978).

Censure and fine for false and misleading brief. — Attorney was publicly censured and fined \$1,000 for knowingly making false, misleading and inaccurate statements in a brief to the court of appeals in violation of this rule (former Rule 7-102). *In re Chakeres*, 101 N.M. 684, 687 P.2d 741 (1984).

Attorney knowingly making a false statement of material fact in a brief filed in the Court of Appeals for the purpose of deceiving the court warranted public censure. *In re Richards*, 1997-NMSC-035, 123 N.M. 579, 943 P.2d 1032.

One-year suspension warranted. — Actions of an attorney involving false statements of material fact to a bankruptcy court, representation of a client in bankruptcy when owed money by the client, deposit of monies in his operating account instead of his trust account, failure to produce required records for his trust account, and misrepresentations to the Internal Revenue Service when acting in his capacity as a CPA, warranted suspension. *In re Archuleta*, 1996-NMSC-039, 122 N.M. 52, 920 P.2d 517.

Indefinite suspension warranted. — Sixteen violations of nine rules governing professional responsibility, involving misrepresentation, neglect, improper fee-splitting, disrespect to various tribunals, and other conduct prejudicial to the administration of justice resulted in defendant's being suspended indefinitely from the practice of law. In re Quintana, 104 N.M. 511, 724 P.2d 220 (1986).

Indefinite suspension was warranted because of attorney's violation of Subparagraph A(1) this rule and other provisions, such as Rule 16-101, by failing to provide competent representation; Rule 16-105, by charging an excessive fee; Rule 16-302, by failing to expedite litigation; Rule 16-304 D, by failing to comply with a discovery request; Rule 16-505 A, by practicing law in a jurisdiction where doing so violates regulations; and Rule 16-804 C, D and H, by engaging in conduct involving dishonesty, deceit, and misrepresentation, by engaging in conduct prejudicial to the administration of justice, and by engaging in conduct that adversely reflects upon his fitness to practice law. In re Righter, 1999-NMSC-009, 126 N.M. 730, 975 P.2d 343.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 40 to 84.

Attorney's verbal abuse of another attorney as basis for disciplinary action, 87 A.L.R.3d 351.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused - modern state cases, 88 A.L.R.3d 449.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that defense counsel believes accused guilty, 89 A.L.R.3d 263.

Disciplinary action against attorney based on communications to judge respecting merits of cause, 22 A.L.R.4th 917.

Authority of trial judge to impose costs or other sanctions against attorney who fails to appear at, or proceed with, scheduled trial, 29 A.L.R.4th 160.

Attorney's misrepresentation to court of his state of health or other personal matter in seeking trial delay as ground for disciplinary action, 61 A.L.R.4th 1216.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witnesses - federal cases, 78 A.L.R. Fed. 23.

7 C.J.S. Attorney and Client §§ 77 to 87.

16-304. Fairness to opposing party and counsel.

A lawyer shall not:

A. unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

B. falsify evidence, counsel or assist a witness to testify falsely or offer an inducement to a witness that is prohibited by law;

C. knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

D. in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

E. in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

F. request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important

procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph A applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to Paragraph B, it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph F permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See *a/so* Rule 16-402 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph E, changed "or state a personal opinion, not supported by the evidence as to the justness of a cause" to "or state a personal opinion as to the justness of a cause".

Lawyers are officers of court and are always under obligation to be truthful to the court. *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 695 P.2d 483 (1985).

Public defenders are not excused from compliance with the Code of Professional Responsibility (now the Rules of Professional Conduct) even though paid with public funds. *State v. Martinez*, 97 N.M. 540, 641 P.2d 1087 (Ct. App. 1982).

Attorney's failure to docket an appeal and lying to his client for seven years about the status of the appeal violated numerous rules and warranted indefinite suspension from practice. *In re Roberts*, 119 N.M. 769, 895 P.2d 669 (1995).

Censure and fine for false and misleading brief. — Attorney was publicly censured and fined \$1,000 for knowingly making false, misleading and inaccurate statements in a brief to the court of appeals in violation of this rule (former Rule 7-102). *In re Chakeres*, 101 N.M. 684, 687 P.2d 741 (1984).

Indefinite suspension warranted. — Indefinite suspension was warranted because of attorney's violation of Paragraph D of this rule and other provisions, such as Rule 16-101, by failing to provide competent representation; Rule 16-105, by charging an

excessive fee; Rule 16-302, by failing to expedite litigation; Rule 16-303 A(1), by making an untrue statement of fact to a tribunal; Rule 16-505 A, by practicing law in a jurisdiction where doing so violates regulations; and Rule 16-804 C, D and H, by engaging in conduct involving dishonesty, deceit, and misrepresentation, by engaging in conduct prejudicial to the administration of justice, and by engaging in conduct that adversely reflects upon his fitness to practice law. *In re Righter*, 1999-NMSC-009, 126 N.M. 730, 975 P.2d 343.

Disbarment for manufacturing evidence. — When an attorney, who is an officer of the court and whose duty is it to protect the integrity of the adversarial system, intentionally lies under oath and manufactures documents designed to achieve an advantage in litigation, he demonstrates a complete lack of fitness to practice law. *In re Gabell*, 115 N.M. 737, 858 P.2d 404 (1993).

Disbarment for misconduct including intimidation of witnesses. — An attorney was properly disbarred for having engaged in four acts of misconduct, including subornation of false statements, intimidation of witnesses, dishonesty and intentional misrepresentations to the disciplinary board in the form of false statements made to the board in the regular course of its proceedings. *In re Ayala*, 102 N.M. 214, 693 P.2d 580 (1984).

Attorney's injection of himself into questions by use of "I" or "we" in his direct and cross-examination of witnesses did not rise to the level of misconduct justifying reversal. *McDowell v. Napolitano*, 119 N.M. 696, 895 P.2d 218 (1995).

Vouching for credibility of witness in closing argument. — The latitude of the prosecutor in closing argument does not encompass the practice of vouching for the credibility of a witness, either by invoking the authority and prestige of the prosecutor's office or by suggesting the prosecutor's special knowledge. *State v. Pennington*, 115 N.M. 372, 851 P.2d 494 (Ct. App. 1993).

Fairness to opposing counsel. — In a personal injury action for damages resulting from a pharmacist filling a child's prescription for Ritalin with methadone, where attorney, despite having prior knowledge that records showed a discrepancy between the number of methadone tablets prescribed and those dispensed, denied plaintiff's request for admission of the existence of records indicating a shortage of methadone tablets and failed to produce a report filed with the Board of Pharmacy, the attorney violated the duty of fairness to opposing counsel. *In re Estrada*, 2006-NMSC-047, 140 N.M. 492, 143 P.3d 731.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 67 to 73.

Duty of attorney to call witness or to procure aid in procuring his attendance, 56 A.L.R. 174.

Interference by prosecution with defense counsel's pretrial interrogation of witnesses, 90 A.L.R.3d 1231.

Disciplinary action against attorney based on communications to judge respecting merits of cause, 22 A.L.R.4th 917.

Counsel's argument or comment stating or implying that defendant is not insured and will have to pay verdict himself as prejudicial error, 68 A.L.R.4th 954.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 A.L.R.4th 131.

7 C.J.S. Attorney and Client §§ 77 to 87.

16-305. Impartiality and decorum of the tribunal.

A lawyer shall not:

- A. seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- B. communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- C. communicate with a juror or prospective juror after discharge of the jury if:
 - (a) the communication is prohibited by law or court order;
 - (b) the juror has made known to the lawyer a desire not to communicate; or
 - (c) the communication involves misrepresentation, coercion, duress or harassment; or
- D. engage in conduct intended to disrupt a tribunal.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation. The judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Paragraph M of Terminology of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph A, deleted "these rules or the Code of Judicial Conduct"; in Paragraph B, changed "except as permitted by law" to "during the proceeding unless authorized to do so by law or court order"; added new Paragraph C; and relettered former Paragraph C as Paragraph D.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 41, 67 to 73.

Propriety of attorney's communication with jurors after trial, 19 A.L.R.4th 1209.

Disciplinary action against attorney based on communications to judge respecting merits of cause, 22 A.L.R.4th 917.

Disciplinary action against attorney for making gift or loan to judge, 29 A.L.R.5th 505.

7 C.J.S. Attorney and Client §§ 77 to 87.

16-306. Trial publicity.

A. **Extrajudicial statements.** A lawyer shall not make any extrajudicial or out-of-forum statement in a proceeding that may be tried to a jury that the lawyer knows or reasonably should know:

- (1) is false; or
- (2) creates a clear and present danger of prejudicing the proceeding.

B. **Attorney's obligations with respect to other persons.** A lawyer shall make reasonable efforts to insure compliance with this rule by associated attorneys, employees and members of law enforcement and investigative agencies.

[As amended, effective October 1, 1991; as amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old State Bar Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Paragraph C of Rule 16-304 NMRA of the Rules of Professional Conduct requires compliance with such rules.

[3] There are certain subjects that are unlikely to have a prejudicial effect on a proceeding. These subjects relate to:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

- (2) information contained in a public record;
- (3) the fact that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger when there is reason to believe that there exists the likelihood of substantial physical harm to an individual or the public; and
- (7) in a criminal case, in addition to items (1) through (6), if accompanied by a statement that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty:
 - (a) the identity of the accused;
 - (b) if the accused has not been apprehended (arrested), information necessary to aid in apprehension (arrest) of that person (the accused);
 - (c) the fact, time and place of arrest; and
 - (d) the identity of investigating and arresting officers or agencies and the length of the investigation.

[4] There are, on the other hand, certain subjects that are more likely than not to have a prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a clear and present danger of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[5] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[6] Finally, extrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[7] See Paragraph F of Rule 16-308 NMRA of the Rules of Professional Conduct for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 1991 amendment, effective on and after October 1, 1991, rewrote this rule.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph A, changed "criminal proceeding" to "proceeding".

Prior restraint orders must be accompanied by factual findings. — To ensure that an appropriate balance is struck between rights of free speech and the interest in fair and impartial adjudication, any prior restraint on public comment by trial participants must be accompanied by specific factual findings supporting the conclusion that further extrajudicial statements would pose a clear and present danger to the administration of justice. *Twohig v. Blackmer*, 1996-NMSC-023, 121 N.M. 746, 918 P.2d 332.

General comment on complexity of cases against public officials. — A United States attorney's brief press statement that was a general comment on the complexity of cases involving charges against public officials, not a specific comment on the strengths of the present case or defendant's guilt or innocence, did not violate former

DR 7-107B6 (now see this rule). *United States v. Troutman*, 814 F.2d 1428 (10th Cir. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of state court's order precluding publicity or comment about pending civil case by counsel, parties, or witnesses, 56 A.L.R.4th 1214.

16-307. Lawyer as witness.

A. **Necessary witnesses.** A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

B. **Associate lawyer.** A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 16-107 NMRA or Rule 16-109 NMRA of the Rules of Professional Conduct.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, Paragraph A prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in Subparagraphs (1) through (3) of Paragraph A. Subparagraph (1) of Paragraph A recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Subparagraph (2) of Paragraph A recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue. Hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, Subparagraph (3) of Paragraph A recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 16-107, 16-109 and 16-110 NMRA of the Rules of Professional Conduct have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, Paragraph B permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 16-107 NMRA or Rule 16-109 NMRA of the Rules of Professional Conduct. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 16-107 NMRA of the Rules of Professional Conduct. This would be true even though the lawyer might not be prohibited by Paragraph A from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by Subparagraph (3) of Paragraph A might be precluded from doing so by Rule 16-109 NMRA of the Rules of Professional Conduct. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will

be precluded from seeking the client's consent. See Rule 16-107 NMRA of the Rules of Professional Conduct. See Paragraph B of Terminology of the Rules of Professional Conduct for the definition of "confirmed in writing" and Paragraph E of Terminology of the Rules of Professional Conduct for the definition of "informed consent".

[7] Paragraph B of this rule provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by Paragraph A. If, however, the testifying lawyer would also be disqualified by Rule 16-107 or Rule 16-109 NMRA of the Rules of Professional Conduct from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 16-110 NMRA of the Rules of Professional Conduct unless the client gives informed consent under the conditions stated in Rule 16-107 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added Subparagraph (3) of Paragraph A.

Materiality, necessity and potential prejudice standard. — An attorney may not be disqualified under this rule absent a showing by the party seeking disqualification that the attorney's testimony is material to an issue in the case, that the evidence to be elicited from the attorney's testimony is not available from another source, and that the attorney's testimony is potentially prejudicial to his client's case. *Chappell v. Cosgrove*, 1996-NMSC-020, 121 N.M. 636, 916 P.2d 836.

Necessary to have reason to believe calling possible. — The state attorney general did not violate former DR 5-102B (now see this rule) by proceeding as the prosecutor of state officials for conspiracy to extort a political contribution where there was no point before or during trial at which it should have been obvious that the attorney general or a member of his staff should be called as a witness. *United States v. Troutman*, 814 F.2d 1428 (10th Cir. 1987).

Law reviews. — For article, "Attorney as Interpreter: A Return to Babble," 20 N.M.L. Rev. 1 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law § 263.

Disqualification of attorney because member of his firm is or ought to be witness in case - modern cases, 5 A.L.R.4th 574.

Appealability to state court's order granting or denying motion to disqualify attorney, 5 A.L.R.4th 1251.

Attorney as witness for client in civil proceedings - modern state cases, 35 A.L.R.4th 810.

7A C.J.S. Attorney and Client §§ 150 to 159.

16-308. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

- A. refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- B. make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel and has been given reasonable opportunity to obtain counsel;
- C. not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- D. make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- E. not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information; and
- F. except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that are false or create a clear and present danger of prejudicing a criminal proceeding, and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 16-306 NMRA of the Rules of Professional Conduct.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 16-804 NMRA of the Rules of Professional Conduct.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph C does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in Paragraph D recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph E is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph F supplements Rule 16-306 NMRA of the Rules of Professional Conduct, which prohibits extrajudicial statements that are false or create a clear and present danger of prejudicing a criminal proceeding. Nothing in this commentary is intended to restrict the statements that a prosecutor may make that comply with Paragraph B or C of Rule 16-306 NMRA of the Rules of Professional Conduct.

[6] Like other lawyers, prosecutors are subject to Rules 16-501 and 16-503 NMRA of the Rules of Professional Conduct, which relate to responsibilities regarding lawyers and non-lawyers who work for or are associated with the lawyer's office. Paragraph F reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, Paragraph F requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial

statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph B, deleted "prior to appearing in a court proceeding where a defendant appears without counsel"; in Paragraph D, changed "reasonably relevant" to "unprivileged"; added Paragraph E; and in Paragraph F, added the provision which provides that except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, the prosecutor must refrain from making extrajudicial comments that are false or create a danger of prejudicing a criminal proceeding.

Prosecutor bias may be imputed to the office when there is an appearance of impropriety in permitting anyone else in the office to proceed. *State v. Gonzales*, 2005-NMSC-025, 138 N.M. 271, 119 P.3d 151.

Bias in fact required. — A prosecutor may not have a personal bias against a defendant. There must be a basis in fact for a determination that a bias exists. *State v. Gonzales*, 2005-NMSC-025, 138 N.M. 271, 119 P.3d 151.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law § 72.

Propriety and prejudicial effect of prosecuting attorney's argument to jury indicating that he has additional evidence of defendant's guilt which he did not deem necessary to present, 90 A.L.R.3d 646.

Disciplinary action against attorney for misconduct related to performance of official duties as prosecuting attorney, 10 A.L.R.4th 605.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness - state cases, 58 A.L.R.4th 1229.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial, or mistrial, 60 A.L.R.4th 1063.

Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error, 88 A.L.R.4th 388.

Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities, 10 A.L.R.5th 700.

16-309. Advocate in non-adjudicative proceedings.

A lawyer representing a client before a legislative body or administrative agency in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Paragraphs A through C of Rule 16-303 NMRA, Paragraphs A through C of Rule 16-304 NMRA and Rule 16-305 NMRA of the Rules of Professional Conduct.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] In representation before bodies such as legislatures, municipal councils and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Paragraphs A through C of Rule 16-303 NMRA, Paragraphs A through C of Rule 16-304 NMRA and Rule 16-305 NMRA of the Rules of Professional Conduct.

[2] Lawyers have no exclusive right to appear before non-adjudicative bodies, as they do before a court. The requirements of this rule may therefore subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 16-401 through 16-404 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The **2008 amendment**, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added the reference in Paragraphs A through C of Rule 16-304.

ARTICLE 4

Other Than Clients

16-401. Truthfulness in statements to others.

In the course of representing a client a lawyer shall not knowingly:

- A. make a false statement of material fact or law to a third person; or
- B. fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 16-106 NMRA of the Rules of Professional Conduct.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 16-804 NMRA of the Rules of Professional Conduct.

Statements of Fact

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, as is the existence of an undisclosed principal except where

nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Paragraph D of Rule 16-102 NMRA of the Rules of Professional Conduct, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph B of this rule states a specific application of the principle set forth in Paragraph D of Rule 16-102 NMRA of the Rules of Professional Conduct and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under Paragraph B the lawyer is required to do so, unless the disclosure is prohibited by Rule 16-106 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added the reference to the Rule of Professional Conduct in Paragraph B.

One-year suspension warranted. — Actions by an attorney involving false statements of material fact to a bankruptcy court, representation of a client in bankruptcy when owed money by the client, deposit of monies in his operating account instead of his trust account, failure to produce required records for his trust account, and misrepresentations to the Internal Revenue Service when acting in his capacity as a CPA, warranted suspension. In re Archuleta, 1996-NMSC-039, 122 N.M. 52, 920 P.2d 517.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Attorney's liability for nondisclosure or misrepresentation to third-party nonclients in private civil actions under federal securities laws, 112 A.L.R. Fed. 141.

16-402. Communications with person represented by counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity about the subject matter of the

representation even though the corporation, partnership or entity itself is represented by counsel.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the un-counseled disclosure of information relating to the representation.

[2] This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See Paragraph A of Rule 16-804 NMRA of the Rules of Professional Conduct. Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply

with this rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. *Compare* Paragraph F of Rule 16-304 NMRA of the Rules of Professional Conduct. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 16-404 NMRA of the Rules of Professional Conduct.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but such actual knowledge may be inferred from the circumstances. See Paragraph F of Terminology of the Rules of Professional Conduct. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 16-403 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added "by law or a court order" at the end of the first sentence.

Constitutionality. — The Supremacy Clause of the United States Constitution did not preclude enforcement of this rule against an Assistant United States Attorney, since it appears to be the intent of Congress that the attorney and others in his position should adhere to the ethical standards prescribed by their licensing states. In re Howes, 1997-NMSC-024, 123 N.M. 311, 940 P.2d 159.

Rule not applicable to guardians ad litem. — This rule does not prohibit guardians ad litem from communicating ex parte with department of children, youth and families social workers; although they are attorneys, guardians ad litem do not have typical attorney-client relationships with children, and are therefore not bound by this rule. *State ex rel. Children, Youth & Families Dep't v. George F.*, 1998-NMCA-119, 125 N.M. 597, 964 P.2d 158.

"Communication." — By simply listening to a represented criminal defendant, an Assistant United States Attorney "communicated" with the defendant, and by not contacting the defendant's attorney and by encouraging the defendant to talk to him and a detective, the attorney violated this rule and the principles behind it. *In re Howes*, 1997-NMSC-024, 123 N.M. 311, 940 P.2d 159.

Prohibited communications. — An Assistant United States Attorney's communications with a represented criminal defendant were not authorized by law within the meaning of this rule. *In re Howes*, 1997-NMSC-024, 123 N.M. 311, 940 P.2d 159.

Taking statement from defendant without notice to attorney. — Obtainment by the prosecuting attorney of defendant's statement without informing his attorney of the impending interview and thus giving the attorney a reasonable opportunity to be present at the interview is unethical conduct by the prosecution. *United States v. Thomas*, 474 F.2d 110 (10th Cir. 1973), cert. denied, 412 U.S. 932, 93 S. Ct. 2758, 37 L. Ed. 2d 160 (1973).

Rule applies even if other party initiates contact. — The proscriptions of this rule apply equally to situations when the party represented by another attorney may initiate the contact with opposing counsel. *In re Herkenhoff*, 116 N.M. 622, 866 P.2d 350 (1993).

Excuse. — Rule 16-502 NMRA did not excuse an Assistant United States Attorney's violation of this rule by communicating with a represented criminal defendant. *In re Howes*, 1997-NMSC-024, 123 N.M. 311, 940 P.2d 159.

Cannot be offered into evidence. — Once a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by interview from the defendant may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview which produced the statement and was given a reasonable opportunity to be present. *United States v. Thomas*, 474 F.2d 110 (10th Cir. 1973), cert. denied, 412 U.S. 932, 93 S. Ct. 2758, 37 L. Ed. 2d 160 (1973).

Jurisdiction over assistant U.S. attorney. — The New Mexico Disciplinary Board, and not the United States District Court, was the appropriate forum for adjudicating a claim against an assistant United States attorney permitted to practice solely by virtue of his New Mexico license. *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992).

Federal removal not proper. — Assistant United States attorney could not properly remove disciplinary proceeding under this rule to federal court under 28 U.S.C. § 1442, and case was remanded accordingly to the New Mexico disciplinary board. In re Gorence, 810 F. Supp. 1234 (D.N.M. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law § 60.

Communication with party represented by counsel as ground for disciplining attorney, 26 A.L.R.4th 102.

Right of attorney to conduct ex parte interviews with corporate party's nonmanagement employees, 50 A.L.R.4th 652.

Right of attorney to conduct ex parte interviews with former corporate employees, 57 A.L.R.5th 633.

Attorney's liability for nondisclosure or misrepresentation to third-party nonclients in private civil actions under federal securities laws, 112 A.L.R. Fed. 141.

7 C.J.S. Attorney and Client §§ 77 to 87.

16-403. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented

person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Paragraph F of Rule 16-113 NMRA of the Rules of Professional Conduct.

[2] The rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with those of the client. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added the last sentence concerning the giving of legal advice to an unrepresented person.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Attorney's liability for nondisclosure or misrepresentation to third-party nonclients in private civil actions under federal securities laws, 112 A.L.R. Fed. 141.

16-404. Respect for rights of third persons.

A. **Prohibited actions.** In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

B. **Inadvertently sent documents.** A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalog all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph B recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 16-102 and 16-104 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added the paragraph letter and title to Paragraph A and added Paragraph B.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Attorney's liability under state law for opposing party's counsel fees, 56 A.L.R.4th 486.

What constitutes negligence sufficient to render attorney liable to person other than immediate client, 61 A.L.R.4th 464.

Attorney's liability, to one other than immediate client, for negligence in connection with legal duties, 61 A.L.R.4th 615.

Attorney's liability for nondisclosure or misrepresentation to third-party nonclients in private civil actions under federal securities laws, 112 A.L.R. Fed. 141.

ARTICLE 5

Law Firms and Associations

16-501. Responsibilities of partners, managers and supervisory lawyers.

A. **Necessary measures.** A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

B. **Compliance with rules.** A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

C. **Responsibility for other lawyer's violations.** A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] Paragraph A applies to lawyers who have managerial authority over the professional work of a firm. See Paragraph C of Terminology of the Rules of Professional Conduct. This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, members of other associations authorized to practice law and lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency, and lawyers who have intermediate managerial responsibilities in a firm. Paragraph B applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph A requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in Paragraph A can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 16-502 NMRA of the Rules of Professional Conduct. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the rules.

[4] Paragraph C expresses a general principle of personal responsibility for acts of another. See *also* Paragraph A of Rule 16-804 NMRA of the Rules of Professional Conduct.

[5] Subparagraph (2) of Paragraph C defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of Paragraph B on the part of the supervisory lawyer even though it does not entail a violation of Paragraph C because there was no direction, ratification or knowledge of the violation.

[7] Apart from this rule and Paragraph A of Rule 16-804 NMRA of the Rules of Professional Conduct, a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

[8] The duties imposed by this rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Paragraph A of Rule 16-502 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added "managers and" to the title; added a new Paragraph A; relettered former Paragraph A as Paragraph B; relettered former Paragraph B as Paragraph C; and in Subparagraph (2) of Paragraph C, added "or has comparable managerial authority".

16-502. Responsibilities of a subordinate lawyer.

A. **Responsibility for own actions.** A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

B. **Arguable question of duty.** A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the

course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 16-107 NMRA of the Rules of Professional Conduct, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 1008.]

Excuse. — This rule did not excuse an Assistant United States Attorney's violation of Rule 16-402 by communicating with a represented criminal defendant. In re Howes, 1997-NMSC-024, 123 N.M. 311, 940 P.2d 159.

16-503. Responsibilities regarding nonlawyer assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

A. a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

B. a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

C. a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph A requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that non-lawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Committee Commentary to Rule 16-501 NMRA of the Rules of Professional Conduct. Paragraph B applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph C specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[Adopted by Supreme Court Order No. 08-8300-29, November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph A, added "and a lawyer who individually or together with other lawyers possesses comparable managerial authority" and in Subparagraph (2) of Paragraph C, added "or has comparable managerial authority".

16-504. Professional independence of a lawyer.

A. **Fee sharing.** A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 16-117 NMRA of the Rules of Professional Conduct, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled or disappeared lawyer may pay to the estate or other representative of the deceased, disabled or disappeared lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

B. Partnerships with nonlawyers. A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

C. Influence by nonclient. A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

D. Professional corporations and associations. A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in Paragraph C, such arrangements should not interfere with the lawyer's professional judgment.

[2] This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another.

See also Paragraph F of Rule 16-108 NMRA of the Rules of Professional Conduct (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added new Subparagraphs (2) and (5) of Paragraph A; relettered former Subparagraph (2) of Paragraph A as Subparagraph (3) of Paragraph A; in Subparagraph (3) of Paragraph A, added "disabled or disappeared lawyer"; relettered former Subparagraph (3) of Paragraph A as Subparagraph (4) of Paragraph A; and in Subparagraph (2) of Paragraph D, added "or occupies the position of similar responsibility in any form of association other than a corporation".

Holding out unauthorized person as partner is violation. — If an attorney aids a person not authorized to practice law in this state to engage in practice and holds that person out as his partner in advertising, such conduct constitutes a violation of this rule (former Rule 3-103) and warrants public censure. In re Bailey, 97 N.M. 88, 637 P.2d 38 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and effect of agreement between attorney and layman to divide attorney's fees or compensation for business of third person, 86 A.L.R. 195.

Attorney's splitting fees with other attorney or layman as ground for disciplinary proceeding, 6 A.L.R.3d 1446.

16-505. Unauthorized practice of law; multijurisdictional practice of law.

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.

B. A lawyer shall not employ or continue the employment of a disbarred or suspended lawyer as an attorney.

C. A lawyer shall not employ or continue the employment of a disbarred or suspended lawyer as a law clerk, a paralegal or in any other position of a quasi-legal nature if the suspended or disbarred lawyer has been specifically prohibited from accepting or continuing such employment by order of the Supreme Court or the disciplinary board.

D. A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by the Rules of Professional Conduct or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

E. A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a court, legislative body, administrative agency or other tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within Subparagraphs (2) or (3) of Paragraph E and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. In transactions involving issues specific to New Mexico law, the lawyer shall associate counsel admitted to practice in this jurisdiction.

F. A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction and who is in compliance with applicable registration requirements, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal or other law to provide in this jurisdiction.

[As amended, effective September 1, 1987; September 1, 2003.]

ANNOTATIONS

Compiler's notes. — The New Mexico rule differs from the ABA model rule in that the New Mexico version adds Paragraphs C and D.

ABA COMMENT:

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph A applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] 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. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 16-503 NMRA.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates Paragraph D if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 16-701(B) and 16-705(B) NMRA.

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph E identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of Subparagraphs (1) and (2) of Paragraph F, this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under Paragraph E. Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs E and F apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in Paragraph E contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Subparagraph (1) of Paragraph E recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a court, legislative body, administrative agency, or other tribunal to appear before the court, legislative body, administrative agency or other tribunal. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the court, legislative body, administrative agency or other tribunal. Under Subparagraph (2) of Paragraph E, a lawyer does not violate this rule when the lawyer appears before a court, legislative body, administrative agency or other tribunal pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a court, legislative body, administrative agency or other tribunal, this rule requires the lawyer to obtain that authority.

[10] Subparagraph (2) of Paragraph E also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court, administrative agency, or other tribunal Subparagraph (2) of Paragraph E also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court, administrative agency or other tribunal. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Subparagraph (3) of Paragraph E permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those

services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Subparagraph (4) of Paragraph E permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within Paragraphs (2) or (3) of Paragraph E. These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. However, in transactions involving New Mexico specific legal issues, a lawyer admitted in another jurisdiction and not in New Mexico must associate with New Mexico counsel to provide legal services relating to those issues.

[14] Subparagraphs (3) and (4) of Paragraph E require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign or international law.

[15] Paragraph F identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis, subject to that lawyer complying with all applicable registration requirements of the New Mexico Supreme Court. Except as provided in Subparagraphs (1) and (2) of Paragraph F, a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Subparagraph (1) of Paragraph F applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's

officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Subparagraph (2) of Paragraph F recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to Paragraphs E or F or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 16-805 NMRA.

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to Paragraphs E or F may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Paragraph B of Rule 16-104 NMRA.

[21] Paragraphs E and F do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 16-701 to 16-705 NMRA.

Holding out unauthorized person as partner is violation. — If an attorney aids a person not authorized to practice law in this state to engage in practice and holds that person out as his partner in advertising, such conduct constitutes a violation of this rule (former Rule 3-101) and warrants public censure. In re Bailey, 97 N.M. 88, 637 P.2d 38 (1981).

Responsibility as to legal assistant. — An attorney violates this rule by hiring a legal assistant, but failing to make reasonable efforts to ensure that the assistant's conduct comports with his own professional obligations. In re Martinez, 107 N.M. 171, 754 P.2d 842 (1988).

Indefinite suspension warranted. — Indefinite suspension was warranted because of attorney's violation of Paragraph A of this rule and other provisions, such as Rule 16-

101, by failing to provide competent representation; Rule 16-105, by charging an excessive fee; Rule 16-302, by failing to expedite litigation; Rule 16-303 A(1), by making an untrue statement of fact to a tribunal; Rule 16-304 D, by failing to comply with a discovery request; and Rule 16-804 C, D and H, by engaging in conduct involving dishonesty, deceit, and misrepresentation, by engaging in conduct prejudicial to the administration of justice, and by engaging in conduct that adversely reflects upon his fitness to practice law. In re Righter, 1999-NMSC-009, 126 N.M. 730, 975 P.2d 343.

Rule violated. — See In re Chavez, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 101 to 117.

Layman's assistance to party in divorce proceedings as unauthorized practice of law, 12 A.L.R.4th 656.

Contracts by organizations in business of providing evidence, witness or research assistance to legal counsel in specific litigation, 15 A.L.R.4th 1255.

Disciplinary action against attorney for aiding or assisting another person in unauthorized practice of law, 41 A.L.R.4th 361.

Propriety and effect of corporation's appearance pro se through agent who is not attorney, 8 A.L.R.5th 653.

What constitutes "unauthorized practice of law" by out-of-state counsel?, 83 A.L.R.5th 497.

16-506. Restrictions on right to practice.

A lawyer shall not participate in offering or making:

A. a partnership, shareholders, operating, employment or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

B. an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph A prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph B prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 16-117 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph A, changed "or employment" to "shareholders, operating, employment or other similar type of" and in Paragraph B, changed "controversy between private parties" to "client controversy".

Am. Jur. 2d, A.L.R. and C.J.S. references. — Enforceability of agreement restricting right of attorney to compete with former law firm, 28 A.L.R.5th 420.

16-507. Responsibilities regarding law-related services.

A. **Application of rule.** A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in Paragraph B of this rule, if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

B. **Definition of "law-related services".** The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

COMMITTEE COMMENTARY

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 16-507 NMRA of the Rules of Professional Conduct applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. *See, e.g.*, Rule 16-804 NMRA of the Rules of Professional Conduct.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Subparagraph (1) of Paragraph A of this rule. Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in Subparagraph (2) of Paragraph A of this rule unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with

others, the lawyer must comply with Paragraph A of Rule 16-108 NMRA of the Rules of Professional Conduct.

[6] In taking the reasonable measures referred to in Subparagraph (2) of Paragraph A to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by Subparagraph (2) of Paragraph A of the rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 16-503 NMRA of the Rules of Professional Conduct, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the rules addressing conflict of interest, see Rules 16-107 through 16-111 NMRA, especially Subparagraph (2) of Paragraph A of Rule 16-107 NMRA and Paragraphs A, B and F of Rule 16-108 NMRA, of the Rules of Professional Conduct, and to scrupulously adhere to the requirements of Rule 16-106

NMRA of the Rules of Professional Conduct relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 16-701 through 16-703 NMRA of the Rules of Professional Conduct, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the rules, for example the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See *a/so* Rule 16-804 NMRA of the Rules of Professional Conduct (Misconduct).

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ARTICLE 6

Public Service

16-601. Voluntary pro bono publico service.

The legal profession has a responsibility to provide legal services to those unable to pay. In fulfilling this responsibility, a lawyer should aspire to:

A. provide legal services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; or

B. provide legal services at:

(1) a substantially reduced fee to persons of limited means; or

(2) no fee or a substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; or

C. participate in activities for improving the law, the legal system or the legal profession; or

D. contribute financial support to organizations that provide legal services to persons of limited means or promote improvement of the law, the legal system or the legal profession.

[As amended, effective January 1, 1997; as amended by Supreme Court Order 08-8300-05, effective March 15, 2008.]

Committee commentary. — For the purposes of this rule, "a court *pro se* assisted program" shall qualify.

Every lawyer, regardless of professional prominence or professional work load, should aspire to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The New Mexico Supreme Court has adopted Rule 24-108 NMRA, which sets forth minimum pro bono goals and reporting requirements.

Subparagraphs (1) and (2) of Paragraph A recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Such services consist of the full range of legal activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

Eligible persons are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but who, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations, such as, homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

Because service should be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of Subparagraphs (1) and (2) of Paragraph A. Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

The aspirational standard of Rule 16-601 NMRA of the Rules of Professional Conduct can be met in a variety of other ways as set forth in Paragraphs B, C and D of the rule.

Subparagraph (1) of Paragraph B covers instances in which the lawyer agrees to and receives a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are examples.

Subparagraph (2) of Paragraph B includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this subparagraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

Paragraph C recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are examples of the many activities that fall within this paragraph.

There may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations within the contemplation of Rule 16-601 NMRA of the Rules of Professional Conduct. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by Rule 16-601 NMRA of the Rules of Professional Conduct.

The responsibility set forth in Rule 16-601 NMRA of the Rules of Professional Conduct is not intended to be enforced through disciplinary process.

ANNOTATIONS

COMMENT TO MODEL RULES

ABA COMMENT:

The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

Cross references. — For provisions pertaining to the civil legal services commission, see 34-14-1 NMSA 1978.

The 1997 amendment, effective January 1, 1997, rewrote the rule.

The 2008 amendment, approved by Supreme Court Order 08-8300-05, effective March 15, 2008, changed the title of the rule; in the introductory paragraph, added a new first sentence, deleted "A lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year", and rewrote the last sentence; in Paragraph B(1), substituted "a substantially reduced fee to persons of limited means" for the content now in Paragraph B(2); deleted former Paragraph C; added a new Paragraph D; deleted the ABA Comment to Model Rules; and added a new committee commentary.

Compiler's notes. — The committee commentary was added in 2000.

16-602. Accepting appointments.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- A. representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- B. representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- C. the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 16-601 NMRA of the Rules of Professional Conduct. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 16-101 NMRA of the Rules of Professional Conduct, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-603. Membership in legal services organization.

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

A. if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 16-107 NMRA of the Rules of Professional Conduct; or

B. where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established written policies in this respect can enhance the credibility of such assurances.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph A, added the reference to the Rules of Professional Conduct and in Paragraph B, added "or action".

16-604. Law reform activities affecting client interests.

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client

may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See *also* Paragraph B of Rule 16-102 NMRA of the Rules of Professional Conduct. For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 16-107 NMRA of the Rules of Professional Conduct. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-605. Nonprofit and court-annexed limited legal services programs.

A. A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rule 16-107 NMRA and Paragraph A of Rule 16-109 NMRA of the Rules of Professional Conduct only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 16-110 NMRA of the Rules of Professional Conduct only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 16-107 NMRA or Paragraph A of Rule 16-109 NMRA of the Rules of Professional Conduct with respect to the matter.

B. Except as provided in Subparagraph (2) of Paragraph A, Rule 16-110 NMRA of the Rules of Professional Conduct is inapplicable to a representation governed by this Rule.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

COMMITTEE COMMENTARY

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms — that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 16-107, 16-109 and 16-110 NMRA of the Rules of Professional Conduct.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Paragraph C of Rule 16-102 NMRA of the Rules of Professional Conduct. If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rule 16-106 NMRA and Paragraph C of Rule 16-109 NMRA, are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, Paragraph A requires compliance with Rule 16-107 NMRA or Paragraph A of Rule 16-109 NMRA of the Rules of Professional Conduct only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 16-110 NMRA of the Rules of Professional Conduct only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rule 16-107 NMRA or Paragraph A of Rule 16-109 NMRA of the Rules of Professional Conduct in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, Paragraph B provides that Rule 16-110 NMRA of the Rules of Professional Conduct is inapplicable to a representation governed by this Rule except as provided by Subparagraph (2) of Paragraph A. Subparagraph (2) of Paragraph A requires the participating lawyer to comply with Rule 16-110 NMRA of the Rules of Professional Conduct when the lawyer knows that the lawyer's firm is disqualified by Rule 16-107 NMRA or Paragraph A of Rule 16-109 NMRA of the Rules of Professional Conduct. By virtue of Paragraph B, however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor

will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rule 16-107 NMRA, Paragraph A of Rule 16-109 NMRA, and Rule 16-110 NMRA of the Rules of Professional Conduct become applicable.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ARTICLE 7

Information About Legal Services

16-701. Communications concerning a lawyer's services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if: it contains a material misrepresentation of fact or law; omits a fact necessary to make the statement considered as a whole not materially misleading; or contains a testimonial about, or endorsement of, the lawyer that is misleading.

[As amended, effective August 1, 1992; December 1, 1992; November 1, 1993; January 1, 1999; January 1, 2000; January 20, 2005.]

ANNOTATIONS

GENERAL COMMENTS ON THE REGULATION OF LAWYER ADVERTISING

The 1992 amendments and additions to the Rules of Professional Conduct were prepared in substantial part by a State Bar task force on the regulation of advertising, with input from the New Mexico Trial Lawyers Association. The Supreme Court made a number of changes to the recommendations of these two organizations. Each organization prepared comments for publication. Reproduced here are the comments relating to the recommendations that have been adopted substantially in the form recommended. Publication of these comments does not imply endorsement thereof by the Supreme Court.

STATE BAR TASK FORCE COMMENTS

The goal of this State Bar task force was to prepare and submit to the Supreme Court of New Mexico amendments to the present advertising rules which would give better guidance to lawyers as to what constitutes permissible and impermissible forms of legal advertising and solicitations.

The committee considered a number of alternative drafts. In preparing amendments the committee attempted to follow existing American Bar Association Model Rules of Professional Conduct. These model rules have been adopted by numerous other jurisdictions. The task force believes that the ABA approved comments should continue to be published with these rules with appropriate compiler's notes as to the differences between the ABA model rules and these rules. Several new rules have been prepared to assure better compliance with the Code of Professional Conduct.

These rules are intended to apply to lawyer advertising, solicitation or other forms of communication by which a lawyer seeks publicity to promote legal business. The rule does not apply to communications between lawyers, including brochures used for recruitment purposes. The State of New Mexico has an interest in protecting the public from false, deceptive or misleading advertisements by lawyers. Regulation of advertising should emphasize what informs the public over what promotes the lawyer.

Lawyer advertising that is false, deceptive or misleading poses special risks to the public. Statements that might be overlooked or unimportant in other advertising may be quite inappropriate in legal advertising. Since lawyer advertising is calculated and not spontaneous, reasonable regulation of lawyer advertising, designed to foster compliance with appropriate standards, serves the public interest without impeding the flow of useful, meaningful and relevant information to the public. To ensure that accurate information of legal services is disseminated, the State of New Mexico should promote more disclosure rather than less disclosure and substance over style.

Any attorney advertising legal services should primarily provide factual information that will foster logical, reasonable and informed thought and action by the public. The lawyer always must be mindful that the benefit to the public in any lawyer advertising rests primarily upon its accuracy, informative value and reliability, and not upon its potential to enhance personal ends for the attorney or to stimulate the baser instincts of the public.

It is the avowed duty of every lawyer to assist in making legal services available to the public. The legal profession should assist the public in recognizing legal problems because such may not be self revealing or timely noticed especially by those of low to moderate income and educational levels. In the past, potential clients often knew the reputations of local attorneys and were, therefore, more easily able to make informed choices when the need for legal services arose. In recent years, however, our society has seen growing complexities in the law and attendant specialization by practitioners, the evolution of a more mobile and media conscious society, and a sharp increase in the overall number of practitioners, rendering the traditional selection process less and less effective. Lack of information about legal rights, the availability of services, and costs thereof, may effectively induce members of the public to avoid seeking legal services. By adoption of Rules 16-701 to 16-704 and 16-706 to 16-707, the State of New Mexico declares it has a substantial interest and need to reasonably regulate the content and manner of advertising by lawyers to help minimize harm to the public interest resulting from advertising which is uninformative and misleading.

A lawyer's competency and integrity cannot be determined from advertisements alone. However, such presentations can convey information which will be relevant, useful, and meaningful to the public in assisting their recognition of legal rights and in locating an attorney who will be both compatible with, and conducive to, their needs and desires.

NEW MEXICO TRIAL LAWYERS ASSOCIATION COMMENTS

Subparagraph (4) of Paragraph C of Rule 16-701 eliminates direct written solicitation in personal injury and wrongful death cases. The rule is designed to advance the substantial state interest of protecting the public's right to an informed selection of an attorney free of duress.

Written solicitation in personal injury and wrongful death cases impedes, rather than encourages, the informed selection of attorneys. First, accident victims are in a unique category of prospective clients because, unlike almost every other potential legal incident, accident reports are available to the public. Second, as a result of this unique exposure, victims are subject to intimate, private correspondence which discourages them from seeking other means of securing an attorney such as word of mouth or other forms of advertising. And, third, accident victims are generally in the midst of physical or emotional upheaval and are particularly susceptible to offers of assistance. See, § 41-1-1 NMSA 1978. (New Mexico Legislature recognizes that unsolicited offers of assistance following an accident are merely veiled forms of duress and for that reason prohibits settlement offers with persons in the hospital within 15 days of the event.)

Since the Supreme Court's decision in *Shapero v. Kentucky Bar Association*, 108 S. Ct. 1916 (1988), attorneys have sent agents to police stations to cull through the accident reports looking for indication of injuries. Letters are then sent to those persons who appear to be injured. This rule is designed to prohibit that conduct based on the unique vulnerability of accident victims.

The proposed rule does not conflict with the United States Supreme Court's recent decision in *Shapero* because, unlike *Shapero*, the rule: (1) does not prohibit direct, written solicitation in all areas of the law; (2) serves substantial state interests; and (3) the restriction is carefully tailored to meet those state interests.

In *Shapero*, the Plaintiff, Richard Shapero, was an attorney specializing in the defense of foreclosure actions. Mr. Shapero applied to the Kentucky Bar Association for permission to send letters to persons who were in foreclosure proceedings. The Bar refused. Shapero applied for certiorari to the United States Supreme Court.

The Supreme Court, in a closely divided opinion, held that states could not categorically prohibit attorneys from sending targeted direct mail solicitation. Justice Brennan, writing for the majority, did hold, however, that less sweeping restrictions could be upheld if such restrictions advance substantial state interests and were tailored to directly advance those interests. *Shapero, supra*, at 1921.

Here, the proposed rule barring direct mail solicitation is not in conflict with *Shapero*. First, unlike *Shapero*, the restriction proposed does not encompass within its breadth all attorney direct mail solicitation. The restriction is applied only to personal injury and wrongful death cases where legitimate governmental interests are at stake.

Second, the proposed rule serves legitimate and substantial state interests. In *Shapero*, no state interests appear to have been presented. Here, a substantial state interest is served - the protection of the public to select their attorneys free of duress. Selection of any product including the services of attorneys, is best made when the information is presented free of duress. With the Supreme Court's lifting of restrictions on lawyer advertising, the public now has a variety of ways of securing information on attorneys. As noted above, direct solicitation in personal injury and wrongful death cases discourages, rather than encourages, consumer shopping of attorneys.

The proposed rule is specifically tailored to address the state interest. The danger of overreaching and duress appears to be limited to personal injury and wrongful death cases. Such cases are the only areas where the restriction is applied. A complete ban is needed in these areas because there is no less restrictive measure which will satisfy the legitimate state interest. Changes to the content of written solicitations will not alleviate the potential for duress. Thus, a complete ban is required.

The proposed rule banning written solicitations in personal injury and wrongful death cases is in keeping with the Supreme Court's dictates in lawyer advertising. The Supreme Court has repeatedly stated that it wishes the public to have access to information by which the public can make an informed choice. This restriction will aid the process by restricting the duress and overreaching that imperil a consumer's choice.

Letter solicitations and their envelopes should be clearly marked in accordance with Paragraph D of Rule 16-701. This will avoid the recipient perceiving that he or she needs to open the envelope because it is from a lawyer or law firm, only to find he or she is being solicited for legal services. With the envelope marked "lawyer advertisement", the recipient can choose to read the solicitation, or not to read it, without fear of legal repercussions.

Paragraph C of Rule 16-701 does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

A lawyer is allowed to pay for advertising permitted by these rules, but otherwise is not permitted to pay or provide other tangible benefits to another person for procuring professional work. See, Paragraph C of Rule 16-702. However, a legal aid agency or prepaid legal services may pay to advertise legal service provided under its auspices. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs. These rules do not prohibit paying regular compensation to an assistant, such as a secretary or advertising consultant, to prepare communications permitted by these rules.

COMMENT TO MODEL RULES

Compiler's notes. — The 1992 changes to this rule were not taken from the ABA Model Code. See State Bar Task Force and New Mexico Trial Lawyer's Association comments following Rule 16-701 for general comments on the regulation of lawyer advertising. The following ABA comment has been printed as requested in the State Bar Task Force Comments.

ABA COMMENT:

This rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2 [16-702 NMRA]. Whatever means are used to make known a lawyer's services, statements about them should be truthful.

Truthful statements that are misleading are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

See *also* Rule 8.4(e) [Paragraph F of Rule 16-804 NMRA] for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

The first 1992 amendment, effective for all lawyer advertisements mailed, displayed or broadcast on and after August 1, 1992, added the Paragraph A designation to the provisions of the former rule, rewriting those provisions, and added Paragraphs B to D.

The second 1992 amendment, effective December 1, 1992, substituted "lawyers or law firm" for "or lawyers" in Subparagraph (4) of Paragraph B.

The 1993 amendment, effective November 1, 1993, in the introductory language of Paragraph D, inserted "shall be at the beginning of the presentation and" in the second

sentence and inserted "the top of" in the third sentence; substituted "Subparagraphs (1) through (9)" for "Subparagraphs (2) through (8)" in Subparagraph D(1); and substituted the language beginning "the classified" for "or" at the end of Subparagraph D(2).

The 1998 amendment, effective January 1, 1999, in Paragraph B deleted former Subparagraph (5), which read: "does not disclose the location, by city, town or county of the offices of the lawyer or lawyers whose services are being advertised;" and redesignated former Subparagraph (6) as Subparagraph (5); and in Subparagraph C(4) deleted ", except as provided in Paragraph A of Rule 16-703," following "other solicitation" near the beginning and added "unless the accident occurred more than thirty (30) days prior to the mailing or other communication or the communication or other solicitation is permitted by Rule 16-703(A) of these rules" at the end.

The 1999 amendment, effective January 1, 2000, added the language following Subparagraph C(4); near the end of the first sentence in Paragraph D, inserted "or advertisements the contents of which are limited to the information described in Paragraph D of Rule 16-702", added the next-to-last-sentence, and added present Subparagraph D(4) and Paragraph E.

The 2005 amendment, effective January 20, 2005, replaced all of Rule 16-701 NMRA with the present rule, withdrew the commentary entitled "General Comments on the Regulation of Lawyer Advertising" which included the "State Bar Task Force Comments" and the "New Mexico Trial Lawyers Association Comments" and replaced the second paragraph of the ABA comment to the model rule with a new the second, third and fourth paragraph.

Law reviews. — For note, "The Tenth Circuit Strikes Down New Mexico's Ban on Targeted Direct-Mail Lawyer Advertising - *Revo v. Disciplinary Board of the Supreme Court*," see 28 N.M.L. Rev. 641 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law § 66.

Lawyer publicity as breach of legal ethics, 4 A.L.R.4th 306.

Modern status of law regarding solicitation of business by or for attorney, 5 A.L.R.4th 866.

Advertising as ground for disciplining attorney, 30 A.L.R.4th 742.

Validity of state judicial or bar association rule forbidding use of law firm name unless it contains exclusively names of persons who are or were members of that state's bar, as it applies to out-of-state law firm, 33 A.L.R.4th 404.

7 C.J.S. Attorney and Client §§ 77 to 87.

16-702. Advertising.

A. **Permitted advertising.** Subject to the requirements of Rules 16-701 and 16-703 NMRA of the Rules of Professional Conduct, a lawyer may advertise services through written, recorded or electronic communication, including public media.

B. **Payments for referrals.** A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 16-117 NMRA of the Rules of Professional Conduct; and

(4) refer clients to another lawyer or a non-lawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

C. **Required information in communications.** Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

[As amended, effective October 1, 1989; August 1, 1992; November 1, 1993; January 1, 2000; November 15, 2000; as amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not

made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income. Prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this rule. But see Paragraph A of Rule 16-703 NMRA of the Rules of Professional Conduct for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this rule nor Rule 16-703 NMRA of the Rules of Professional Conduct prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[5] Lawyers are not permitted to pay others for channeling professional work. Subparagraph (1) of Paragraph B, however, allows a lawyer to pay for advertising and communications permitted by this rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 16-503 NMRA of the Rules of Professional Conduct for the duties of lawyers and law firms with respect to the conduct of non-lawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that

holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable, objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 16-503 NMRA of the Rules of Professional Conduct. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 16-703 NMRA of the Rules of Professional Conduct.

[8] A lawyer also may agree to refer clients to another lawyer or a non-lawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule 16-201 NMRA and Paragraph C of Rule 16-504 NMRA of the Rules of Professional Conduct. Except as provided in Paragraph E of Rule 16-105 NMRA of the Rules of Professional Conduct, a lawyer who receives referrals from a lawyer or non-lawyer professional must not pay anything solely for the referral, but the lawyer does not violate Paragraph B of this rule by agreeing to refer clients to the other lawyer or non-lawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 16-107 NMRA of the Rules of Professional Conduct. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these rules. This rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 1992 amendment, effective for all lawyer advertisements mailed, displayed or broadcast on and after August 1, 1992, in Paragraph A, substituted "these rules" for "Rule 16-701" and inserted "billboards or signs"; rewrote Paragraph B; in Paragraph C, substituted "Payments for referrals" for "Expense limitations" in the heading and inserted "or otherwise provide a benefit"; deleted former Paragraphs D and E, relating to responsibility for content and claims of specialization, respectively; and added present Paragraphs D and E.

The 1993 amendment, effective November 1, 1993, inserted "or a statement to the effect that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery" in Subparagraph E(3) and added the last sentence of Subparagraph E(7).

The 1999 amendment, effective January 1, 2000, in Paragraph A, near the end, substituted "internet or through other written or electronic communication" for "or through written communication."

The 2000 amendment, effective November 1, 2000, substituted "that" for "whether" following "(b) specifically states" in Paragraph E(3) and added the "Supreme Court Committee on Rules of Professional Conduct Comments" following the ABA Comment.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, deleted "and solicitation" from the title; deleted former Paragraph A which permitted a lawyer to advertise legal services through the public media; deleted former Paragraph B which required a lawyer to keep a copy or recording of advertisements or solicitations; deleted former Paragraph C which prohibited a lawyer from giving anything of value or any benefit to a person for recommending the lawyer's services; deleted former Paragraph D which required that a lawyer's advertisement or solicitation include specified information; deleted former Paragraph E which specified the permissible information about fees that an advertisement or solicitation could contain; and added new Paragraphs A through C.

Applicability. — Pursuant to a supreme court order dated April 30, 1992, the 5-year recordkeeping requirements of this rule as revised shall apply to all advertisements mailed, displayed or broadcast on and after August 1, 1992.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 62 to 66.

Lawyer publicity as breach of legal ethics, 4 A.L.R.4th 306.

Modern status of law regarding solicitation of business by or for attorney, 5 A.L.R.4th 866.

Advertising as ground for disciplining attorney, 30 A.L.R.4th 742.

Validity of state judicial or bar association rule forbidding use of law firm name unless it contains exclusively names of persons who are or were members of that state's bar, as it applies to out-of-state law firm, 33 A.L.R.4th 404.

7 C.J.S. Attorney and Client §§ 77 to 87.

16-703. Direct contact with prospective clients.

A. In-person, live or real-time contact. A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal or prior professional relationship with the lawyer.

B. Restrictions on all contacts. A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by Paragraph A, if:

- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

C. Notice required. Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any written, recorded or electronic communication, unless the recipient of the communication is a person specified in Subparagraphs (1) or (2) of Paragraph A.

D. Exceptions. Notwithstanding the prohibitions in Paragraph A, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

[Adopted, effective October 1, 1989; as amended, effective August 1, 1992; as amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation and overreaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 16-702 NMRA of the Rules of Professional Conduct offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications that may be mailed or auto-dialed make it possible for a prospective client to be informed about the need for legal services and about the qualifications of available lawyers and law firms without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 16-702 NMRA of the Rules of Professional Conduct can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 16-701 NMRA of the Rules of Professional Conduct. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client or with whom the lawyer has a close

personal or family relationship or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Paragraph A of Rule 16-703 NMRA of the Rules of Professional Conduct and the requirements of Paragraph C of that rule are not applicable in those situations. Also, Paragraph A is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 16-701 NMRA of the Rules of Professional Conduct, that involves coercion, duress or harassment within the meaning of Subparagraph (2) of Paragraph B of Rule 16-703 NMRA of the Rules of Professional Conduct or that involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Subparagraph (1) of Paragraph B of Rule 16-703 NMRA of the Rules of Professional Conduct is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 16-702 NMRA of the Rules of Professional Conduct the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Paragraph B of Rule 16-703 NMRA of the Rules of Professional Conduct.

[6] This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 16-702 NMRA of the Rules of Professional Conduct.

[7] The requirement in Paragraph C of Rule 16-703 NMRA of the Rules of Professional Conduct that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.

[8] Paragraph D of this rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan,

provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, Paragraph D would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rule 16-701 NMRA, Rule 16-702 NMRA and Paragraph B of Rule 16-703 NMRA of the Rules of Professional Conduct. See Paragraph A of Rule 16-804 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 1992 amendment, effective for all lawyer advertisements mailed, displayed or broadcast on and after August 1, 1992, rewrote the introductory paragraph and Paragraph A; added present Paragraph B; and deleted former Paragraphs B and C, relating to exceptions to permitted solicitations and advertising designations, respectively.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, deleted "in-person or telephone" in the title; deleted former provisions of the rule which permitted a lawyer or a lawyer's agent to engage in the in-person or telephone solicitation of business if the prospective client is a relative or the lawyer has a prior personal business or professional relationship with the prospective client or if the communication is made under the auspices of a public or charitable legal organization or other organizations whose purposes include providing or recommending legal services; and added new Paragraphs A through D.

16-704. Communication of fields of practice and specialization.

A. **Communication of fields of practice.** A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

B. **Patent practice.** A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

C. **Admiralty practice.** A lawyer engaged in admiralty practice may use the designation "Admiralty", "Proctor in Admiralty" or a substantially similar designation.

D. **Certification by organization.** A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by the New Mexico Board of Legal Specialization, an organization that has been approved by an appropriate authority of another state, or by an organization that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

[As amended, effective August 1, 1992; December 1, 1992; as amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] Paragraph A of this rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist", practices a "specialty" or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 16-701 NMRA of the Rules of Professional Conduct to communications concerning a lawyer's services.

[2] Paragraph B recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before that office. Paragraph C recognizes that designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph D permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by the New Mexico Board of Legal Specialization; by an organization that has been approved by an appropriate authority of another state; or by an organization that has been accredited by the American Bar Association. This may include a state bar association that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

The first 1992 amendment, effective for all lawyer advertisements mailed, displayed or broadcast on and after August 1, 1992, inserted "as permitted by Subparagraph (2) of Paragraph D of Rule 16-702" in the first sentence of the introductory paragraph; in Paragraph C, substituted references to recognized specialists for references to registered specialists throughout, substituted "New Mexico Board of Legal Specialization" for "specialization board", corrected a misspelling, and deleted the former second paragraph relating to a requirement that attorneys disclose that they are not registered specialists in certain instances; and added Paragraph D.

The second 1992 amendment, effective December 1, 1992, added "or the board does not recognize specialization in that area" to the end of Paragraph D.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added "and specialization" to the title; labeled the former prefatory sentence of the rule as Paragraph A; added the title to Paragraph A; deleted language in Paragraph A which provided "as permitted by Paragraph (2) of Paragraph D of Rule 16-702. A lawyer shall not state or imply that the lawyer is a specialist except as follows:"; relettered former Paragraph A as Paragraph B; relettered former Paragraph B as Paragraph C; deleted former Paragraph C which permitted a board recognized specialist to indicate that he is a board recognized specialist in the lawyer's area of specialty; deleted former Paragraph D which permitted a lawyer who is certified by an organization other than the New Mexico Board of Legal Specialization to state the certification if the certification is available to all lawyers who meet objective and consistently applied standards and if the statement is accompanied by a disclaimer that the certification does not constitute recognition by the New Mexico Board of Legal Specialization; and added new Paragraph D.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law § 66.

7 C.J.S. Attorney and Client §§ 77 to 87.

16-705. Firm names and letterheads.

A. Use of trade or firm name. A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 16-701 NMRA of the Rules of Professional Conduct. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 16-701 NMRA of the Rules of Professional Conduct.

B. Multi-jurisdictional law firms. A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

C. Use of names of lawyers holding public office. The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

D. Statements about association. Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic". A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic", an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a non-lawyer.

[2] With regard to Paragraph D, lawyers sharing office facilities but who are not in fact associated with each other in a law firm may not denominate themselves as, for example, "Smith and Jones", for that title suggests that they are practicing law together in a firm.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added "of the Rules of Professional Conduct" in Paragraph A; added "or other professional designation" in Paragraph B; and in Paragraph D, changed "Lawyers may not state or imply" to "Lawyers may state or imply", changed "unless" to "only when".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law § 66.

Publication and distribution of announcement of new or changed associations or addresses, change of firm name, or the like as ground for disciplinary action, 53 A.L.R.3d 1261.

Lawyer publicity as breach of legal ethics, 4 A.L.R.4th 306.

Use of assumed or trade name as ground for disciplining attorney, 26 A.L.R.4th 1083.

Advertising as ground for disciplining attorney, 30 A.L.R.4th 742.

7 C.J.S. Attorney and Client §§ 77 to 87.

16-706. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated December 12, 2003, this rule, pertaining to the legal advertising committee, is withdrawn, effective December 12, 2003.

16-707. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated December 12, 2003, this rule, pertaining to the legal advertising committee, is withdrawn, effective December 12, 2003.

ARTICLE 8

Maintaining the Integrity of the Profession

16-801. Bar admission and disciplinary matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- A. knowingly make a false statement of material fact; or
- B. fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 16-106 NMRA of the Rules of Professional Conduct.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] The duty imposed by this rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted and, in any event, may be relevant in a subsequent admission application. The duty imposed by this rule applies to a lawyer's own admission or discipline as well as to that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph B of this rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this rule.

[3] A lawyer representing an applicant for admission to the bar or representing a lawyer who is the subject of a disciplinary inquiry or proceeding is governed by the rules applicable to the client-lawyer relationship, including Rule 16-106 NMRA of the Rules of Professional Conduct and, in some cases, Rule 16-303 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

Cross references. — For Parental Responsibility Act, see Chapter 40, Article 5A NMSA 1978.

For effect of Parental Responsibility Act on licensing of lawyers and other persons by the supreme court, see 40-5A-10 NMSA 1978.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added "of the Rules of Professional Conduct" in Paragraph B.

Protection of public is primary concern. — The court's primary concern in all cases involving attorney discipline is to assure that the public is protected from dishonest attorneys, whatever the explanation for the dishonesty. *In re Stewart*, 104 N.M. 337, 721 P.2d 405 (1986).

Membership in bar requires more than an absence of intention to do wrong; otherwise a high standard of conduct could not be maintained. In re Nelson, 79 N.M. 779, 450 P.2d 188 (1969).

Ignoring inquiries of disciplinary counsel. — The act of ignoring the inquiries of disciplinary counsel concerning allegations of misconduct is a violation of this rule (former Rule 1-101). In re Martinez, 104 N.M. 152, 717 P.2d 1121 (1986).

Attorney's knowingly false statement to hearing committee. — Attorney violated this rule when he knowingly made a false statement to the hearing committee when he stated that a former client's judgment against him in a civil suit for debt and money due, conspiracy and fraud did not involve a finding of fraud. In re C'De Baca, 109 N.M. 151, 782 P.2d 1348 (1989).

Cooperation with disciplinary counsel. — An attorney's apparent failure to complete several cases, to take steps to insure that the interests of her clients were protected upon her withdrawal from their cases, and to promptly refund any unearned portions of fees paid in advance, as well as her lack of cooperation with the disciplinary counsel, constitute conduct violative of the professional rules warranting an indefinite suspension from the practice of law. In re Roth, 105 N.M. 255, 731 P.2d 951 (1987).

Moral turpitude is not necessary element to support discipline, and, it may not be synonymous with "conduct contrary to honesty, justice or good morals". In re Morris, 74 N.M. 679, 397 P.2d 475 (1964).

True question in disbarment. — Whether the misconduct with which a person is charged is a crime involving moral turpitude or, if a crime, whether it is malum prohibitum or malum in se or, for that matter, if the act is neither a felony nor misdemeanor, is not the issue. The true question in considering disbarment is: was the act to which respondent pleaded guilty "contrary to honesty, justice or good morals"? In re Morris, 74 N.M. 679, 397 P.2d 475, 17 A.L.R.3d 681 (1964).

Involuntary manslaughter sufficient to support suspension. — When a member of the bar is guilty of the crime of involuntary manslaughter resulting from driving a motor vehicle while under the influence of intoxicating liquor, such offense is an act contrary to honesty, justice or good morals sufficient to support a suspension from practice. In re Morris, 74 N.M. 679, 397 P.2d 475, 17 A.L.R.3d 681 (1964).

One-year suspension warranted. — Attorney's actions warranted a one-year suspension since he made misrepresentations to a court, failed to return unearned fees, failed to render an accounting to a client and acted otherwise to prejudice the administration of justice. In re Arrieta, 104 N.M. 389, 722 P.2d 640 (1986).

Attorney was suspended from practice for one year for engaging in conduct that adversely reflected upon his fitness to practice law, for neglecting a legal matter entrusted to him, for engaging in conduct involving dishonesty or misrepresentation, and

for failure to give his full cooperation and assistance to counsel for the disciplinary board. In re Laughlin, 104 N.M. 630, 725 P.2d 830 (1986).

Indefinite suspension warranted. — An attorney who collected a fee to represent a client in a criminal matter and who failed to return the fee even though the charge was dismissed without any action by the lawyer, who subsequently contended (knowingly and dishonestly) that he was entitled to the fee in disciplinary proceedings, and who forged a physician's signature on a fitness to practice law form on an application to the Arizona bar, was suspended indefinitely. In re Cherryhomes, 115 N.M. 734, 858 P.2d 401 (1993).

Indefinite suspension was warranted because an attorney violated Paragraph B, by failing to respond to lawful requests for information from the office of disciplinary counsel. The attorney also violated the following rules: Rule 16-101 NMRA, by failing to provide competent representation; Rule 16-102A NMRA, by failing to abide by a client's decisions concerning the objectives of the representation; Rule 16-103 NMRA, by failing to act with reasonable diligence and promptness in representing a client; Rule 16-104A NMRA, by failing to keep a client reasonably informed about the status of a matter and by failing to promptly comply with reasonable requests for information; Rule 16-116D NMRA, by failing to timely surrender papers and property to which a client was entitled and by failing to timely refund any advance payment of fee that had not been earned; Rule 16-804D and H NMRA, by engaging in conduct that is prejudicial to the administration of justice and conduct that adversely reflects on his fitness to practice law; and Rule 16-803D NMRA, by failing to cooperate with disciplinary counsel in the course of the investigation. In re Carlton, 2000-NMSC-001, 128 N.M. 419, 993 P.2d 736.

Disbarment warranted. — Disbarment was justified because of the inadequacy of an attorney's representation of clients in violation of Rules 16-101, 16-102(A), 16-103 and 16-104(A) NMRA, by his business transaction and trust account violations of Rules 16-108, 16-115 and 16-116(D) NMRA, and violations of this rule and other rules relating to disciplinary proceedings. In re Darnell, 1997-NMSC-025, 123 N.M. 323, 940 P.2d 171.

Rule violated. — See In re Chavez, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417.

Law reviews. — For comment, "The Clark Report and The Revised New Mexico Disciplinary Procedures," see 2 N.M.L. Rev. 292 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 67 to 73.

Fee collection practices as ground for disciplinary action, 91 A.L.R.3d 583.

Attorney's failure to report promptly receipt of money or property belonging to client as ground for disciplinary action, 91 A.L.R.3d 975.

Conduct of attorney in connection with settlement of client's case as ground for disciplinary action, 92 A.L.R.3d 288.

Conduct of attorney in capacity of executor or administrator of decedent's estate as ground for disciplinary action, 92 A.L.R.3d 655.

Disciplinary action against attorney based on misconduct prior to admission to bar, 92 A.L.R.3d 807.

Attorney's commingling of client's funds with his own as ground for modern action - modern status, 94 A.L.R.3d 846.

Restitution as mitigating circumstance in disciplinary action against attorney based on wrongful conduct, 95 A.L.R.3d 724.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar, 4 A.L.R.4th 436.

Failure to cooperate with or obey disciplinary authorities as ground for disciplining attorney - modern cases, 37 A.L.R.4th 646.

7 C.J.S. Attorney and Client §§ 43 to 45.

16-802. Judicial and legal officials.

A. **Defamation.** A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

B. **Judicial candidates; Code of Judicial Conduct.** A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the

administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

Am. Jur. 2d, A.L.R. and C.J.S. references. — Attorney's criticism of judicial acts as ground of disciplinary action, 12 A.L.R.3d 1408.

Election campaign activities as ground for disciplining attorney, 26 A.L.R.4th 170.

16-803. Reporting professional misconduct.

A. Misconduct of other lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the New Mexico Disciplinary Board.

B. Misconduct of judges. A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the New Mexico Judicial Standards Commission.

C. Confidential information. This rule does not require disclosure of information otherwise protected by Rule 16-106 NMRA of the Rules of Professional Conduct, or as set forth in Paragraph E, information gained by a lawyer or a judge while participating in an approved lawyers assistance program.

D. Cooperation and assistance; required. A lawyer shall give full cooperation and assistance to the highest court of the state and to the disciplinary board, hearing committees and disciplinary counsel in discharging the lawyer's respective functions and duties with respect to discipline and disciplinary procedures.

E. Alcohol and substance abuse exception. The reporting requirements set forth in Paragraphs A and B of this rule do not apply to any communication concerning alcohol or substance abuse by a judge or lawyer that is:

(1) made for the purpose of reporting substance abuse or recommending, seeking or furthering the diagnosis, counseling or treatment of a judge or an attorney for alcohol or substance abuse; and

(2) made to, by or among members or representatives of the Lawyer's Assistance Committee of the State Bar, Alcoholics Anonymous, Narcotics Anonymous or other support group recognized by the Judicial Standards Commission or the Disciplinary Board; recognition of any additional support group by the Judicial Standards Commission or the Disciplinary Board shall be published in the Bar Bulletin.

This exception does not apply to information that is required by law to be reported, including information that must be reported under Paragraph F of this rule, or to disclosures or threats of future criminal acts or violations of these rules.

F. Judicial misconduct involving unlawful drugs; reporting requirement.

Notwithstanding the provisions of Paragraph E, any incumbent judge who illegally sells, purchases, possesses, or uses drugs or any substance considered unlawful under the provisions of the Controlled Substances Act, shall be subject to discipline under the Code of Judicial Conduct.

Any lawyer who has specific objective and articulable facts or reasonable inferences that can be drawn from those facts, that a judge has engaged in such misconduct, shall report those facts to the New Mexico Judicial Standards Commission. Reports of such misconduct shall include the following information:

- (1) name of person filing the report;
- (2) address and telephone number where the person may be contacted;
- (3) a detailed description of the alleged misconduct;
- (4) dates of the alleged misconduct; and
- (5) any supporting evidence or material that may be available to the reporting person.

The Judicial Standards Commission shall review and evaluate reports of such misconduct to determine if the report warrants further review or investigation.

[As amended, effective April 1, 1991; as amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve a violation of Rule 16-106 NMRA of the Rules of Professional Conduct. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules of Professional Conduct, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer privilege.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved support group. A lawyer may also receive such information in the context of the lawyer who has a problem with alcohol or substance abuse reporting the problem in order to seek help, or another person reporting the problem or making a recommendation in order to seek help for the affected lawyer. In those circumstances, providing for an exception to the reporting requirements of Paragraphs A and B of this rule encourages lawyers and judges to seek treatment through such programs or by reporting such problems to their colleagues in an effort to seek help, and encourages lawyers to report alcohol or substance abuse by other lawyers in order to get counseling or treatment for them. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs or to report alcohol or substance abuse problems of other lawyers, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program. Such an obligation, however, may be imposed by the rules of the program or other law.

[6] Notwithstanding the provisions of Paragraph E, Paragraph F sets forth the requirements for reporting judicial misconduct involving unlawful drugs. See *In the Matter of Carlos Garza*, 2007-NMSC-028, 141 N.M. 831, 161 P.3d 876. In addition to these reporting requirements set forth in Paragraph F, the Supreme Court encourages any judge, employee of the judiciary, or lawyer who has a good faith basis to believe a judge is engaged in such misconduct, but does not have specific and articulable facts regarding such conduct, to report such belief to the Lawyer Assistance Committee hotline. The suggested reporting is to encourage members of the judiciary to seek appropriate help for alcohol and/or substance abuse problems.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 1991 amendment, effective April 1, 1991, added Paragraph E.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph A, changed "appropriate professional authority" to "New Mexico Disciplinary Board"; in Paragraph B, changed "a judge has committed a violation of applicable rules of judicial conduct or has engaged in conduct that raises a substantial question" to "a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question" and changed "appropriate authority" to "New Mexico Judicial Standards Commission"; in Paragraph C, added the provision which provides that the rule does not require disclosure of information gained while participating in an approved lawyers assistance program except as provided in Paragraph E; in Paragraph E, deleted former Subparagraph (1) which provided that Paragraphs A and B do not apply to any communication that is intended to be confidential; relettered former Subparagraph (2) of Paragraph E as Subparagraph (1); relettered former Subparagraph (3) of Paragraph E as Subparagraph (2); in Subparagraph (2) of Paragraph E, changed "a lawyers support group" to "the Lawyer's Assistance Committee of the State Bar"; in the last sentence of Paragraph E, inserted "including information that must be reported under Paragraph F of this Rule"; and added a new Paragraph F.

Failure to cooperate with disciplinary proceedings. — When attorney failed to file an answer or appear at the proceedings before the hearing committee, he did not request a hearing before the Disciplinary Board although advised of his right to do so, and failed to appear before the supreme court, such conduct violated Rule 16-804D NMRA and Paragraph D of this rule. *In re Carrasco*, 106 N.M. 294, 742 P.2d 506 (1987).

Since attorney failed to pay complainant-physician certain funds reportedly withheld by attorney for physician from the settlement funds of three of attorney's clients, who were also physician's patients, and attorney later informed physician that he had spent the clients' funds but would be able to pay physician as soon as he received money in another settlement, and failed to respond to the board's inquiries after physician reported attorney's failure to pay to the disciplinary authorities, attorney violated this rule in that he failed to give full cooperation and assistance to the disciplinary board and its

counsel in discharging their respective functions and duties with respect to discipline and disciplinary procedures. In re C'De Baca, 109 N.M. 151, 782 P.2d 1348 (1989).

Any attempt by counsel to prevent the filing of a disciplinary complaint, such as by suing former client in retaliation for client's filing of a disciplinary complaint against him, will not be tolerated and will be viewed as a failure to cooperate with the New Mexico Supreme Court, the Disciplinary Board, its hearing committees and disciplinary counsel in the discharge of their respective functions and duties. In re Cutter, 118 N.M. 152, 879 P.2d 784 (1994).

Attorney's misappropriation of client funds and failure to cooperate with disciplinary counsel warranted disbarment. In re Krob, 1997-NMSC-037, 123 N.M. 652, 944 P.2d 881.

Practice before disciplinary board. — It is the duty of all attorneys, even those representing an attorney before the disciplinary board, to give full cooperation and assistance to not only the Supreme Court, but also the disciplinary board and its representatives; deadlines imposed by disciplinary counsel or the Rules Governing Discipline are to insure that the disciplinary process moves as expeditiously as possible. In re Jones, 119 N.M. 229, 889 P.2d 837 (1995).

Indefinite suspension warranted. — Indefinite suspension was warranted because an attorney violated Paragraph D, by failing to cooperate with disciplinary counsel in the course of the investigation. The attorney also violated the following rules: Rule 16-101 NMRA, by failing to provide competent representation; Rule 16-102A NMRA, by failing to abide by a client's decisions concerning the objectives of the representation; Rule 16-103 NMRA, by failing to act with reasonable diligence and promptness in representing a client; Rule 16-104A NMRA, by failing to keep a client reasonably informed about the status of a matter and by failing to promptly comply with reasonable requests for information; Rule 16-116D NMRA, by failing to timely surrender papers and property to which a client was entitled and by failing to timely refund any advance payment of fee that had not been earned; Rule 16-804D and H NMRA, by engaging in conduct that is prejudicial to the administration of justice and conduct that adversely reflects on his fitness to practice law; and Rule 16-801B NMRA, by failing to respond to lawful requests for information from the office of disciplinary counsel. In re Carlton, 2000-NMSC-001, 128 N.M. 419, 993 P.2d 736.

Rule violated. — See In re Martinez, 107 N.M. 171, 754 P.2d 842 (1988); In re Canevaro, 1997-NMSC-033, 123 N.M. 576, 943 P.2d 1029; In re Chavez, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417.

16-804. Misconduct.

It is professional misconduct for a lawyer to:

- A. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;
- B. commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- C. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- D. engage in conduct that is prejudicial to the administration of justice;
- E. state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- F. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

ANNOTATIONS

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

2008 COMMITTEE COMMENTARY

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph A, however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude". That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates Paragraph D when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate Paragraph D. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Paragraph D of Rule 16-102 NMRA of the Rules of Professional Conduct concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, deleted former Paragraph E which provided that it is professional misconduct to willfully violate the Supreme Court Rules on Minimum Continuing Legal Education or the New Mexico Plan of Specialization or the board regulations promulgated under the authority of the rules or the plan; relettered former Paragraph F as Paragraph E; in Paragraph E, added the phrase "or to achieve results by means that violate the Rules of Professional Conduct or other law"; relettered former Paragraph G as Paragraph F; and deleted former Paragraph H which provided that it is professional misconduct to engage in any conduct that adversely reflects on his fitness to practice law.

Attorneys found to have committed criminal acts are generally suspended or disbarred. In re Key, 2005-NMSC-014, 137 N.M. 517, 113 P.3d 340.

ABA Standards for Imposing Lawyer Sanctions. — While the Supreme Court has not formally adopted the ABA Standards for Imposing Lawyer Sanctions, the standards are looked to for guidance in determining appropriate sanctions for attorneys found guilty of misconduct and to insure a certain degree of consistency, although each case is decided on the basis of its own merits. In re Key, 2005-NMSC-014, 137 N.M. 517, 113 P.3d 340.

Denial of due process. — Respondent's contention that, in some way, he had been denied procedural and substantive due process of law and equal protection of the law

has no validity since the conduct charged against him is wholly and entirely concerned with his activity as an attorney. In re Nelson, 79 N.M. 779, 450 P.2d 188 (1969).

True question in disbarment. — Whether the misconduct with which a person is charged is a crime involving moral turpitude or, if a crime, whether it is malum prohibitum or malum in se or, for that matter, if the act is neither a felony nor misdemeanor, is not the issue. The true question in considering disbarment is: was the act to which respondent pleaded guilty "contrary to honesty, justice or good morals"? In re Morris, 74 N.M. 679, 397 P.2d 475, 17 A.L.R.3d 681 (1964).

Moral turpitude is not necessary element to support discipline, and, it may not be synonymous with "conduct contrary to honesty, justice or good morals". In re Morris, 74 N.M. 679, 397 P.2d 475, 17 A.L.R.3d 681 (1964).

Relation of attorney and client is one of the highest trust and confidence, requiring the attorney to observe the utmost good faith towards his client, and not to allow his private interests to conflict with those of his client. Very strict and rigid rules have always been enforced, under which an attorney could not maintain a purchase from his client, unless he was able to clearly show that he had made a full communication to his client of all that he knew of advantage to the client regarding the subject of the negotiations. Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 N.M. 119, 452 P.2d 188 (1969).

With respect to transactions between attorney and client involving the acquisition of property from the client a heavy burden is imposed upon the attorney to establish the absolute fairness of the transactions. Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 N.M. 119, 452 P.2d 188 (1969).

Standard of proof when fraud not alleged. — In disciplinary proceedings when fraud has not been alleged, the standard of proof is a preponderance of the evidence. In re D'Angelo, 105 N.M. 391, 733 P.2d 360 (1986).

Misappropriation of funds. — Attorney's conversion to his own use of money received from a client to have a liquor license transferred to her name violated Rules 1-102, 6-101, 7-101 and 9-102 of the Code of Professional Responsibility (now see Rules 16-102, 16-104, 16-115 and 16-804 of the Rules of Professional Conduct). In re Gallegos, 104 N.M. 496, 723 P.2d 967 (1986).

Attorney's misappropriation of client funds and failure to cooperate with disciplinary counsel warranted disbarment. In re Krob, 1997-NMSC-037, 123 N.M. 652, 944 P.2d 881.

Failure to maintain trust account. — Failure of an attorney to properly maintain his trust account records constituted a violation of Rule 16-115 NMRA and Paragraph H of this rule and, coupled with other violations, such failure warranted disbarment. In re Greenfield, 1996-NMSC-015, 121 N.M. 633, 916 P.2d 833.

Attorney's failure to docket an appeal and lying to his client for seven years about the status of the appeal violated numerous rules and warranted indefinite suspension from practice. In re Roberts, 119 N.M. 769, 895 P.2d 669 (1995).

Six-month suspension and other penalties warranted since attorney accepted one-half of fee and failed to represent client, allowing default to be entered against client. In re Trujillo, 110 N.M. 180, 793 P.2d 862 (1990).

Attorney who stole approximately \$62,500 from various clients by forging his clients' names on settlement checks and withdrawal slips on accounts maintained by clients was disbarred. In re Wilson, 108 N.M. 378, 772 P.2d 1301 (1989).

Refusal to release escrowed funds when required by the terms of the escrow agreement violated Subdivisions A(1) and A(4) of DR 1-102 (now see Paragraphs A and C of this rule). In re Arrieta, 105 N.M. 418, 733 P.2d 866 (1987).

Failure to cooperate with disciplinary proceedings. — When attorney failed to file an answer or appear at the proceedings before the hearing committee, he did not request a hearing before the Disciplinary Board although advised of his right to do so, and failed to appear before the supreme court, such conduct violated Rules 16-803D and Paragraph D of this rule. In re Carrasco, 106 N.M. 294, 742 P.2d 506 (1987).

When attorney failed to pay complainant-physician certain funds reportedly withheld by attorney for physician from the settlement funds of three of attorney's clients, who were also physician's patients, and attorney later informed physician that he had spent the clients' funds but would be able to pay physician as soon as he received money in another settlement, and failed to respond to the board's inquiries after physician reported attorney's failure to pay to the disciplinary authorities, attorney violated this rule in that he engaged in conduct involving dishonesty, engaged in conduct prejudicial to the administration of justice, and engaged in conduct that adversely reflects on his fitness to practice law. In re C'De Baca, 109 N.M. 151, 782 P.2d 1348 (1989).

Since additional acts of misconduct and failure to communicate came to light after suspension had been imposed, and the attorney failed to cooperate with disciplinary proceedings, the additional matters warranted adding time to the suspension from the practice of law previously imposed. In re Tapia, 110 N.M. 693, 799 P.2d 129 (1990).

Attorney's convictions of embezzlement and aggravated assault with a deadly weapon warranted disbarment. In re Benavidez, 111 N.M. 642, 808 P.2d 612 (1991).

Forgeries on warranty deed. — By forging the signatures of her cotenants on a warranty deed and exchanging that deed for money and by causing a notary public to falsely acknowledge the forged signatures, attorney violated Paragraphs C and H of this rule. In re Siler, 106 N.M. 292, 742 P.2d 504 (1987).

Destruction of legal document. — That an attorney would destroy without reading a legal document served upon him, regardless of the real or imagined nature of the proceedings, would cast grave doubts upon his ability to appreciate his obligations as an attorney to uphold the law and facilitate rather than impede the administration of justice. In re Martinez, 107 N.M. 171, 754 P.2d 842 (1988).

Promise to probate upon death of clients. — Attorney defrauded his clients when he suggested that if they would each pay him \$1,000 plus tax, he would probate their estates at the time of their deaths. In re Gallegos, 104 N.M. 496, 723 P.2d 967 (1986).

Lawyers are officers of court and are always under obligation to be truthful to the court. Woodson v. Phillips Petroleum Co., 102 N.M. 333, 695 P.2d 483 (1985).

Taking advantage of technical procedural errors. — This rule (former Rule 1-102) mandates "fair play" of opposing counsel in the administration of justice; lawyers should not attempt to take advantage of technical errors under the rules of procedure, as neither the trial court nor the appellate court will condone this practice. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Using unauthorized subpoena to compel witness to produce documents amounts to perpetrating a deceit on the witness in violation of Paragraph C. State v. Eder, 103 N.M. 211, 704 P.2d 465 (Ct. App. 1985).

Disbarment appropriate for attorney convicted of tampering with evidence and making false report. — See In re McCulloch, 103 N.M. 542, 710 P.2d 736 (1985).

Disbarment for manufacturing evidence. — When an attorney, who is an officer of the court and whose duty is it to protect the integrity of the adversarial system, intentionally lies under oath and manufactures documents designed to achieve an advantage in litigation, he demonstrates a complete lack of fitness to practice law. In re Gabell, 115 N.M. 737, 858 P.2d 404 (1993).

Restitution generally irrelevant in determining punishment. — Generally, when an attorney engages in intentional conduct involving dishonesty, he or she is disbarred. This is true even where restitution has been made to persons injured by the lawyer's misconduct. In re Hartley, 107 N.M. 376, 758 P.2d 790 (1988).

Falsified statement in appellate brief constitutes misconduct. — If an attorney makes a statement in his brief on appeal as to the date of appointment of a trustee without examining the bankruptcy records and falsifies the statement made, the attorney is guilty of misconduct under this rule (former Rule 1-102). Cornell v. Albuquerque Chem. Co., 92 N.M. 121, 584 P.2d 168 (Ct. App. 1978).

Censure and fine for false and misleading brief. — Attorney was publicly censured and fined \$1,000 for knowingly making false, misleading and inaccurate statements in a

brief to the court of appeals in violation of this rule (former Rule 1-102). In re Chakeres, 101 N.M. 684, 687 P.2d 741 (1984).

Attorney knowingly making a false statement of material fact in a brief filed in the Court of Appeals for the purpose of deceiving the court warranted public censure. In re Richards, 1997-NMSC-035, 123 N.M. 579, 943 P.2d 1032.

Attorney's tactics in pursuing a baseless claim and then ignoring efforts to dispose of the claim amounted to conduct prejudicial to the administration of justice in violation of this rule. In re Bloomfield, 1996-NMSC-017, 121 N.M. 605, 916 P.2d 224.

Threatening debtor with criminal charges. — When an attorney implied, during the course of a telephone conversation, that criminal charges were or would be pending in New Mexico against an alleged debtor so as to gain an advantage in pending civil litigation against the alleged debtor, such conduct warranted suspension from the practice of law for a period of 120 days. In re Frith, 103 N.M. 792, 715 P.2d 65 (1986).

Fraud warrants disbarment. — Unprofessional conduct involving fraud upon an insurance company in excess of \$2,500 (a third degree felony) warrants disbarment. In re Rickard, 93 N.M. 35, 596 P.2d 248 (1979).

Attorney violated this rule when he engaged in conduct involving dishonesty or misrepresentation in his dealings with a former client, engaged in conduct prejudicial to the administration of justice, and engaged in conduct adversely reflecting upon his fitness to practice law. In re C'De Baca, 109 N.M. 151, 782 P.2d 1348 (1989).

Suspension from practice for gross mishandling of trust funds. — See In re Privette, 92 N.M. 32, 582 P.2d 804 (1978).

Disbarment is appropriate sanction for attorney's conversion of his clients' funds to his own use. — See In re Duffy, 102 N.M. 524, 697 P.2d 943 (1985).

Disbarment was the appropriate sanction, since defendant commingled his own monies with a trust account, issued checks to clients for whom no monies were on deposit, issued checks against insufficient funds and transferred monies from the trust account to his own accounts. In re Rawson, 113 N.M. 758, 833 P.2d 235 (1992).

Attorneys should not be allowed to practice law while on probation under a criminal sentence and the court may disbar such an attorney until he is no longer on probation. In re Norrid, 100 N.M. 326, 670 P.2d 580 (1983).

Involuntary manslaughter sufficient to support suspension. — When a member of the bar is guilty of the crime of involuntary manslaughter resulting from driving a motor vehicle while under the influence of intoxicating liquor, such offense is an act contrary to honesty, justice or good morals sufficient to support a suspension from practice. In re Morris, 74 N.M. 679, 397 P.2d 475, 17 A.L.R.3d 681 (1964).

Conclusive proof of crime involving moral turpitude. — Since there was a judgment of conviction of second-degree murder preceded by a plea of nolo contendere, it amounted to conclusive proof of a crime involving moral turpitude, and disbarment was justified. In re Noble, 77 N.M. 461, 423 P.2d 984 (1967).

Criminal sexual contact upon client warrants disbarment. — See In re Stanton, 103 N.M. 413, 708 P.2d 325 (1985).

Bankruptcy practice. — An attorney's failure to address a potential secured claim against his client in a bankruptcy proceeding was a violation of Rules 16-101 and 16-804. In re Elmore, 1997-NMSC-020, 123 N.M. 79, 934 P.2d 273.

One-year suspension warranted. — Attorney's actions warranted a one-year suspension since he made misrepresentations to a court, failed to return unearned fees, failed to render an accounting to a client and acted otherwise to prejudice the administration of justice. In re Arrieta, 104 N.M. 389, 722 P.2d 640 (1986).

Attorney was suspended from practice for one year for engaging in conduct that adversely reflected upon his fitness to practice law, for neglecting a legal matter entrusted to him, for engaging in conduct involving dishonesty or misrepresentation, and for failure to give his full cooperation and assistance to counsel for the disciplinary board. In re Laughlin, 104 N.M. 630, 725 P.2d 830 (1986).

Attorney's actions warranted a one-year suspension since he took \$6900.00 from his client on the pretense of needing it to cover the costs of litigation and converted it to his own use and thereafter demonstrated an apparent lack of concern about refunding the money. In re Everidge, 105 N.M. 203, 730 P.2d 1185 (1983).

By keeping money that erroneously was given to him and then refusing to respond to demands that he properly channel the funds, attorney's conduct warranted suspension from the practice of law for a definite period of one year, with suspension deferred under prescribed terms and conditions. In re Norton, 109 N.M. 616, 788 P.2d 372 (1990).

Actions by an attorney involving false statements of material fact to a bankruptcy court, representation of a client in bankruptcy when owed money by the client, deposit of monies in his operating account instead of his trust account, failure to produce required records for his trust account, and misrepresentations to the Internal Revenue Service when acting in his capacity as a CPA, warranted suspension. In re Archuleta, 1996-NMSC-039, 122 N.M. 52, 920 P.2d 517.

Attorney's conduct involving two frivolous claims resulting in violation of Rule 16-301 and several other provisions of the Rules of Professional Conduct warranted a one-year suspension. In re Richards, 1999-NMSC-030, 127 N.M. 716, 986 P.2d 1117.

Indefinite suspension warranted. — Sixteen violations of nine rules governing professional responsibility, involving misrepresentation, neglect, improper fee-splitting,

disrespect to various tribunals, and other conduct prejudicial to the administration of justice resulted in defendant's being suspended indefinitely from the practice of law. In re Quintana, 104 N.M. 511, 724 P.2d 220 (1986).

An attorney's apparent failure to complete several cases, to take steps to insure that the interests of her clients were protected upon her withdrawal from their cases, and to promptly refund any unearned portions of fees paid in advance, as well as her lack of cooperation with the disciplinary counsel, constitute conduct violative of the professional rules warranting an indefinite suspension from the practice of law. In re Roth, 105 N.M. 255, 731 P.2d 951 (1987).

Attorney was subject to an indefinite period of suspension of not less than five years since he had used a client's funds as collateral for a personal loan and had invested client's funds in a corporation in which he had an ownership interest, even though he made full restitution and fully acknowledged his misconduct. In re Thompson, 105 N.M. 257, 731 P.2d 953 (1987).

An attorney who collected a fee to represent a client in a criminal matter and who failed to return the fee even though the charge was dismissed without any action by the lawyer, who subsequently contended, knowingly and dishonestly, that he was entitled to the fee in disciplinary proceedings, and who forged a physician's signature on a fitness to practice law form on an application to the Arizona bar, was suspended indefinitely. In re Cherryhomes, 115 N.M. 734, 858 P.2d 401 (1993).

Indefinite suspension was warranted because of an attorney's violation of Paragraphs C, D and H of this rule and other provisions, such as Rule 16-101, by failing to provide competent representation; Rule 16-103, by failing to act with diligence and promptness in representing a client; Rule 16-104, by failing to keep his client informed about the status of a matter and failing to respond to requests for information; and Rule 16-116 D, by failing to surrender papers and property to which the client was entitled at the termination of the representation. In re Lally, 1999-NMSC-003, 126 N.M. 566, 973 P.2d 243.

Indefinite suspension was warranted because of attorney's violation of Paragraphs C, D and H of this rule and other provisions, such as Rule 16-101, by failing to provide competent representation; Rule 16-105, by charging an excessive fee; Rule 16-302, by failing to expedite litigation; Rule 16-303 A(1), by making an untrue statement of fact to a tribunal; Rule 16-304 D, by failing to comply with a discovery request; and Rule 16-505 A, by practicing law in a jurisdiction where doing so violates regulations. In re Righter, 1999-NMSC-009, 126 N.M. 730, 975 P.2d 343.

Indefinite suspension was warranted because an attorney violated Paragraphs D and H by engaging in conduct that was prejudicial to the administration of justice and conduct that adversely reflected on his fitness to practice law. The attorney also violated the following rules: Rule 16-101 NMRA, by failing to provide competent representation; Rule 16-102A NMRA, by failing to abide by a client's decisions concerning the objectives of

the representation; Rule 16-103 NMRA, by failing to act with reasonable diligence and promptness in representing a client; Rule 16-104A NMRA, by failing to keep a client reasonably informed about the status of a matter and by failing to promptly comply with reasonable requests for information; Rule 16-116D NMRA, by failing to timely surrender papers and property to which a client was entitled and by failing to timely refund any advance payment of fee that had not been earned; Rule 16-801B NMRA, by failing to respond to lawful requests for information from the office of disciplinary counsel; and Rule 16-803D NMRA, by failing to cooperate with disciplinary counsel in the course of the investigation. In re Carlton, 2000-NMSC-001, 128 N.M. 419, 993 P.2d 736.

Probation and indefinite suspension warranted. — See In re Gabriel, 110 N.M. 691, 799 P.2d 127 (1990).

Attorney disbarred for committing 79 violations of various rules. In re Ortega, 101 N.M. 719, 688 P.2d 329 (1984).

Attorney disbarred for having engaged in four acts of misconduct, including subornation of false statements, intimidation of witnesses, dishonesty and intentional misrepresentations to the disciplinary board in the form of false statements made to the board in the regular course of its proceedings. See In re Ayala, 102 N.M. 214, 693 P.2d 580 (1984).

An attorney was disbarred for conviction of bribery in violation of 30-24-2 NMSA 1978. In re Esquibel, 113 N.M. 24, 822 P.2d 121 (1992).

Disbarment warranted. — Disbarment was warranted, despite mitigating factors, since the attorney converted client funds; engaged in conduct involving deceit, dishonesty and misrepresentation; failed to hold clients' funds separate from his own; failed to notify clients of the receipt of funds belonging to them; failed to maintain required trust account records; failed to protect clients' interests at the termination of the representation; failed to advise clients of the status of their legal matters; engaged in conduct prejudicial to the administration of justice; and engaged in conduct adversely affecting his fitness to practice law. In re Kelly, 119 N.M. 807, 896 P.2d 487 (1995).

Attorney's engaging in conduct involving deceit, dishonesty, misrepresentation, or fraud, conduct adversely reflecting upon his fitness to practice law, and other violations warranted disbarment. In re Hamar, 1997-NMSC-048, 123 N.M. 795, 945 P.2d 1013.

Disbarment of an attorney was warranted where, based on his pleas of guilty to three counts of fraud and three counts of embezzlement, a hearing committee of the disciplinary board concluded that he violated Paragraphs B and H. In re Frontino, 2001-NMSC-010, 130 N.M. 175, 21 P.3d 635.

Disbarment of an attorney for 20 months, with automatic reinstatement on a probationary basis, was warranted based on intervention in his law practice because he was abusing crack cocaine and on his admission that during his drug addiction he had

misappropriated money from his attorney trust account in violation of Paragraph A of Rule 16-115 NMRA, by failing to safeguard a client's property, and Paragraphs C and H of this rule, by engaging in conduct involving dishonesty, and conduct adversely reflecting upon one's fitness to practice law. *In re Zamora*, 2001-NMSC-011, 130 N.M. 161, 21 P.3d 30.

Agreements not to prosecute in exchange for restitution. — The practice by attorneys or their agents involving the payment of money as privately-negotiated restitution to an alleged victim in exchange for that person's execution of any sworn statement not to prosecute constitutes conduct prejudicial to the administration of justice in violation of Paragraph D, and adversely reflects on an attorney's fitness to practice law in violation of Paragraph H. *In re Steere*, 110 N.M. 405, 796 P.2d 1101 (1990).

Failure to notify appellate court of settlement. — The failure by counsel for either party to notify the Court of Appeals of settlement pending appeal has adversely affected the operation of the court and may be "conduct that is prejudicial to the administration of justice." In the future the court will routinely advise disciplinary counsel of any instance in which appellate counsel have not forthwith informed the court of a settlement (in whole or in part) of a pending case. *Riesenecker v. Arkansas Best Freight Sys.*, 110 N.M. 451, 796 P.2d 1147 (Ct. App. 1990).

Rule violated. — See *In re Canevaro*, 1997-NMSC-033, 123 N.M. 576, 943 P.2d 1029; *In re Chavez*, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417; *In re Dawson*, 2000-NMSC-024, 129 N.M. 369, 8 P.3d 856.

Administration of justice. — In a personal injury action for damages resulting from a pharmacist filling a child's prescription for Ritalin with methadone, where attorney, despite having prior knowledge that records showed a discrepancy between the number of methadone tablets prescribed and those dispensed, denied plaintiff's request for admission of the existence of records indicating a shortage of methadone tablets, failed to produce a report filed with the Board of Pharmacy, and failed to verify the authenticity of a forged prescription for methadone that was introduced into evidence, the attorney engaged in conduct that was prejudicial to the administration of justice and that adversely reflected on the attorney's fitness to practice law. *In re Estrada*, 2006-NMSC-047, 140 N.M. 492, 143 P.3d 731.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 60 to 73.

Attorney's verbal abuse of another attorney as basis for disciplinary action, 87 A.L.R.3d 351.

Method employed in collecting debt due client as ground for disciplinary action against attorney, 93 A.L.R.3d 880.

Attorney's conviction in foreign or federal jurisdiction as ground for disciplinary action, 98 A.L.R.3d 357.

Narcotics conviction as crime of moral turpitude justifying disbarment or other disciplinary action against attorney, 99 A.L.R.3d 288.

Election campaign activities as ground for disciplining attorney, 26 A.L.R.4th 170.

Validity and enforceability of referral fee agreement between attorneys, 28 A.L.R.4th 665.

Liability of attorney for improper or ineffective incorporation of client, 40 A.L.R.4th 535.

Sexual misconduct as ground for disciplining attorney or judge, 43 A.L.R.4th 1062.

Liability of attorney, acting for client, for malicious prosecution, 46 A.L.R.4th 249.

Right of attorney to conduct ex parte interviews with corporate party's nonmanagement employees, 50 A.L.R.4th 652.

Legal malpractice liability for advising client to commit crime or unlawful act, 51 A.L.R.4th 1227.

Attorney's liability under state law for opposing party's counsel fees, 56 A.L.R.4th 486.

Attorney's misrepresentation to court of his state of health or other personal matter in seeking trial delay as ground for disciplinary action, 61 A.L.R.4th 1216.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in matters involving real estate transactions as ground for disciplinary action - modern cases, 65 A.L.R.4th 24.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in tax matters as ground for disciplinary action - modern cases, 66 A.L.R.4th 314.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in estate or probate matters as ground for disciplinary action - modern cases, 66 A.L.R.4th 342.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in family law matters as ground for disciplinary action - modern cases, 67 A.L.R.4th 415.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in bankruptcy matters as ground for disciplinary action - modern cases, 70 A.L.R.4th 786.

Legal malpractice in handling or defending medical malpractice claim, 78 A.L.R.4th 725.

Criminal liability of attorney for tampering with evidence, 49 A.L.R. 5th 619.

Propriety of law firm's representation of client in federal court where lawyer affiliated with firm is disqualified from representing client, 51 A.L.R. Fed. 678.

7 C.J.S. Attorney and Client §§ 77 to 87.

16-805. Disciplinary authority.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

[As amended, effective September 1, 2003.]

ANNOTATIONS

COMMENT TO MODEL RULES

ABA COMMENT:

It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule.

Application of disciplinary rules. — In cases where New Mexico attorneys confer with out-of-state counsel for corporate clients involved in litigation in New Mexico, attorneys licensed to practice in New Mexico have an independent duty to the New Mexico judiciary to obey New Mexico's ethical and discovery rules, regardless of the opinion of out-of-state counsel. In re Estrada, 2006-NMSC-047, 140 N.M. 492, 143 P.3d 731.

Table Of Corresponding Rules

The first table below reflects the disposition of the former Code of Professional Responsibility. The left-hand column contains the former rule number, and the right-hand column contains the corresponding present Rule of Professional Conduct.

The second table below reflects the antecedent provisions in the former Code of Professional Responsibility (right-hand column) of the present Rules of Professional Conduct (left-hand column).

Former Rule	NMRA	Former Rule	NMRA
1-101	16-801	5-105(A)	16-107, 16-110, 16-202
1-102(A)(1)	16-804	5-105(B)	16-107, 16-113, 16-202
1-102(A)(2)	16-501, 16-503, 16-804	5-105(C)	16-107, 16-109, 16-113, 16-202
1-102(A)(3)	16-804	5-105(D)	16-110, 16-112, 16-113
1-102(A)(4)	16-303, 16-304, 16-804	5-106	16-108
1-102(A)(5)	16-301 to 16-304, 16-804	5-107(A)	16-107, 16-108
1-102(A)(6)	16-304, 16-804	5-107(B)	16-107, 16-108, 16-113, 16-201, 16-504
1-103(A)	16-501, 16-803	5-107(C)	16-504
1-103(B)	16-801	6-101	16-101, 16-103, 16-104
2-101(A)	16-701	6-102	16-108
2-101(B)	16-701, 16-702	7-101(A)	16-102, 16-103, 16-302, 16-305, 16-404
2-101(C)	16-701	7-101(B)	16-102, 16-116
2-101(D)	16-702	7-102(A)(1)	16-301, 16-404
2-101(E)	16-701	7-102(A)(2)	16-301
2-101(F)	16-701	7-102(A)(3)	16-303, 16-401
2-101(G)	16-701	7-102(A)(4)	16-303, 16-401
2-101(H)	16-702	7-102(A)(5)	16-303, 16-401
2-101(I)	16-702	7-102(A)(6)	16-102, 16-304
2-102(A)	16-702, 16-704	7-102(A)(7)	16-102, 16-303, 16-401
2-102(B)	16-702, 16-705	7-102(A)(8)	16-102, 16-804
2-102(C)	16-705	7-102(B)	16-106, 16-303, 16-401
2-102(D)	16-705	7-103	16-308
2-102(E)	16-701, 16-704, 16-705	7-104	16-304, 16-402, 16-403

2-103(A)	None	7-105	None
2-103(B)	16-702	7-106(A)	16-102, 16-304, 16-305
2-108(C)	16-504, 16-702	7-106(B)	16-107, 16-303, 16-309
2-103(D)	16-116, 16-504	7-106(C)	16-304, 16-305, 16-404
2-103(E)	16-116, 16-702	7-107(A)-(I)	16-306
2-104	16-116	7-107(D)-(F)	16-404
2-105	16-704	7-107(J)	16-501, 16-503
2-106	16-105	7-108(A)	16-305
2-107(A)	16-105	7-108(B)	16-305, 16-503
2-107(B)	16-504	7-108(C)	16-305
2-108	16-506	7-108(D)	16-404
2-109	16-116, 16-301	7-108(E)	16-404, 16-501, 16-503
2-110(A)	16-116	7-108(F)	16-404
2-110(B)	16-116, 16-404	7-108(G)	None
2-110(C)	16-102, 16-116	7-109(A)	16-303, 16-304
3-101(A)	16-505	7-109(B)	16-304
3-101(B)	16-505, 16-804	7-109(C)	16-304
3-102	16-504	7-110(A)	16-305, 16-804
3-103	16-504	7-110(B)	16-305
4-101(A)	16-106	8-101	16-305, 16-804
4-101(B)	16-106, 16-108, 16-109	8-102	16-802, 16-804
4-101(C)	16-106	9-101(A)	16-112
4-101(D)	16-501, 16-503	9-101(B)	16-111, 16-112
5-101(A)	16-107, 16-108, 16-603, 16-604	9-101(C)	16-102, 16-309, 16-701, 16-804
5-101(B)	16-107, 16-307	9-102	16-104, 16-115
5-102	16-107, 16-307		
5-103(A)	16-108, 16-115		
5-103(B)	16-108		
5-104(A)	16-107, 16-108		
5-104(B)	16-108		
NMRA	Former Rule	NMRA	Former Rule
16-111	9-101	16-404	2-110, 7-101, 7-102, 7-106 to 7-108
16-112	5-105, 9-101	16-501	1-102, 1-103, 4-101, 7-107, 7-108

16-113	5-105, 5-107	16-502	None
16-114	None	16-503	1-102, 4-101, 7-107, 7-108
16-115	5-103, 9-102	16-504	2-103, 3-102, 3-103, 5-107
16-116	2-103, 2-104, 2-109, 2-110	16-505	3-101
16-201	5-107	16-506	2-108
16-202	5-105	16-601, 16-602	None
16-203	None	16-603	5-101
16-301	1-102, 2-109, 7-102	16-604	5-101, 8-101
16-302	1-102, 7-101	16-701	2-101, 2-102, 9-101
16-303	1-102, 7-102, 7-106, 7-109	16-702	2-101 to 2-104
16-304	1-102, 7-102, 7-104, 7-106, 7-109	16-704	2-101, 2-102, 2-105
16-305	7-101, 7-106, 7-108 to 7-110, 8-101	16-705	2-102, 2-105
16-306	7-107	16-801	1-101 to 1-103
16-307	5-101, 5-102	16-802	8-102, 6-103
16-308	7-103	16-803	1-103
16-309	7-106, 9-101	16-804	1-102, 2-103, 3-101, 7-102, 7-110, 8-101, 9-101
16-401	7-102	16-805	None
16-402, 16-403	7-104		