RULES OF PROFESSIONAL CONDUCT

1986 Recompilation

Rule

SCRA 16-001 (1991 Repl.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF AMENDMENT OF :
RULE 16-505 OF THE
RULES : Misc. 8000
GOVERNING PROFESSIONAL CONDUCT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Scarborough, Senior Justice Sosa, Justice Stowers, Justice Walters and Justice Ransom concurring:

NOW, THEREFORE, IT IS ORDERED that Rule 16-505 of the Rules Governing Professional Conduct be and the same is hereby amended;

IT IS FURTHER ORDERED that the amendment of the Rule 16-505 of the Supreme Court Rules Governing Professional Conduct shall be effective on and after September 1, 1987;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment of Rule 16-505 of the Rules Governing Professional Conduct by publishing the same in the News and Views and in the NMSA 1978.

DONE at Santa Fe, New Mexico this 8th day of June, 1987.

/s/ TONY SCARBOROUGH
Chief Justice
/s/ DAN SOSA, JR.
Senior Justice
/s/ HARRY E. STOWERS, JR.
Justice
/s/ MARY C. WALTERS
Justice
/s/ RICHARD E. RANSOM
Justice

SCRA 16-002 (1991 Repl.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE AMENDMENT :
OF RULE 16-115 OF THE RULES
OF : 8000 Misc.
PROFESSIONAL CONDUCT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Scarborough, Senior Justice Sosa, Justice Stowers, Justice Walters and Justice Ransom concurring:

NOW, THEREFORE, IT IS ORDERED that Rule 16-115 be and the same is hereby amended;

IT IS FURTHER ORDERED that the amendment of Rule 16-115 of the Rules of Professional Conduct shall be effective on and after February 15, 1988;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment of the Rules of Professional Conduct by publishing the same in the Bar Bulletin and in the SCRA 1986.

DONE at Santa Fe, New Mexico this 20th day of January, 1988.

/s/ TONY SCARBOROUGH
Chief Justice
/s/ DAN SOSA, JR.
Senior Justice
/s/ HARRY E. STOWERS, JR.
Justice
/s/ MARY C. WALTERS
Justice
/s/ RICHARD E. RANSOM
Justice

SCRA 16-003 (1991 Repl.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE AMENDMENT OF :
RULES 16-702 AND 16-703 OF
THE : 8000 Misc.
RULES OF PROFESSIONAL CONDUCT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Sosa, Justice Ransom, Justice Baca and Justice Larrabee concurring:

NOW, THEREFORE, IT IS ORDERED that Rules 16-702 and 16-703

be and the same are hereby amended;

IT IS FURTHER ORDERED that the amendment of Rules 16-702 and 16-703 of the Rules of Professional Conduct shall be effective on and after October 1, 1989;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment of the Rules of Professional Conduct by publishing the same in the Bar Bulletin and in the SCRA 1986.

DONE at Santa Fe, New Mexico this 9th day of August, 1989.

/s/ DAN SOSA, JR.
Chief Justice
/s/ RICHARD E. RANSOM
Justice
/s/ JOSEPH F. BACA
Justice
/s/ CHARLES B. LARRABEE
Justice

SCRA 16-004 (1991 Repl.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

IN THE MATTER OF THE AMENDMENT OF :
RULE 16-115 OF THE RULES
OF : 8000 Misc.
PROFESSIONAL CONDUCT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Sosa, Justice Ransom, Justice Baca and Justice Larrabee concurring:

NOW, THEREFORE, IT IS ORDERED that Rule 16-115 and the same are hereby amended;

IT IS FURTHER ORDERED that the amendment of Rule 16-115 of the Rules of Professional Conduct shall be effective on and after January 1, 1990;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment of the Rules of Professional Conduct by publishing the same in the Bar Bulletin and in the SCRA 1986.

DONE at Santa Fe, New Mexico this 16th day of August, 1989.

/s/ DAN SOSA, JR.
Chief Justice
/s/ RICHARD E. RANSOM
Justice
/s/ JOSEPH F. BACA
Justice

/s/ CHARLES B. LARRABEE
Justice

SCRA 16-005 (1991 Repl.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE :
AMENDMENT OF THE
RULES : 8000 Misc.
OF PROFESSIONAL CONDUCT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Sosa, Justice Ransom, Justice Baca, Justice Montgomery and Justice Franchini concurring:

NOW, THEREFORE, IT IS ORDERED that Rule 16-803 of the Rules of Professional Conduct be and the same is hereby amended;

IT IS FURTHER ORDERED that the above amendment of the Rules of Professional Conduct shall be effective on and after April 1, 1991;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment and adoption of the above rules by publishing the same in the Bar Bulletin and the SCRA 1986.

DONE at Santa Fe, New Mexico this 9th day of January, 1991.

/s/ DAN SOSA, JR.
Chief Justice
/s/ RICHARD E. RANSOM
Justice
/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice

SCRA 16-006 (1993 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE :
AMENDMENT OF THE
RULES : 8000 Misc.

OF PROFESSIONAL CONDUCT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Sosa, Justice Ransom, Justice Baca, Justice Montgomery and Justice Franchini concurring:

NOW, THEREFORE, IT IS ORDERED that Rule 16-306 and Comment of the Rules of Professional Conduct be and the same is hereby amended;

IT IS FURTHER ORDERED that the above amendment of the Rules of Professional Conduct shall be effective on or after October 1, 1991;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment of Rule 16-306 by publishing the same in the Bar Bulletin and SCRA 1986.

DONE at Santa Fe, New Mexico this 27th day of June, 1991.

/s/ DAN SOSA, JR.
Chief Justice
/s/ RICHARD E. RANSOM
Justice
/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice

SCRA 16-007 (1993 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE :
AMENDMENT AND ADOPTION
OF : 8000 Misc.
RULES OF PROFESSIONAL CONDUCT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Ransom, Justice Baca, Justice Montgomery, Justice Franchini and Justice Frost concurring:

NOW, THEREFORE, IT IS ORDERED that Rules 16-701, 16-702, 16-703 and 16-704 of the Rules of Professional Conduct be and the same are hereby amended;

IT IS FURTHER ORDERED that the adoption of Rules 16-706 and 16-707 of the Rules of Professional Conduct be and the same is hereby approved;

IT IS FURTHER ORDERED that the above amendment and adoption

of the Rules of Professional Conduct shall be effective for all lawyer advertisements mailed, displayed or broadcast on and after August 1, 1992;

IT IS FURTHER ORDERED that the five (5) year recordkeeping requirements of revised Rule 16-702 shall apply to all advertisements mailed, displayed or broadcast on and after August 1, 1992;

IT IS FURTHER ORDERED that any advertising contract entered into prior to the publication of these rules in the Bar Bulletin, other than a contract which provides for the mailing of advertisements to accident victims, may be continued in effect until the termination date of such contract or the exercise of an option to extend such contract whichever date occurs earlier, provided such contracts are filed with the Legal Advertising Committee of the Disciplinary Board on or before August 15, 1992;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment and adoption of the above rules by publishing the same in the Bar Bulletin and in the SCRA 1986.

DONE at Santa Fe, New Mexico this 30th day of April, 1992.

/s/ RICHARD E. RANSOM
Chief Justice
/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice
/s/ STANLEY F. FROST
Justice

SCRA 16-008 (1993 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE :
AMENDMENT OF THE
RULES : Misc. 8000
OF PROFESSIONAL CONDUCT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Ransom, Justice Baca, Justice Montgomery, Justice Franchini and Justice Frost concurring:

NOW, THEREFORE, IT IS ORDERED that Rules 16-701 and 16-704

of the Rules of Professional Conduct be and the same are hereby amended;

IT IS FURTHER ORDERED that the above amendment and adoption of the Rules of Professional Conduct shall be effective on and after December 1, 1992;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment and adoption of the above rules by publishing the same in the Bar Bulletin and SCRA 1986.

DONE at Santa Fe, New Mexico this 13th day of August, 1992.

/s/ RICHARD E. RANSOM
Chief Justice
/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice
/s/ STANLEY F. FROST
Justice

SCRA 16-009 (1993 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE AMENDMENT :
OF THE RULES OF
PROFESSIONAL : 93-8300
CONDUCT :

This matter coming on for consideration by the Court and the Court being sufficiently advised, Chief Justice Ransom, Justice Baca, Justice Montgomery, Justice Franchini, and Justice Frost concurring:

NOW, THEREFORE, IT IS ORDERED that Rules 16-701, 16-702, and 16-707 of the Rules of Professional Conduct be and the same hereby are amended;

IT IS FURTHER ORDERED that the amendment of the above rules shall be effective November 1, 1993;

IT IS FURTHER ORDERED that the clerk of the Court hereby is authorized and directed to give notice of the amendment of the Rules of Professional Conduct by publishing the same in the SCRA 1986.

DONE at Santa Fe, New Mexico, this 15th day of July, 1993.

/s/ RICHARD E. RANSOM
Chief Justice

/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice
/s/ STANLEY F. FROST
Justice

SCRA 16-010 (1993 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE APPROVAL :
OF RULE 16-300 OF THE RULES OF :
PROFESSIONAL
CONDUCT : 93-8300

This matter coming on for consideration by the Court and the Court being sufficiently advised, Chief Justice Ransom, Justice Baca, Justice Montgomery, Justice Franchini, and Justice Frost concurring:

NOW, THEREFORE, IT IS ORDERED that a new Rule 16-300 of the Rules of Professional Conduct be and the same is hereby approved;

IT IS FURTHER ORDERED that Rule 16-300 of the Rules of Professional Conduct shall be effective on and after January 1, 1994;

IT IS FURTHER ORDERED that the Clerk of the Court is hereby authorized and directed to give notice of the adoption of the above rule by publishing the same in the Bar Bulletin and SCRA 1986.

DONE at Santa Fe, New Mexico, this 8th day of November, 1993.

/s/ RICHARD E. RANSOM
Chief Justice
/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice
/s/ STANLEY F. FROST
Justice

SCRA 16-011 (1993 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
NO. 94-8300
IN THE MATTER OF THE AMENDMENT OF RULE
16-706 OF THE RULES OF PROFESSIONAL
CONDUCT GOVERNING LEGAL ADVERTISING

This matter coming on for consideration by the Court upon the recommendation from the Legal Advertising Committee of the Disciplinary Board to amend Rule 16-706 of the Rules of Professional Conduct governing legal advertising by adding five members to the committee, and the Court being sufficiently advised, Chief Justice Ransom, Justice Baca, Justice Montgomery, Justice Franchini and Justice Frost concurring;

NOW, THEREFORE, IT IS ORDERED that Rule 16-706 of the Rules of Professional Conduct hereby is amended and five (5) additional members shall be appointed to the Legal Advertising Committee of the Disciplinary Board effective January 1, 1994;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendment of Rule 16-706 of the Rules Governing Professional Conduct and of the vacancies created by this order by publishing the same in the Bar Bulletin.

DONE at Santa Fe, New Mexico this 17th day of February, 1994.

/s/ RICHARD E. RANSOM
Chief Justice
/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice
/s/ STANLEY F. FROST
Justice

PREAMBLE A Lawyer's Responsibilities

A lawyer 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 dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

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, 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. 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, and should therefore devote professional time and civic influence in their behalf. 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 substantative 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 responsibility 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 upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these rules 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.

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 which 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 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 on 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.

CLIENT-LAWYER RELATIONSHIP

Rule

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

COMMENT TO MODEL RULES
ABA COMMENT:

Legal Knowledge and Skill

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.

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.

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.

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 6.2 [16-602].

Thoroughness and Preparation

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 elaborate treatment than matters of lesser consequence.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

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). In re Reid, 116 N.M. 38, 859 P.2d 1065 (1993).

Failure of defense counsel 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. - Where 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. - Where 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 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).

One-year suspension warranted. - Attorney's actions warranted a one-year suspension where 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. - 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).

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, or 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).

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).

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

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.

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.

A. **Client's decisions.** A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to Paragraphs C, D and E, and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of 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 objectives of the representation if the client consents after consultation.

D. **Course of conduct.** A lawyer shall not engage, or counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or which misleads the court, but a lawyer may 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.

E. **Consultation on limitations of assistance.** When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the

lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version inserts "engage or" and "or which misleads a client" in Paragraph D.

ABA COMMENT:

Scope of Representation

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14 [16-114].

Independence from Client's Views or Activities

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.

Services Limited in Objectives or Means

The objectives or scope of services 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. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [16-101], or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. 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.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6 [16-106]. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

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

Paragraph (d) [D] applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) [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) [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.

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).

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, paid with public funds, are not excused from compliance with the Code of Professional Responsibility (now the Rules of Professional Conduct). 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) 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) 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 where 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. - Where 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 where 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).

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).

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

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

COMMENT TO MODEL RULES
ABA COMMENT:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2 [16-102]. A lawyer's workload should be controlled so that each matter can be handled adequately.

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.

Unless the relationship is terminated as provided in Rule 1.16 [16-116], 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 but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

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, N.M. , 884 P.2d 481 (1994).

Six-month suspension and other penalties warranted where 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, or 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).

Rule violated. - See In re Martinez, 107 N.M. 171, 754 P.2d 842 (1988).

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

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 keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

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. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a) [16-102A]. Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, 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 might injure or coerce others. On the other hand, a lawyer ordinarily cannot 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.

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 mental disability. See Rule 1.14 [16-114]. 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 1.13 [16-113]. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

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. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) [16-304C] directs compliance with such rules or orders.

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, N.M. , 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).

Indefinite suspension warranted. - Where 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).

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's fee shall be reasonable. 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 performing the services; and

(8) whether the fee is fixed or contingent.

B. **Basis or rate of fees.** When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

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 writing 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. 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 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, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d) [16-116D]. 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 Rule 1.8(j) [16-108J]. However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

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. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

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) [E.] permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 [16-501] for purposes of the matter involved.

Disputes Over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law 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.

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 331/3% 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).

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 payments 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. - 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 where 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 discernable 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).

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).

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).

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.

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 representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in Paragraphs B, C and D.

B. **Disclosure to prevent harm to others.** To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, a lawyer should reveal such information to the extent the lawyer reasonably believes necessary.

C. **Disclosure to prevent financial or property-related harm.** To prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another, a lawyer may reveal such information to the extent the lawyer reasonably believes necessary.

D. **Disclosure in lawyer-client controversy.** 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, a lawyer may reveal such information to the extent the lawyer reasonably believes necessary.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version designates Paragraphs (b)(1) and (b)(2) of the ABA version as Paragraphs B and D, and adds Paragraph C.

ABA COMMENT:

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies 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 applies not merely 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.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

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

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d) [16-102D]. Similarly, a lawyer has a duty under Rule 3.3(a)(4) [16-303A(4)] not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) [16-102D] to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d) [16-102D], because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1) [C], the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of 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. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) [C] does not violate this Rule.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1) [16-116A(1)].

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6 [16-106]. Neither this Rule nor Rule 1.8(b) [16-108B] nor Rule 1.16(d) [16-116D] prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b) [16-113B].

Dispute Concerning Lawyer's Conduct

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. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) [D] 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, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which 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.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary 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. A lawyer entitled to a fee is permitted by paragraph (b)(2) [D] 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. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a

representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) [16-106A] requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1 [16-202, 16-203, 16-303 and 16-401]. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 [16-106] is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

The duty of confidentiality continues after the client-lawyer relationship has terminated.

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

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 where 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 annual survey of New Mexico law relating to evidence, see 12 N.M.L. Rev. 379 (1982).

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.

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

16-107. Conflict of interest; general rule.

A. **Representation adverse to other client considered.** A lawyer shall not represent a client if the representation of that client will be directly or substantially adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation. The consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

B. **Lawyer's other responsibilities considered.** Unless otherwise required by these rules, a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version inserts "or substantially" in the first sentence, adds the second sentence in Paragraph A(2), and inserts "Unless otherwise required by these rules," at the beginning of Paragraph B.

ABA COMMENT:

Loyalty to a Client

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16 [16-116]. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9 [16-109]. See also Rule 2.2(c) [16-202C]. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 [16-103] and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) [A] expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) [A] applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other

responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) [B] addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict 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. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) [A(1)] with respect to representation directly adverse to a client, and paragraph (b)(1) [B(1)] with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is 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.

Lawyer's Interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 [16-101] and 1.5 [16-105]. 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. 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 interest.

Conflicts in Litigation

Paragraph (a) [A] prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b) [B]. An impermissible 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 codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) [B] are met. Compare Rule 2.2 [16-202] involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f) [16-108F]. For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect 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 actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

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 of interest among them.

Conflict questions may also 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 arise. 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. The lawyer should make clear the relationship to the parties involved.

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's 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.

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

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).

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).

Suspension warranted where conflicting interests impair independent judgment. - Where 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).

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; prohibited transactions.

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 to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

B. **Use of information limited.** Unless otherwise required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

C. **Client gifts.** A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

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, provided the client remain ultimately liable for such costs and expenses.

(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 consents after consultation;

(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.

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 consents after consultation, including disclosure of 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 make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

I. **Representation adverse to representation by related lawyer.** A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

J. **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 granted 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.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version inserts "Unless otherwise required by these rules" at the beginning of Paragraph B and substitutes "provided the client remain ultimately liable for such costs and expenses" for "the repayment of which may be contingent on the outcome of the matter" in Paragraph E(1).

ABA COMMENT:

Transactions Between Client and Lawyer

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) [A] does not, however, 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) [A] are unnecessary and impracticable.

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 effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) [C] recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

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) [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 1.5 [16-105] and paragraph (j) [J].

Person Paying for Lawyer's Services

Rule 1.8(f) [16-108F] requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 [16-106] concerning confidentiality and Rule 1.7 [16-107] concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers

Rule 1.8(i) [16-108I] applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10 [16-107, 16-109, and

16-110]. The disqualification stated in Rule 1.8(i) [16-108I] is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation

Paragraph (j) [J] states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 [16-105] and the exception for certain advances of the costs of litigation set forth in paragraph (e) [E].

This Rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

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).

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).

Where 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).

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).

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. Conflict of interest; former client.

A lawyer who has formerly represented a client in a matter shall not thereafter:

A. 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 consents after consultation; or

B. use information relating to the representation to the disadvantage of the former client except as Rule 16-106 would permit with respect to a client or when the information has become generally known.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 [16-107] determine whether the interests of the present and former client are adverse. Thus, 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.

The scope of a "matter" for purposes of Rule 1.9(a) [16-109A] may depend 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 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 wholly 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 jurisdiction. 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.

Information acquired by the lawyer in the course of representing a client may not subsequently be used 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.

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7 [16-107]. With regard to disqualification of a firm with which a lawyer is associated, see Rule 1.10 [16-110].

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).

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. Imputed disqualification; 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 Rule 16-107, Paragraph C of Rule 16-108, Rule 16-109 or 16-202.

B. **Previous representation.** When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rule 16-106 and Paragraph B of Rule 16-109 that is material to the matter.

C. **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 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 and Paragraph B of Rule 16-109 that is material to the matter.

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.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

Definition of "Firm"

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition 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 suggesting 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 confidential 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.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty 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.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.1(a) [16-111A] and (b) [B]; where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.1(c)(1) [16-111C(1)]. The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9 [16-106, 16-107, and 16-109].

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11 [16-106, 16-109, and 16-111]. However, if the more extensive disqualification in Rule 1.10 [16-110] were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 [16-110] were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11 [16-111].

Principles of Imputed Disqualification

The rule of imputed disqualification stated in paragraph (a) [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) [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 paragraphs (b) [B] and (c) [C].

Lawyers Moving Between Firms

When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal

counsel. Third, the rule of disqualification 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 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 imputed disqualification were defined 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.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, 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 discussion 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.

Application of paragraphs (b) [B] and (c) [C] depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraph (b) [B] and (c) [C] operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 [16-106] and 1.9(b) [16-109B]. Thus, if a lawyer while with one firm acquired no knowledge of 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.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 [16-106] and 1.9 [16-109].

Adverse Positions

The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a) [16-109A]. Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.10(b) [16-110B] and (c) [C] concerning confidentiality have been met.

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).

16-111. Successive government and private employment.

A. **Subsequent private representation.** Except as law may otherwise expressly permit, a lawyer shall not represent a private 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 consents in writing after consultation. 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 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.

B. **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. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

C. **Subsequent government employment.** Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

D. **"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.

E. **"Confidential government information" defined.** As used in this rule, the term "confidential government information" means information which 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.

F. **"Screened" defined.** As used in this rule, the term "screened" means that appropriate steps shall be taken to insure that no information about the matter is, or shall be, transmitted to or from the disqualified lawyer.

G. **Advocacy before governmental body.** A lawyer in private practice shall not appear as an advocate before a governmental body or any division thereof, or governmental agency or commission, at any time when the lawyer is representing that same governmental body or division, agency or commission in another matter. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue advocacy in such a circumstance, unless:

(1) the disqualified lawyer is screened from any participation in the matter; and

(2) written notice is promptly given to the appropriate governmental agency and to any adverse party to enable such agency or party to ascertain compliance with this rule. Provided, however, that nothing in this rule shall be interpreted to prohibit an attorney appearing as an advocate before one division or an executive department while representing another division within the same department, so long as said attorney has not, during his representation of the division, advised or had significant contact with the secretary or other administrative head governing both divisions.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version inserts "in writing" in Paragraph A and adds Paragraphs F and G.

ABA COMMENT:

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b) [16-110B], which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 [16-107] and the protections afforded former clients in Rule 1.9 [16-109]. In addition, such a lawyer is subject to Rule 1.11 [16-111] and 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.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public

authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, 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. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) [A(1)] and (b) [B] do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) [A(2)] does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 [16-111] and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) [B] 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.

Paragraphs (a) [A] and (c) [C] do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 [16-107] and is not otherwise prohibited by law.

Paragraph (c) [C] does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

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).

16-112. Former judge or arbitrator.

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 as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless the court, if applicable, and all parties to the proceeding consent after disclosure.

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

C. **Representation by firm.** 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 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 tribunal to enable it 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.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that, in Paragraph A, the New Mexico version omits "and substantially" following "participated personally" and inserts "the court, if applicable, and".

ABA COMMENT:

This Rule generally parallels Rule 1.11 [16-111]. The term "personally and substantially" signifies that a judge who was a member of a multi-member 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 the Comment to Rule 1.11 [16-111]. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial 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.

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 which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, 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 consideration. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

C. **Terminating representation.** If, despite the lawyer's efforts in accordance with Paragraph B, the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 16-116.

D. **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 it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

E. **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. If the organization's consent to the dual representation is required by Rule 16-107, 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.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

The Entity as the Client

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 Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

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 1.6 [16-106]. 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 1.6 [16-106]. 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 1.6 [16-106].

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. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the

lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

The authority and responsibility provided in paragraph (b) [B] 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 1.6, 1.8, and 1.16, 3.3 or 4.1 [16-106, 16-108, and 16-116, 16-303 or 16-401]. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) [16-102D] can be applicable.

Government Agency

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official 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. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally 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 government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

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.

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

Paragraph (e) [E] recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

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.

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 1.7 [16-107] governs who should represent the directors and the organization.

16-114. Client under a disability.

A. **Client-lawyer relationship.** When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability 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.** A lawyer may seek the appointment of a guardian or conservator or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version inserts "or conservator" in Paragraph B.

ABA COMMENT:

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 mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. 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.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

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. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

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 Rule 1.2(d) [16-102].

Disclosure of the Client's Condition

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

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 in a manner that conforms to the requirements of Rule 17-204 of the Rules Governing Discipline and shall be preserved for a period of five (5) years after termination of the representation of the client in the matter or the termination of the fiduciary or trust relationship.

B. **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.

C. **Severance of interest.** When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interest, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

D. **Pooled interest-bearing trust accounts.** A lawyer or law firm may elect to create and maintain a pooled interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time in compliance with the following provisions:

(1) No earning from such an account shall be made available to a lawyer or law firm.

(2) The account shall include all clients' funds which are nominal in amount or to be held for a short period of time.

(3) An interest-bearing trust account may be established with any bank, savings and loan association or credit union authorized by federal or state law to do business in New Mexico and insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation or the National Credit Union Administration. Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.

(4) The rate of interest payable on any interest-bearing trust account shall not be less than the rate paid by the depository institution to regular, nonlawyer depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minima, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of deposited funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

(5) Lawyers or law firms depositing client funds in a trust savings account established pursuant to this paragraph shall direct the depository institution:

(a) to remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the New Mexico State Bar Foundation ("foundation");

(b) to transmit with each remittance to the foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied; and

(c) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the foundation, the rate of interest applied, and the average account balance of the period for which the report is made.

(6) All interest transmitted to the New Mexico State Bar Foundation shall be distributed periodically in accordance with a plan of distribution which shall be prepared at least annually and approved by the Supreme Court of New Mexico, for the following purposes:

(a) to provide legal assistance to the poor;

(b) to provide legal education;

(c) to improve the administration of justice; and

(d) for such other programs for the benefit of the public as are specifically approved by the Supreme Court of New Mexico from time to time.

E. **Separate interest-bearing trust accounts.** A lawyer or law firm may establish a separate interest-bearing trust account for clients' funds which are neither nominal in amount nor to be held for a short period of time for a particular client or client's matter on which the interest, net of any transaction costs, will be paid to the client.

F. **Determination of nominal amount.** In the exercise of a lawyer's good faith judgment in determining whether funds of a client are of such nominal amounts or are expected to be held for such a short period of time that the funds should not be placed in a separate interest-bearing trust account for the benefit of the client, a lawyer shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be deposited;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services, accounting fees and tax reporting procedures; and

(3) the nature of the transaction(s) involved.

(As amended, effective February 15, 1988, and January 1, 1990.)

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version adds Paragraphs D, E, and F.

ABA COMMENT:

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 which is the property of clients or third persons should 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.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust 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.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

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 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.

A "client's security fund" 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 should participate.

Personal use of client's funds. - Attorney was subject to an indefinite period of suspension (of not less than five years) where 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).

Where 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, where 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 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 SCRA 1986 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 SCRA 1986 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, N.M. , 884 P.2d 478 (1994).

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).

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 where 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).

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).

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).

One-year suspension warranted. - Attorney's actions warranted a one-year suspension where 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).

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).

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 withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) 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;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

C. **Representation required.** 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law, or the Rules of Professional Conduct.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version substitutes "by law or the Rules of Professional Conduct" for "by other law" at the end of Paragraph D.

ABA COMMENT:

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

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.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2 [16-602]. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish 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.

Discharge

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.

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 the client to represent himself.

If the client is mentally incompetent, 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, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14 [16-114].

Optional Withdrawal

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 also may withdraw where the client insists on a repugnant or imprudent objective.

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

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.

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

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).

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, N.M. , 884 P.2d 481 (1994).

Rule violated. - See In re Martinez, 107 N.M. 171, 754 P.2d 842 (1988).

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.

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

ARTICLE 2
COUNSELOR

Rule

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

COMMENT TO MODEL RULES
ABA COMMENT:

Scope of Advice

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.

Advice couched in narrowly 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.

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.

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

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, duty to the client under Rule 1.4 [16-104] may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate 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.

16-202. Intermediary.

If approved by each client in writing:

A. **Intermediary between clients.** A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

B. **Consultation with each client.** While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

C. **Withdrawal as intermediary.** A lawyer shall withdraw as intermediary if any of the clients so request, or if any of the conditions stated in Paragraph A are no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version adds "if required by each client in writing:" at the beginning of the rule.

ABA COMMENT:

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable 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.

A lawyer acts as intermediary in seeking 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, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment

and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 [16-104] and 1.6 [16-106]. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. 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.

Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between the client and one to whom the lawyer has only recently been introduced.

Consultation

In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

Paragraph (b) [B] is an application of the principle expressed in Rule 1.4 [16-104]. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16 [16-116], and the protection of Rule 1.9 [16-109] concerning obligations to a former client.

16-203. Evaluation for use by third persons.

A. **Limitations.** A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

B. **Protected information.** Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 16-106.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

Definition

An evaluation may be performed at the client's direction but 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.

Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the

purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

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 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.

Duty to Third Person

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

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 noncooperation of persons having relevant information. Any such limitations which 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.

Financial Auditors' Requests for Information

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.

ARTICLE 3
ADVOCATE

Rule

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.]

STATE BAR COMMENTARY

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For purposes of this rule, the terms "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.

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.

ANNOTATIONS

Effective dates. - Pursuant to a court order dated November 8, 1993, this rule is effective January 1, 1994.

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 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.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

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.

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. 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 client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or 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.

16-302. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or 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.

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).

16-303. Candor toward the tribunal.

A. **Duties.** A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) 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

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

B. **Compliance with rule.** The duties stated in Paragraph A continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 16-106.

C. **Refusal to offer evidence.** A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

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 which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

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 3.1 [16-301]. 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 Rule 1.2(d) [16-102D] not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d) [16-102D], see the Comment to that Rule. See also the Comment to Rule 8.4(b) [16-804B].

Misleading Legal Argument

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 paragraph (a)(3) [A(3)], an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which 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.

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure 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 which the adversary system is designed to implement. See Rule 1.2(d) [16-102D]. 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.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d) [16-102D].

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule - that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client - applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. 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. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

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 an 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.

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

Public defenders, paid with public funds, are not excused from compliance with the Code of Professional Responsibility (now the Rules of Professional Conduct). 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. 755, 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. - Where 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).

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).

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, not supported by the evidence 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 interest will not be adversely affected by refraining from giving such information.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version adds "not supported by the evidence" in Paragraph E.

ABA COMMENT:

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.

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 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) [A] applies to evidentiary material generally, including computerized information.

With regard to paragraph (b) [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.

Paragraph (f) [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 also Rule 4.2 [16-402].

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

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

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).

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).

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).

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, these rules or the Code of Judicial Conduct;

B. communicate ex parte with such a person except as permitted by law; or

C. engage in conduct intended to disrupt, and which in fact disrupts, a tribunal.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version adds "these rules or the Code of Judicial Conduct" in Paragraph A and "and which in fact disrupts" in Paragraph C.

ABA COMMENT:

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

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.

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.

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 criminal 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.]

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The merits of every adjudicative proceeding should be decided on the basis of the evidence presented in the proceeding, and not on the basis of out of court publicity, influence or pressure. On the other hand, the well-being of the judicial, administrative and legislative systems, and of the larger society of which they are parts, requires a public informed of matters arising in law practice and of matters pertaining to proceedings of public interest. Where the public interest is served, out of court statements in civil proceedings are not forbidden by this rule.

COMMENT TO MODEL RULES

Compiler's notes. - Following the 1991 amendment, the New Mexico rule differs from the ABA model rule to such an extent that a detailed comparison would be impracticable.

ABA COMMENT:

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.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) [16-304C] requires compliance with such Rules.

ANNOTATIONS

The 1991 amendment, effective on and after October 1, 1991, rewrote this rule to the extent that a detailed comparison would be impracticable.

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 witness.** A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue; or

(2) the testimony relates to the nature and value of legal services rendered in the case.

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 or 16-109.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version omits Paragraph (a)(3) of the ABA model rule, which reads "disqualification of the lawyer would work substantial hardship on the client".

ABA COMMENT:

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

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.

Paragraph (a)(1) [A(1)] recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) [A(2)] 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 first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) [omitted in the New Mexico rules] recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether 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 principle of imputed disqualification stated in Rule 1.10 [16-110] has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 [16-107] or 1.9 [16-109]. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. 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. See Comment to Rule 1.7 [16-107]. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 [16-110] disqualifies the firm also.

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. prior to appearing in a court proceeding where a defendant appears without counsel, 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 reasonably relevant mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

E. 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.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version adds "prior to appearing in a court proceeding where a defendant appears without counsel" at the beginning of Paragraph B and inserts "reasonably relevant" in Paragraph D.

ABA COMMENT:

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 Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d) [16-303D], governing ex parte proceedings, among which grand jury proceedings are included. 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 8.4 [16-804].

Paragraph (c) [C] does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) [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.

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 nonadjudicative proceedings.

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Paragraphs A through C of Rules 16-303 and 16-304 and with Rule 16-305.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

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 should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may 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.

This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4 [16-401 through 16-404].

ARTICLE 4
OTHER THAN CLIENTS

Rule

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.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

Misrepresentation

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 failure to act.

Statements of Fact

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 in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

Paragraph (b) [B] recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6 [16-106].

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. Communication with person represented by counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so. 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.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version adds the second sentence.

ABA COMMENT:

This Rule does not prohibit communication with a party, or an employee or agent of a party, 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 nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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 Rule 3.4(f) [16-304F].

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

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.), 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).

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.), 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.

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.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

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. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

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.

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.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

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 catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

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

Rule

16-501. Responsibilities of a partner or supervisory lawyer.

A. **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.

B. **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 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.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version omits Paragraph (a) of the ABA model rule, which reads "A partner 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" and redesignates Paragraphs (b) and (c) of the ABA model rule as Paragraphs A and B.

ABA COMMENT:

Paragraphs (a) [omitted in New Mexico rules] and (b) [A] refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

The measures required to fulfill the responsibility prescribed in paragraphs (a) [omitted in New Mexico rules] and (b) [A] can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures 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 5.2 [16-502]. 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 a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (c)(1) [B(1)] expresses a general principle of responsibility for acts of another. See also Rule 8.4(a) [16-804A].

Paragraph (c)(2) [B(2)] defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The 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.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) [A] on the part of the supervisory lawyer even though it does not entail a

violation of paragraph (c) [B] because there was no direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4(a) [16-804A], 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.

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

COMMENT TO MODEL RULES
ABA COMMENT:

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.

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 1.7 [16-107], the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

16-503. Responsibilities regarding nonlawyer assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

A. a partner 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 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.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

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 should 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.

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 undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) 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.

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

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

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) [C], such arrangements should not interfere with the lawyer's professional judgment.

Holding out unauthorized person as partner is violation. - Where 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.

A lawyer shall not:

A. practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

B. assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law;

C. employ or continue the employment of a disbarred or suspended lawyer as an attorney; or

D. 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.

[As amended, effective September 1, 1987.]

ANNOTATIONS

COMMENT TO MODEL RULES

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:

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. Paragraph (b) [B] 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 5.3 [16-503]. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Holding out unauthorized person as partner is violation. - Where 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).

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.

16-506. Restrictions on right to practice.

A lawyer shall not participate in offering or making:

A. a partnership or employment agreement that restricts the rights 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 controversy between private parties.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

An agreement restricting the right of partners or associates 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) [A] prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Paragraph (b) [B] prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

ARTICLE 6
PUBLIC SERVICE

Rule

16-601. Pro bono public service.

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

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.

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

COMMENT TO MODEL RULES
ABA COMMENT:

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 6.1 [16-601]. 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

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 1.1 [16-101], 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.

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.

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 would be incompatible with the lawyer's obligations to a client under Rule 16-107; or

B. where the decision 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.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

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.

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.

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

COMMENT TO MODEL RULES
ABA COMMENT:

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 Rule 1.2(b) [16-102B]. 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 1.7 [16-107]. 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.

ARTICLE 7
INFORMATION ABOUT LEGAL SERVICES

Rule

16-701. Communications concerning a lawyer's services.

A. **False or misleading statements.** A lawyer shall not, directly or indirectly, make or permit to be made a false or misleading communication in an advertisement or solicitation about the lawyer, the lawyer's services or the services of the lawyer's firm. A false or misleading communication includes but is not limited to that which:

(1) contains a material misrepresentation of fact or law; or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is intended or is likely to create an unjustified expectation, including expectations concerning the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law or contains a testimonial about, or endorsement of, the lawyer;

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;

(4) contains information based on past successes without a disclaimer that past successes cannot be an assurance of future success because each case must be decided on its own merits; or

(5) states or implies that the lawyer is a specialist in any field of law other than as specifically permitted by Rule 16-704.

B. **Other prohibited statements.** A lawyer shall not, directly or indirectly, make or permit to be made any statement in an advertisement or solicitation about the lawyer, the lawyer's services or the services of the lawyer's firm which:

(1) is intended or is likely to convey the impression that the lawyer is in a position to improperly influence any court, tribunal or other public body or official;

(2) fails to contain disclaimers required by these rules;

(3) predicts future success, except in direct response to a request from a prospective client;

(4) does not disclose the name or names of the lawyer, lawyers or law firm whose services are being advertised;

(5) does not disclose the location, by city, town or county, of the offices of the lawyer or lawyers whose services are being advertised; or

(6) otherwise violates these rules.

C. **Prohibited solicitations.** A lawyer may not send or permit to be sent a written communication to a prospective client for the purpose of obtaining professional employment, or engage in the in-person or telephone solicitation of legal business allowed by these rules if:

(1) the person being solicited has made known a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress or harassment;

(3) the lawyer reasonably should know that the physical, emotional or mental state of the person solicited is such that the person could not exercise reasonable judgment in employing a lawyer; or

(4) the written communication or other solicitation, except as provided in Paragraph A of Rule 16-703, concerns an action for personal injury or wrongful death or otherwise relates to an accident involving the person to whom the communication is addressed or a relative of that person.

D. **Mandatory disclosure.** Except for advertisements sent to existing clients or in direct response to a request from a prospective client, all advertisements of legal services shall contain the disclosure: "LAWYER ADVERTISEMENT". This disclosure shall be prominently and conspicuously displayed at the beginning of all written advertisements, and in all other media the disclosure shall be at the beginning of the presentation and shall be made in an equally prominent and conspicuous manner. Additionally, in advertisements in the form of correspondence the top of the first page of the communication and the outside of the communication shall have printed on it in conspicuous writing the words: **"LAWYER ADVERTISEMENT".** The words "Lawyer Advertisement" are not required if:

(1) the advertisement is one described in Subparagraphs [(2) through (8)] (1) through (9) of Paragraph C of Rule 16-707;

(2) the advertisement appears in the yellow pages of the telephone directory, [or] the classified advertising section of a newspaper or other similar publication or section of a publication which consists solely of advertisements;

(3) the advertisement appears on an outdoor billboard.

[As amended, effective August 1, 1992; December 1, 1992; November 1, 1993.]

ANNOTATIONS

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]. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) [B] of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

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).

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 and solicitation.

A. **Public media advertising.** Subject to the requirements of these rules, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor billboards or signs, radio or television, or through written communication.

B. **Record keeping requirements.** The lawyer shall keep a copy or recording of any advertisement or solicitation disseminated to any member of the public, as permitted by these rules, subject to the exemptions stated in Paragraph C of Rule 16-707, together with a written record of each and every dissemination, publication, or broadcast in his or her records for five (5) years following the date of the last publication, broadcast or dissemination.

C. **Payments for referrals.** A lawyer shall not give anything of value or otherwise provide a benefit to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of the advertising or the reasonable cost of preparing the communication which is permitted by this rule and may pay the usual charges for a not-for-profit lawyer referral service or other legal service organization.

D. **Permissible content.** A lawyer's advertisement or solicitation may include, but is not limited to, the following information:

(1) name, including name of law firm and names of professional associates; addresses and telephone numbers;

(2) one or more fields of law in which the lawyer or law firm practices, using commonly accepted and understood definitions and designations, so long as said statements do not improperly suggest specialization or certification except as otherwise provided by these rules;

(3) a claim of certification if the requirements in Paragraph D of Rule 16-704 are met;

(4) date and place of birth;

(5) date and place of admission to bar of state and federal courts;

(6) schools attended, with date of graduation, degrees, and other scholastic distinctions;

(7) public or quasi-public offices;

(8) military service;

(9) legal authorships;

(10) legal teaching positions;

(11) offices and committee assignments in bar associations and court appointed offices and committee assignments;

(12) technical and professional licenses;

(13) foreign language ability;

(14) names and addresses of bank references;

(15) prepaid or group legal services programs in which the lawyer participates;

(16) whether credit cards or other credit arrangements are accepted;

(17) office and telephone answering service hours.

E. **Permissible fee information.** Lawyer advertisements or solicitations may contain information about fees for services as follows:

(1) fee for an initial consultation;

(2) availability upon request of a written schedule of fees or an estimate of fees to be charged for specific services;

(3) contingent fee rates, 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 recovery, provided that the statement discloses (a) whether percentages are computed before or after deduction of costs, and (b) specifically states whether the client will bear the expenses incurred in the client's case regardless of outcome;

(4) range of fees for services, provided that the statement discloses that (a) the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and (b) the client is entitled without obligation to an estimate of the fee within the range likely to be charged;

(5) hourly rate, provided that the statement discloses that (a) the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client, and (b) the client is entitled without obligation to an estimate of the fee likely to be charged;

(6) fixed fees for specific legal services, provided that the statement discloses that the quoted fee will be available only to a client seeking the specific services described;

(7) the disclosures required by Paragraph E of this rule relating to fees or rates shall be located with and in print size at least equivalent to that used in describing the fee or rate for which the disclosure is required. In a radio or television advertisement, the disclosures shall be presented immediately following the information regarding the fee or rate, shall be in the same form, either spoken or written, as the information regarding the fee or rate and shall be prominent and conspicuous.

[As amended, effective October 1, 1989; August 1, 1992; November 1, 1993.]

ANNOTATIONS

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:

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.

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.

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.

Neither this Rule nor Rule 7.3 [16-703] prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

Paragraph (b) [B] requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) [C] does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

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 Subpargraph E(7).

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.

Office signs advertising law and realty as violation. - The respondent's actions and conduct in utilizing the common signs in front of his law office to advertise both his law office and his realty company were in violation of former Canon 27 of the Canons of Professional Ethics. In re Avallone, 83 N.M. 189, 490 P.2d 235, cert. denied, 404 U.S. 906, 92 S. Ct. 210, 30 L. Ed. 2d 179 (1971) (decided prior to 1992 amendment of this rule).

And common phone listing. - The actions and conduct of the respondent in procuring telephone listings in the telephone directory and utilizing a common phone number for his law practice, his realty company and his other related businesses were in violation of former Canon 27 of the Canons of Professional Ethics. In re Avallone, 83 N.M. 189, 490 P.2d 235, cert. denied, 404 U.S. 906, 92 S. Ct. 210, 30 L. Ed. 2d 179 (1971).

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 in-person or telephone contact with prospective clients.

A lawyer or lawyer's agent may engage in the in-person or telephone solicitation of legal business, only under the following circumstances:

A. the prospective client is a relative, or the lawyer has a prior personal, business or professional relationship with the prospective client; or

B. the communication is made under the auspices of a public or charitable legal services organization or a bona fide political, social, civic, charitable, religious, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services.

[Adopted, effective October 1, 1989; as amended, effective August 1, 1992.]

ANNOTATIONS

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:

There is a potential for abuse inherent in direct in-person or live telephone 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 over-reaching. This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 [16-702] offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed 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 or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisement and communications permitted under Rule 7.2 [16-702] are 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 7.1 [16-701]. The contents of direct in-person or

live telephone conversations between a lawyer to a prospective client can be disputed and are not 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.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) [16-703A] and the requirements of 7.3(c) [16-703C] are not applicable in those situations.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1 [16-701], which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2) [16-703B(2)], or which 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 Rule 7.3(b)(1) [16-703B(1)] is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 [16-702] the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b) [16-703B].

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 which 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 which 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 7.2 [16-702].

The requirement in Rule 7.3(c) [16-703C] 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.

Paragraph (d) [not adopted in New Mexico] of this Rule would permit an attorney to participate with an organization which 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 referred to in paragraph (d) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participate 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 Rules 7.1 [16-701], 7.2 [16-702] and 7.3(b) [16-703B]. See 8.4(a) [16-804A].

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.

16-704. Communication of fields of practice.

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law as permitted by Subparagraph (2) of Paragraph D of Rule 16-702. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

A. **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;

B. **Admiralty practice.** A lawyer engaged in admiralty practice may use the designation "Admiralty", "Proctor in Admiralty" or a substantially similar designation;

C. **Board recognized specialists.** A lawyer who has complied with the requirements of the New Mexico Board of Legal Specialization to become a board recognized specialist may indicate that he is a board recognized specialist in his areas of specialty; and

D. **Certification by organization.** A lawyer who is certified in a particular area of the law by an organization other than the New Mexico Board of Legal Specialization may so state so long as such certification is available to all lawyers who meet objective and consistently applied standards relevant in a particular area of the law, and the statement is accompanied by a prominent disclaimer that such certification does not constitute recognition by the New Mexico Board of Legal Specialization, unless the lawyer is also recognized by the board as a specialist in that area of law or the board does not recognize specialization in that area.

[As amended, effective August 1, 1992; December 1, 1992.]

ANNOTATIONS

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 permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist" or that the lawyer's practice "is limited to" or "concentrated in" particular fields is not permitted. These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice.

Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services, for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, a lawyer is not permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields. These terms have acquired a secondary meaning implying formal recognition as a specialist and therefore, use of these terms is misleading. [An exception would apply in those states which provide procedures for certification or recognition of specialization and the lawyer has complied with such procedures.]

Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

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.

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. 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.

B. **Multi-jurisdictional law firms.** A law firm with offices in more than one jurisdiction may use the same name 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 not state or imply that they practice in a partnership or other organization unless that is a fact.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version substitutes "unless that is a fact" for "only when that is a fact" at the end of Paragraph D.

ABA COMMENT:

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." 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.

With regard to paragraph (d) [D], lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

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. Legal advertising committee.

A. **Appointment and composition.** There is established a committee to be known as "the Legal Advertising Committee of the Disciplinary Board," referred to below as "the committee", which shall consist of ten members. The Supreme Court shall appoint four lawyer members and four nonlawyer public members of the committee. The president of the state bar shall appoint two lawyer members of the committee.

B. **Functions.** It shall be the task of the committee to evaluate all advertisements filed with the committee for compliance with the rules governing advertising and solicitation and to provide written advisory opinions concerning compliance to the respective filers; to develop a handbook on advertising for the guidance of and dissemination to members of the State Bar of New Mexico and to recommend to the Supreme Court Standing Committee on Code of Professional Conduct from time to time such amendments to the Rules of Professional Conduct as the committee may deem advisable.

C. **Powers and duties.** The legal advertising committee shall have the following powers and duties regarding legal advertising:

(1) to investigate the conduct of any attorney who advertises, initiating an investigation on its own motion or undertaking the same upon complaint by any person;

(2) to report the results of their investigation, findings of fact, conclusions and recommendations to the disciplinary counsel only in the event the committee determines there is a violation of the regulations regarding legal advertising;

(3) to conduct an annual meeting at a time and place to be determined by the chairman of the committee. The purpose of this meeting will be to review rules, discuss problems, establish performance criteria and discuss any other matters the committee or Supreme Court may deem necessary; and to adopt rules of procedure subject to approval by the Supreme Court.

D. **Qualifications of public members.** A "nonlawyer public member" is a person who:

(1) has never engaged in the practice of law;

(2) has not graduated from a law school;

(3) is not directly employed by a lawyer subject to the jurisdiction of these rules; and

(4) does not have any direct significant financial interest in the practice of law.

E. **Terms of office.** The term of office of members of the committee shall be two (2) years. No member shall serve for more than three consecutive terms.

F. **Quorum.** Three members of the committee shall constitute a quorum.

G. **Officers.** The Supreme Court shall designate one attorney member as chair; the president of the State Bar shall designate a vice-chair to act in the absence or disability of the chair. The committee shall, from time to time, designate one of its members to act as secretary. This secretary shall record all plenary proceedings of the committee and keep permanent records of the proceedings.

H. **Expense reimbursement.** No member of the committee shall receive any compensation, but shall receive per diem and mileage at the same rate as provided for public officials and employees of the state for expenses incurred to attend committee meetings or to perform their duties as committee members.

I. **Recusal of members.** Members of the committee shall be disqualified from consideration of any advertisement proposed or used by themselves or other lawyers in their firms.

[Adopted, effective August 1, 1992; as amended, effective January 1, 1994.]

ANNOTATIONS

The 1994 amendment, effective May 1, 1994, in Paragraph A, substituted "ten members" for "five members" at the end of the first sentence and rewrote the second

sentence, which read "The Supreme Court shall appoint one of the lawyer members who shall be designated as chairman, and two nonlawyer public members"; and in Paragraph G, substituted "chair" for "chairman" in two places, substituted "vice-chair" for "vice chairman" in the first sentence, and substituted "committee" for "board" in the last sentence.

Effective dates. - Pursuant to a supreme court order dated April 30, 1992, this rule is effective for all lawyer advertisements mailed, displayed or broadcast on and after August 1, 1992.

16-707. Evaluation by legal advertising committee.

A. **Advisory opinions.** A lawyer may obtain an advisory opinion concerning the compliance of a contemplated advertisement or written communication in advance of disseminating the advertisement or communication by submitting the material and fee specified in Paragraph D of this rule to the legal advertising committee at least thirty (30) days prior to such dissemination. If the committee finds that the advertisement complies with these rules, the lawyer's voluntary submission shall be deemed to satisfy the filing requirement set forth in Paragraph B of this rule.

B. **Filing requirements.** Subject to the exemptions stated in Paragraph C of this rule, any lawyer who advertises services through any public media or through written communication involving solicitation shall file a copy of each such advertisement or revisions thereto with the legal advertising committee for evaluation of compliance with these rules. The copy shall be filed either prior to or concurrently with the lawyer's first dissemination of the advertisement or written communication, and shall be accompanied by the information and fee specified in Paragraph D of this rule. Each submission shall have the names of lawyers responsible for the content of the advertisement and the names of those lawyers for whose benefit the advertisement is disseminated.

C. **Exemptions.** Exempt from the filing requirements of Paragraph B of this rule and the record keeping requirements of Paragraph B of Rule 16-702 are:

(1) advertisements in any of the public media, including the yellow pages of telephone directories, that contain no illustrations and no information other than that specifically permitted under Rule 16-702. This exemption extends to television advertisements only if the visual display featured in such advertisements is limited to the words spoken by the announcer;

(2) listings or entries in a law list;

(3) newsletters mailed only to existing clients or other lawyers;

(4) professional announcement cards stating new or changed associations, new offices and similar changes relating to a lawyer or law firm, and which are mailed only to other lawyers, relatives, close personal friends and existing clients;

(5) documents prepared in connection with a bidding procedure;

(6) firm brochures mailed to a prospective client who requested such a brochure, or with whom a lawyer has a prior personal business or professional relationship;

(7) advertisements in a publication which is primarily subscribed to by other lawyers;

(8) advertisements in a publication or program of a governmental entity or a non-profit organization, if limited to information specifically permitted under Paragraph D of Rule 16-702, [the name, address and telephone number of the lawyer or law firm] and preceded by the words "SPONSORED BY" or other similar words;

(9) notices of an upcoming educational seminar or similar presentation which includes information concerning participating lawyers or law firms if limited to information specifically permitted under Paragraph D of Rule 16-702 and other information describing qualifications of speakers.

D. **Contents of filing.** A filing with the committee as required by Paragraph B of this rule or as permitted by Paragraph A of this rule shall consist of:

(1) a copy of the advertisement or communication in the form or forms in which it is to be disseminated (e.g., videotapes, audiotapes, print, photographs of outdoor advertising). Subject to Paragraph H of this rule, advertisements or communications need only be submitted once if the content of the advertisement or communication has not been changed;

(2) a transcript, if the advertisement or communication is on videotape or audiotape;

(3) a statement listing all media in which the advertisement or communication will appear, the anticipated frequency of use of the advertisement or communication in each medium in which it will appear and the anticipated time period during which the advertisement or communication will be used;

(4) a filing fee of fifty dollars ($50.00) per submission, made payable to the Disciplinary Board. This filing fee shall be used solely to defray the costs of administering Rules 16-701 to 16-707.

E. **Committee evaluation of advertisements.** The committee shall evaluate all advertisements and written communications filed with it pursuant to this rule for compliance with these rules. The committee shall complete its evaluation within thirty (30) days of receipt of a filing unless the committee determines that there is reasonable doubt that the advertisement or written communication is in compliance with the rules

and that further examination is warranted but cannot be completed within the thirty (30) day period, and so advises the lawyer within the thirty (30) day period. In the latter event, the committee shall complete its review as promptly as the circumstances reasonably allow. If the committee does not send any communication to the lawyer within thirty (30) days, the advertisement will be deemed approved.

F. **Additional information.** If requested to do so by the committee, the filing lawyer shall submit information to substantiate representations made or implied in that lawyer's advertisement or written communication.

G. **Finding of non-compliance by committee.** When the committee determines that an advertisement or written communication is not in compliance with the applicable rules, the committee shall advise the lawyer that dissemination or continued dissemination of the advertisement or written communication may result in professional discipline.

H. **Notice of changed circumstances.** If a substantial change of circumstances occurring subsequent to the committee's evaluation of an advertisement or written communication raises a possibility that the advertisement or communication has become false or misleading as a result of the change in circumstances, the lawyer shall promptly refile the advertisement or a modified advertisement with the committee along with an explanation of the change in circumstances. No fee shall be charged for such re-submission.

[Adopted, effective August 1, 1992; November 1, 1993.]

ANNOTATIONS

The 1993 amendment, effective November 1, 1993, substituted "information specifically permitted under Paragraph D of Rule 16-702" for "the name, address and telephone number of the lawyer or law firm" in Subparagraph C(8) and added Subparagraph C(9).

Effective dates. - Pursuant to a supreme court order dated April 30, 1992, this rule is effective for all lawyer advertisements mailed, displayed or broadcast on and after August 1, 1992.

ARTICLE 8
MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule

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.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

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 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. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

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.

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.

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 where 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).

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

COMMENT TO MODEL RULES
ABA COMMENT:

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.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

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 having knowledge 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 appropriate professional authority.

B. **Misconduct of judges.** A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct or has engaged in conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

C. **Confidential information.** This rule does not require a disclosure of information otherwise protected by Rule 16-106.

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 their 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 attorney that is:

(1) intended to be confidential;

(2) 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

(3) made to, by or among members or representatives of a lawyers support group, 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 Disciplinary Board shall be published in the Bar Bulletin.

This exception does not apply to information that is required by law to be reported or to disclosures or threats of future criminal acts or violations of these rules.

[As amended effective April 1, 1991.]

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version inserts "or has engaged in conduct" in Paragraph B and adds Paragraph D.

ABA COMMENT:

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.

A report about misconduct is not required where it would involve violation of Rule 1.6 [16-106]. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, 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.

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 relationship.

The 1991 amendment, effective April 1, 1991, added Paragraph E.

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 and Paragraph D of this rule. In re Carrasco, 106 N.M. 294, 742 P.2d 506 (1987).

Where 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).

Rule violated. - See In re Martinez, 107 N.M. 171, 754 P.2d 842 (1988).

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. 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;

F. state or imply an ability to influence improperly a government agency or official;

G. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

H. engage in any conduct that adversely reflects on his fitness to practice law.

ANNOTATIONS

COMMENT TO MODEL RULES

Compiler's notes. - The New Mexico rule differs from the ABA model rule in that the New Mexico version adds Paragraph E, redesignates Paragraphs (e) and (f) of the ABA version as Paragraphs F and G, and adds Paragraph H.

ABA COMMENT:

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 offense 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, that 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, or 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.

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 Rule 1.2(d) 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.

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 attorney. 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.

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 where 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 where fraud not alleged. - In disciplinary proceedings where 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).

Six-month suspension and other penalties warranted where 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).

Where 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).

Where 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. - See 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).

Threatening debtor with criminal charges. - Where 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).

When 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, where 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. - Where 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).

One-year suspension warranted. - Attorney's actions warranted a one-year suspension where 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 where 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).

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) where 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).

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. See 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).

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).

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.

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. Jurisdiction.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

ANNOTATIONS

COMMENT TO MODEL RULES
ABA COMMENT:

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5 [16-505].

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.