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# THE RULES OF OUR PROFESSION

By Peter H. Pierotti



Until June 2007, New Mexico was one of only eight states yet to issue a report. The New Mexico Supreme Court Code of Professional Conduct Committee advertised recommended changes to the New Mexico Rules of Professional Conduct in the June 15, 2007, *Bar Bulletin* Special Issue.<sup>3</sup> Final revisions were adopted by the New Mexico Supreme Court, effective Nov. 3, 2008.

## Similarities Between the ABA and New Mexico Rules of Professional Conduct

The New Mexico Supreme Court adopted the general format of the ABA Model Rules.<sup>4</sup> The rules are codified in New Mexico with a different but corresponding numbering system. For example, Model Rule 1.1 corresponds to New Mexico Rule 16-101; Model Rule 1.16 corresponds to New Mexico Rule 16-116; Model Rule 8.3 corresponds to New Mexico Rule 16-803.

The New Mexico Supreme Court has adopted new Rules of Professional Conduct for Lawyers, effective Nov. 3, 2008<sup>1</sup>. The Rules are much more than requirements necessary to maintain a law license. They provide an outline for the *practice* of law—how to effectively represent your client, maintain a law business, and interact with your employees, other lawyers, witnesses, the courts, the public, and the profession. The concepts in the Rules are applied daily by all lawyers. The Rules foster dedication to self-regulation of the legal profession and service to the legal community.

All lawyers and judges can readily appreciate a comprehensive revision to the Rules of Professional Conduct. This article discusses the history behind the revisions and highlights some of more significant changes.

## History of Revisions to the Rules of Professional Conduct

In 1997, the American Bar Association announced its “Ethics 2000” initiative to revise the Model Rules of Professional Conduct for Lawyers. The ABA’s previous Model Rules, first promulgated in 1983, were adopted in large part by almost all state jurisdictions, including New Mexico. Since then, the interpretation and application of the Model Rules have been significantly developed by case law and ethical opinions produced by the ABA and authoritative bodies in the various jurisdictions. During much of the same time period, the American Law Institute was developing the *Restatement (Third) of the Law Governing Lawyers*, which it published in 2000. The goal of the Ethics 2000 initiative was to revise the Model Rules to correspond to the body of law which has developed.

The ABA completed the Ethics 2000 revisions and adopted corresponding amendments to the Model Rules in 2002 and 2003. According to the ABA, 36 states and the District of Columbia have adopted revisions based on the new Model Rules.<sup>2</sup>

Some of the new Model Rules have already been incorporated into the New Mexico Rules. The New Mexico Supreme Court adopted Rule 16-117 regarding sale of a law practice in 2002. However, this rule differed substantially from the Model Rule, and a new revision generally tracking the Model Rule was adopted with the recent revisions. In 2003, the New Mexico Supreme Court adopted, with some revisions, the text and commentary to Model Rules 5.5 and 8.5 regarding the multijurisdictional and unauthorized practice of law.

## New Rules

Five Rules adopted from the ABA Model Rules are new to New Mexico.<sup>5</sup> The new terminology rule, 16-100, affects all rules. Some of the terms require specific actions. Note the new definition of “informed consent,” “confirmed in writing,” and “writing.” A good example of this application is found in Rule 16-107(B)(4), which allows waiver of a waiveable conflict if “each affected client gives informed consent, confirmed in writing.” Also, former Rule 16-105 requiring a contingency fee agreement to be in writing has been expanded to require that the writing be “signed by the client.”

Rule 16-118, “Duties to Prospective Client,” outlines confidentiality and disqualification issues which arise from communications with prospective clients.

Rule 16-204, “Lawyer Serving as Third-Party Neutral,” describes the duties of lawyers who serve as mediators, arbitrators, or evaluators who assist third parties in the resolution of disputes.

Rule 16-507, “Responsibilities Regarding Law-Related Practice,” addresses services that may be performed in conjunction with and are related to the provision of legal services, but are not prohibited



as unauthorized practice of law when provided by non-lawyers. The new rule extends the application of the Rules of Professional Conduct to a lawyer's "law related services" if the law-related services are provided "(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to ensure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist."

Rule 16-605, "Nonprofit and Court-Annexed Limited Legal-Service Programs," provides an exception to conflict and disqualification rules for lawyers who provide short-term limited legal services under the auspices of a nonprofit organization or court.

### Confidentiality

The revisions to the rules regarding confidentiality represent some of the most significant changes arising from the Ethics 2000 initiative. The purpose of the revisions is to create more exceptions to lawyer-client confidentiality as necessary to allow lawyers to comply with corporate governance laws and other mandatory disclosure laws and regulations.

The federal Sarbanes-Oxley Act of 2002<sup>6</sup> was promulgated in the wake of corporate scandals to protect investors in publicly traded companies by providing governance standards and improving the accuracy and reliability of corporate disclosures made pursuant to securities laws. The act required the Securities and Exchange Commission to adopt rules establishing standards of professional conduct for lawyers who appear and practice before the commission on behalf of issuers. The SEC rules are intended to protect investors and increase their confidence in public companies by ensuring that lawyers who work for those companies respond appropriately to evidence of material misconduct. The final rules became effective in 2003.<sup>7</sup>

In response to the Sarbanes-Oxley Act and the SEC rules, the American Bar Association amended Model Rule of Professional Conduct 1.6 regarding client confidentiality and Rule 1.13 regarding organization as client. The amended rules were adopted at the ABA annual meeting on Aug. 12, 2003. The New Mexico Supreme Court has adopted both rules in their entirety.

Rule 16-106 reorganizes the confidentiality rule into two sections. Section A prohibits disclosure of any information relating to the representation of the client absent express or implied consent of the client. Section B permits six exceptions to the confidentiality required in A, whether or not adverse to client interests. Four of these exceptions are to prevent death or bodily harm, secure legal advice about rule compliance, establish a claim or defense to a controversy between the lawyer and the client, and to comply with other law or court order. The other two are to prevent, mitigate,

or rectify a client's criminal acts in furtherance of which the client has used the lawyer's services.

The former New Mexico rule was unique in stating that a lawyer should (as opposed to "may") divulge information to prevent the client from committing a criminal act causing death or substantial bodily harm. The new rule broadens the criminal act limitation to permit disclosure in all circumstances involving death or substantial bodily harm. The former rule included an exception for financial or property-related harm which was not contained in the Model Rules before the Ethics 2000 initiative. The new rule changes New Mexico's unique property harm rule in two important ways. First, the new rule requires disclosure of client actions "in furtherance of which the client has used the lawyer's services." Second, the new rule provides for disclosure of past acts as necessary to "prevent, mitigate, or rectify injury to financial interests." The former text only applied to prevent future acts.

The confidentiality exceptions in Rule 16-106 permit but do not require disclosure. This permissive nature of Rule 16-106 is deceiving because other rules require disclosure in specific circumstances. For example, Rule 16-401(B) requires a lawyer to disclose a material fact when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client, unless the disclosure is *prohibited* by Rule 16-106. Rule 16-303(C) requires specific disclosures to tribunals of law and fact, even if compliance requires disclosure of information otherwise prohibited by Rule 16-106.

Rule 16-113 adopts the Model Rule requiring lawyers retained by organizations, including government agencies, to report improper acts by corporate representatives likely to result in substantial injury to the organization. The revised rule requires reporting to higher authorities in the organization and, in limited circumstances, outside the organization. The combination of this rule and rules 16-106 and 16-401 would require organizational lawyers to disclose material

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# CLIENT PROTECTION FUND

By Charles J. Vigil

Despite the best attempts of the legal profession to establish high standards of legal ethics and severe disciplinary sanctions for their breach, it always has been true that a small number of lawyers from time to time misappropriate money from their clients (see *ABA Compendium of Client Protection Rules, 2005 Edition*). In most cases, those dishonest lawyers have neither the inclination nor the financial ability to reimburse their victims. According to the *ABA Compendium*, since 1959 when the first client protection fund in the United States was established by the Vermont Bar Association, most other jurisdictions have established similar funds for protecting the public. These client protection funds have been created by court rule, legislation, or the voluntary action of bar associations. In jurisdictions in which bar membership is mandatory, the fund usually is managed and operated by the state bar association. The revenues for these funds are generated from a variety of sources including mandatory assessments, legislative budget appropriations, and voluntary contributions. The American Bar Association has concluded that mandatory assessment by court rule is the best method of funding because the result is a reliable and predictable annual source of income which allows the client protection fund to fully reimburse all losses.

This nationwide attempt to establish client protection funds in every state is based on the ideas that (1) the practice of law is a profession; (2) professionalism is a fundamental obligation of every lawyer; and (3) the protection of our client interests is at the heart of professionalism. Of course, noble intentions and lofty ideals are not enough. True professionalism requires lawyers to take concrete steps to protect the public. The reputation of all lawyers is besmirched by the wrongdoing of a few, and all lawyers benefit from the establishment and support of a fund that reimburses clients for the dishonest conduct of another lawyer. This is why all lawyers should participate in financially supporting the client protection fund in their states.

New Mexico has followed the national trends with regard to client protection. Over the past 30 years, the Supreme Court and the State Bar of New Mexico have worked together to maintain a viable and effective client protection fund, although the fund has substantially evolved over that time frame. In 2005, the Supreme Court issued an order directing the State Bar to create a commission that could manage New Mexico's client protection funds pursuant to the modified guidelines promulgated by the American Bar Association's *Model Rules for Lawyers' Funds for Client Protection*. The result of that order was the creation of a Client Protection Fund Commission that currently operates as an arm of the State Bar.

The New Mexico Client Protection Fund Commission consists of seven lawyers appointed for staggered three-year terms. Four are appointed by the Supreme Court, two by the Board of Bar Commissioners, and one by the treasurer of the BBC. The executive



director of the State Bar and the staff administrator are ex officio and nonvoting members. The commission currently meets approximately four times per year, depending on the number of pending claims.

The mission of the Commission and the Client Protection Fund is simple: to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in the courts of this jurisdiction. The Commission receives, evaluates, and pays claims; promulgates rules of procedure and, subject to the approval by the Supreme Court, prudently invests portions of the fund that may not be needed to pay current losses. As part of its charter, the Commission also publicizes its activities to potential claimants, the public, and the bar; prosecutes claims for restitution; and, among other things, engages in studies and programs for client protection and the prevention of dishonest conduct by lawyers.

In order for a claim to be eligible, the loss must be caused by the dishonest conduct of the lawyer and must have arisen by reason of a client/lawyer relationship. The claim must be filed no later than five years after the claimant knew or should have known of the dishonest conduct of the lawyer. *Dishonest conduct* means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property, or other things of value, including but not limited to the failure to refund unearned fees received in advance, as required by the New Mexico Rules of Professional Conduct, and the borrowing of money from a client without intention to repay it or with disregard to the lawyer's inability to or reasonably anticipated inability to repay it. It is important to note that the fund does not exist to reimburse clients for the alleged negligence or malpractice of a lawyer, nor does it serve

as a mechanism to resolve fee disputes. If a client has a claim of negligence or a fee dispute, both of which are not eligible for reimbursement through the fund, those claims can be pursued in court or through the State Bar fee arbitration program. With respect to eligible claims, current fund rules provide that the Commission can pay a maximum of \$10,000 per claim.

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**35 claims totaling \$88,177.98 were paid in full or in part in 2008.**

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The Commission processed a total of 38 claim form requests in 2007. Of those requests, 16 claim forms alleging a total loss of \$61,715.89 were filed with the Commission. Of these 16, six claims in the total amount of \$13,645 were paid in full or in part. Claims submitted and paid substantially increased in 2008. The Commission processed a total of 76 claim form requests in 2008. Of those requests, 57 claim forms alleging a total loss of \$189,236.13 were filed with the Commission. The return rate of claim forms filed in 2008 represents 75 percent of the total claim forms that were requested and sent. Of the 57 claims filed with the Commission, 35 claims totaling \$88,177.98 were paid in full or in part.

The Commission firmly believes that it is the duty of every lawyer to support continued funding for client protection in amounts adequate for the proper payment of claims and the costs of administering the fund. Although permitted, it has not yet been necessary for the Commission to seek an assessment from New Mexico

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lawyers to fund client protection in New Mexico. The New Mexico Client Protection Fund currently receives its revenues by order of the Supreme Court through the Minimum Continuing Legal Education Board, which graciously has agreed to provide its excess funds for the benefit of the Client Protection Fund. For now, the Commission has sufficient reserves to pay claims and operational expenses.

The number of New Mexico Client Protection Fund claims is on the rise, and the Commission expects this trend to continue. The commission's goals for the future include, among other things, an increase in the maximum amount that it can pay per claim. In the best of all worlds, the Commission would be in a position to operate and manage a fund that could fully reimburse every claimant. Indeed, a survey of client protection funds from every jurisdiction reveals that the New Mexico cap of \$10,000 per claim is one of the lowest in the United States. For the reasons explained at the beginning of this article, lawyers in New Mexico should strive to do better.

#### *About the Author*

*Charles J. Vigil is the president and managing director of Rodey, Dickason, Sloan, Akin & Robb PA in Albuquerque, where he practices in the areas of labor and employment, products liability, commercial litigation and professional liability. He is a past president of the State Bar of New Mexico and has been actively involved in the area of client protection on both the state and national level. Since 2006, Vigil has served as a member of the New Mexico Client Protection Fund Commission and in 2008 he was appointed to serve on the ABA Client Protection Fund Committee.*

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## *The Rules of Our Profession* continued from page 4

facts learned in the course of their representation when disclosure is necessary to avoid assisting in a criminal or fraudulent act.

### **Conflicts, Disqualification, and Screening**

The rules regarding conflicts of interest and disqualification (16-107 through 16-112) have been reorganized for clarity. Substantial new commentary has been provided for guidance in these most difficult of areas. Some specific changes are worth mention here.

Rule 16-108 lists nine specific concurrent conflicts. The revision clarifies that these conflicts are imputed to other lawyers in a firm.

Rule 16-110, regarding imputation of conflicts for non government lawyers, differs from the former rule and the Model Rule by allowing for screening without consent of the affected clients. The Ethics 2000 Commission was persuaded that nonconsensual screening adequately balances the interests of the former client in confidentiality of information; the interests of current clients in hiring the counsel of their choice (including a law firm that may have represented the client in similar matters for many years); and the interests of lawyers in mobility, particularly when they are moving involuntarily because their former law firms have downsized, dissolved or drifted into bankruptcy. Presently, 17 jurisdictions permit non-consensual screening of laterals by this rule.<sup>8</sup> The ABA House of Delegates rejected the recommendation and struck the revision from the rule. The primary argument against screening is that the client gets no choice at all when a lawyer goes to a firm on the other side. The New Mexico revision rejects the ABA's position and instead adopts what is currently the minority position allowing non-consensual screening.

Rule 16-111, regarding conflicts of former and current government officers and employees, will allow the same lawyer who represents a government agency to concurrently represent a private client before the government agency under limited circumstances.

### **Candor Toward the tribunal**

Rule 16-303 is revised and reorganized to clarify a lawyer's obligation of candor to the tribunal with respect to testimony given and actions taken by the client and other witnesses. The commentary was reorganized and expanded to address some recurring situations not directly addressed in the rule. Some of the lawyer's obligations to the tribunal have been strengthened. For example, the rule now clarifies that the lawyer must not allow the introduction of false evidence and must take remedial steps where the lawyer learns that material evidence offered by the client or a witness called by the lawyer is false, regardless of the client's wishes. As under the former rule, the lawyer's obligations to the tribunal may require the lawyer to reveal information otherwise protected by Rule 16-106. The lawyer's obligation in the former rule to avoid assisting client crime or fraud is replaced by a broader obligation to ensure the integrity of the adjudicative process. The lawyer must take remedial measures whenever the lawyer comes to know that any person is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, such as jury tampering or document destruction.

In one special case, however, the lawyer's obligation to the client has been reaffirmed and strengthened, and that is where the lawyer represents the defendant in a criminal proceeding. For the first time the rule text will address the special obligations of a criminal defense lawyer, providing that such a lawyer does not have the same discretion as

other lawyers regarding the client's own testimony. While a criminal defense lawyer is subject to the general rule prohibiting the offering of testimony the lawyer knows to be false, the lawyer may not refuse to allow a defendant to testify in the defendant's defense if the lawyer only reasonably believes the testimony will be false. The commentary also provides that where a court insists that a criminal defendant be permitted to testify in the defendant's defense, the lawyer commits no ethical violation in allowing the client to do so even if the lawyer knows the client intends to lie.

### **Trial Publicity**

The revision to Rule 16-306, regarding trial publicity, maintained much of the former rule over the substantially different Model Rule. The former rule applies only to criminal cases which will be tried to a jury. The revision applies to all jury cases, whether civil or criminal. The committee commentary is much more instructive than the rule and should be carefully analyzed by all litigation lawyers who may have media contact.

### **Special Responsibilities of a Prosecutor**

The revision to Rule 16-308 provides that disclosure of mitigating evidence to the defense for sentencing purposes is now limited to "unprivileged" information in subsection (D). The revision adds a significant prohibition in subsection (E) that prosecutors are to refrain from issuing subpoenas to other lawyers to appear in criminal proceedings except in the presence of three prescribed conditions. Subsection (F) now explains that when prosecutors make public statements, they are to refrain from making comments "that are false or create a clear and present danger of prejudicing a criminal proceeding." The changes in the rule may have an effect on the way some prosecutors present cases to a grand jury or at trial.

### **Pro Bono Considerations**

The revised Rule 16-601 simply states that lawyers have a "responsibility" to provide legal services without the expectation of a fee to persons of limited means or groups and causes addressing such needs; deliver services at a reduced fee or no fee to legal service organizations; participate in activities for improving the law, the legal system, or the profession; or contribute financial support to legal service organizations. The language that a lawyer should aspire to render at least 50 hours of pro bono legal service per year or in the alternative contribute financial support of \$350 has been removed from this rule, but the New Mexico Supreme Court has adopted Rule 24-108 NMRA, which sets forth minimum pro bono goals and reporting requirements. Rule 24-108 emphasizes that service to the poor should be the primary mechanism of fulfilling this responsibility, and the financial support alternative has been increased to \$500.

### **Advertising and Solicitation**

Rule 16-702, regarding communications concerning a lawyer's services and referrals, has been replaced with a shorter more general rule with respect to the content of advertising but more specific with respect to referrals. Lawyers utilizing referral services, reciprocal referrals, or legal services plans should analyze the changes.

Rule 16-703 contains more specific guidelines for direct contact with prospective clients. The revisions address the issues presented by the prevalence of electronic media by regulating real-time electronic contact and all written, recorded, or electronic communication, rather than just in-person or telephone communications referenced in the former rule. Lawyers will no longer be permitted to participate in real-time solicitation of potential clients, such as chat rooms, unless those potential clients are lawyers, family members, close personal friends, or have a prior professional relationship. The

proposed requirement that personal injury lawyers wait a period of 30 days before directly soliciting a potential client suffering an injury was rejected by the Supreme Court.

### **Reporting of Misconduct and Substance Abuse**

Rule 16-803 provides greater specificity regarding the reporting of lawyer and judicial misconduct. The most significant change involves the mandatory reporting to the New Mexico Judicial Standards Commission of "any incumbent judge who illegally sells, purchases, possesses, or uses drugs or any substance considered unlawful under the provisions of the Controlled Substances Act" by any lawyer who has "specific objective and articulable facts or reasonable inferences that can be drawn from those facts," that a judge has engaged in such misconduct.

### **Conclusion**

The above examples provide some insight into the depth of the revisions. The revision of the New Mexico Rules of Professional Conduct is an historic occasion for the bar. The overhaul of the rules provides an opportunity for New Mexico lawyers to study the rule changes and thereby renew their commitment to clients and their passion for the legal profession.

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### **Endnotes**

<sup>1</sup> As of Dec. 1, 2008, the text of the revised New Mexico rules are only available on the New Mexico Supreme Court Web site: [http://nmsupremecourt.nmcourts.gov/rules/app.php?rule\\_no=16](http://nmsupremecourt.nmcourts.gov/rules/app.php?rule_no=16).

<sup>2</sup> The ABA maintains an updated chart with Web links to individual state initiatives at [http://www.abanet.org/cpr/jclr/ethics\\_2000\\_status\\_chart.pdf](http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf).

<sup>3</sup> The State Bar of New Mexico Ethics Advisory Committee provided a complete analysis and submitted comments to the proposed revisions to the New Mexico Rules, which can be viewed on the State Bar Web site at [http://www.nmbar.org/legalresearch/eao/Revisions\\_Analysis\\_for\\_Bar.pdf](http://www.nmbar.org/legalresearch/eao/Revisions_Analysis_for_Bar.pdf) and [http://www.nmbar.org/legalresearch/eao/RPC\\_Recommendations\\_EthicsAdvisoryCommittee07.pdf](http://www.nmbar.org/legalresearch/eao/RPC_Recommendations_EthicsAdvisoryCommittee07.pdf).

<sup>4</sup> The text of the ABA Model Rules and commentary can be accessed on the ABA Web site at [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).

<sup>5</sup> One Model Rule conspicuously was not recommended for adoption in New Mexico. Model Rule 7.6, "Political Contributions to Obtain Government Legal Engagements or Appointments by Judges," disqualifies a lawyer from accepting a government legal engagement or appointment if the lawyer or law firm makes a political contribution for the purpose of obtaining or being considered for appointment to a legal office. The concern behind this rule is that the integrity of the profession and the government is undermined if contributions, rather than competence and merit, provide the basis for appointments or awards of legal work by government agencies. The Code of Professional Conduct Committee has provided no explanation why this rule was omitted from the revisions proposed to the Supreme Court.

<sup>6</sup> 15 U.S.C. § 7201, the "Act."

<sup>7</sup> 17 C.F.R Part 205.

<sup>8</sup> Susan R. Martyn, Lawrence J. Fox, and W. Bradley Wendel, *The Law Governing Lawyers*, 2007-2008 Edition, pp. 120-123.

### *About the Author*

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# Fee Arbitration: An Alternative to Litigation in Resolving Fee Disputes

By Christine Joseph

Assisting the membership in resolving fee disputes with their clients or among each other is the goal of the State Bar's Fee Arbitration Program—a convenient and cost effective alternative to litigation. This program, in which the parties must agree to participate, is binding with the court and brings closure for the attorney and the client in a relatively quick manner. There is no charge for the program. The arbitrations are conducted by a panel of volunteer attorneys in accordance with the rules of the program and the New Mexico Uniform Arbitration Act, §44-7A-1 et. al. seq. NMSA 1978.

In 2008, the program received a total of 37 fee arbitration requests which were agreed to by both the attorney and the client. Twenty-three fee arbitrations were completed with a total amount in dispute of \$95,278.48. The other 14 arbitrations remain ongoing and have a total amount in dispute of over \$62,000. Of the completed arbitrations in 2008, 76 per cent of the fee disputes were awarded either totally or partially in favor of the attorney.

The following steps summarize the fee arbitration process which provides attorneys and clients with an expeditious, confidential, inexpensive, and impartial out-of-court method for resolving fee disputes.



**Petition to Arbitrate:** The Fee Arbitration Rules are located at [www.nmbar.org](http://www.nmbar.org). Obtain the Petition to Arbitrate by calling (505) 797-6068 or 1-800-876-6657 or visit [www.nmbar.org](http://www.nmbar.org). Return the signed form along with billing statements, receipts, and any correspondence regarding the fee dispute.

**Respondent Agreement:** Copies of the petition and a respondent agreement are sent to the respondent, who has 20 days to return the signed agreement.

**Volunteer Arbitrators:** If both parties agree to arbitrate, an arbitrator is assigned. Arbitrators are attorneys and non-attorneys from throughout New Mexico who donate their time to help resolve fee disputes.

**Arbitration Hearing:** The arbitrator will schedule a hearing to be held in person or over the phone. Parties may choose to be represented by an attorney, present evidence, and cross-examine witnesses appearing at the hearing. If one party does not appear, the arbitrator may still hear and determine the controversy. Parties may request a record of the hearing at their own expense.

**Disputed Amounts:** If the amount in dispute is between \$1,000 and \$25,000, the hearing will be held before a single arbitrator. If

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## The Office of General Counsel of the State Bar of New Mexico offers the following resources for attorneys:

**Attorney Helpline:** Provides members of the State Bar and non-admitted attorneys information and referrals in areas of attorney regulation, registrations (non-admitted, pro hac vice, legal services), rules, and practice. Attorneys wanting assistance should contact the general counsel at (505) 797-6050 or 1-800-876-6227 or e-mail [rspinello@nmbar.org](mailto:rspinello@nmbar.org).

**Ethics Assistance:** Members may contact the ethics helpline at 1-800-326-8155 for immediate assistance. For written response to an ethics inquiry, send original questions regarding one's own conduct to the Ethics Advisory Committee at [rspinello@nmbar.org](mailto:rspinello@nmbar.org). Formal ethics opinions are available at [www.nmbar.org](http://www.nmbar.org).

**Lawyers Assistance Program:** A statewide network of recovering lawyers and substance abuse professionals dedicated to helping others within the profession get the assistance and support they need. Contact (505) 228-1948 or 1-800-860-4914.

**Fee Arbitration:** Provides free arbitration to resolve fee disputes between attorneys and their clients or disputes between attorneys. Contact (505) 797-6068 or 1-800-876-6657.

**Client Protection Fund:** Reimburses certain losses up to \$10,000 caused by a member's misappropriation of client funds or other dishonest conduct. Contact (505) 797-6068 or 1-800-876-6657.

# THE LAWYERS/JUDGES ASSISTANCE PROGRAM: — Confidential Assistance and Support for Bar Members in Need —

By Briggs Cheney



For over ten years, hundreds of State Bar members have benefited from the confidential information and assistance provided by a statewide network of volunteers known as the New Mexico Lawyers Assistance Program. The network is composed of volunteers in recovery— mental health professionals as well as lawyers and judges. Those who have utilized NMLAP services range from professionals concerned about a colleague’s alcohol use, to individuals struggling with depression, to members seeking treatment after a wake-up call such as a DWI arrest. The number of calls made to NMLAP volunteers and helpline professionals (1-800-860-4914, 228-1948 in Albuquerque) has increased over the years, but there should be more. With help “only a phone call away,” why are individuals reluctant to seek assistance? Why do people hesitate to call when they know a lawyer or a judge who appears to have a problem? The answer is fear.

“I’m just not sure. After all, Mary has been under a lot of pressure lately.”

“Frank’s behavior has been erratic, but it’s probably just a rough spot in his life. He’ll get through it.”

“If I call, Mary may get a Bar complaint.”

“If I call, Frank might be fired by the firm.”

“What if I’m wrong?”

The list of reasons people conjure up for not calling the helpline is unending.

Don’t feel bad. These are natural fears, but what if “Mary” suffers from the disease of alcoholism or a gambling addiction? What if “Frank” is becoming immobilized by depression? Who/what might stop their lives from spiraling out of control? If you let fear keep you from calling the helpline and you do nothing to intervene, then maybe Mary will get arrested for DWI or worse, kill herself or someone else while driving under the influence. Perhaps it won’t be that bad. Maybe Frank will just miss a statute of limitations or other important deadline and get sued, along with his firm, and eventually lose that job you were so worried about when you decided not to call the helpline.

You don’t help a friend or colleague by not calling, nor do you protect the public or a colleague by ignoring the warning signs. Sitting back and hoping for the best is a risky stance at best, but looking deep and finding the courage to call is an action you will not regret. So what can you expect to happen if you make that call?

If you are seeking assistance for yourself, we will help you assess your situation and explore available counseling and support group options. We will also offer to connect you with a NMLAP volunteer in recovery who shares a history similar to yours. What you decide

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## Common Warning Signs

- Drinking or using on the job before appointments, meetings, depositions or court appearances.
- Failing to show (or frequently being late) for appointments, meetings, depositions or court appearances; failing to return phone calls.
- Blaming others for mistakes, difficulties, or problems.
- Isolation: avoiding partners, office staff, friends, family or clients.
- Making excuses for, or lying about, frequency or amount of drinking or drug use.
- Driving while under the influence (whether arrested or not).
- Experiencing blackouts or memory lapses when drinking or using.
- Missing deadlines or neglecting work; overall decline in work.
- Loss of appetite and lack of interest in recreation.
- Trouble sleeping or sleeping too much.
- Unprofessional appearance/hygiene.
- Increased irritability; mood swings.



to do with the information we provide is up to you. We won't force you to participate in counseling, support groups or anything else; nor will we share your identity or other personal information with anyone else. Your confidentiality will be honored.

If you are calling with concerns about a fellow attorney or judge, you are not required to identify yourself or the individual about whom you are calling. The call and everything discussed is kept absolutely confidential. Just as with the individual seeking personal help, reports are made to no one, including the State Bar and the Disciplinary Board (see Rule 16-803(E) NMRA). Nothing happens unless and until you feel comfortable with some action being taken to help the individual in trouble.

When you call the helpline, you get a chance to talk to someone who understands addiction and mental health issues. No question is out of bounds and you can call back as often as you like. It

is not uncommon for individuals to call more than once before they feel comfortable identifying themselves and the person about whom they are concerned. Once the person of concern is identified, the helpline professional and caller thoroughly examine the specifics of the situation and discuss options for reaching out to the individual in need. A common method of reaching out is what I affectionately term a *drive-by*, in which two NMLAP volunteers stop by Mary or Frank's office unannounced. In this scenario, Mary or Frank is simply told there have been calls to the helpline and people are worried about him or her. The caller's identity is never disclosed, nor are specific incidents disclosed that might be associated with the caller. In fact, the NMLAP volunteers often do not know the identity of the caller. Most importantly, Mary and Frank are not labeled. Instead, the NMLAP volunteers honestly share their own personal struggles with alcohol, other drugs, or depression. They let them know there are many lawyers who struggle with addiction and/or mental illness, and that if a lawyer is struggling, he or she is not alone. There is help. That's it. That's all that happens.

Studies show that approximately 50 percent of lawyers facing serious disciplinary charges admit to addiction or a psychiatric disability. Most of these individuals exhibit warning signs long before an investigation is initiated and in many cases, their colleagues and friends had concerns that they pushed aside. The choice is yours. You can let fear win and pray that your friend or colleague finds his or her bottom without paying too heavy a price, or you can take "a shot of courage" (pun intended) and call the helpline.

*About the Author*

*Briggs Cheney has practiced law since 1973 in Albuquerque and practices with Sheehan, Sheehan & Stelzner PA, as an of counsel. His practice focuses on the representation of lawyers.*

## New Mexico Lawyers Assistance Program Helpline

1-800-860-4914 • 228-1948 (in Albuquerque)

### Fee Arbitration *continued from page 8*

the amount in dispute is more than \$25,000, either party may request a panel of three arbitrators.

**Outcome:** The arbitrator will send a written determination to the State Bar's fee arbitration program administrator who will forward it to the two parties involved.

**Fee Service:** The State Bar's Fee Arbitration Program is a free service offered to members of the State Bar of New Mexico.

For more information or to volunteer for the Fee Arbitration Panel, contact Program Administrator Christine Joseph, (505) 797-6054.

*About the Author*

*Christine Joseph is the program administrator for the general counsel of the State Bar of New Mexico. She assists with the Helpline, the Fee Arbitration Program, and the Client Protection Fund Commission.*

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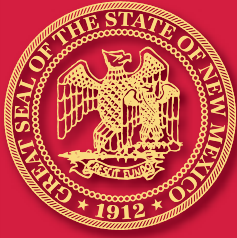
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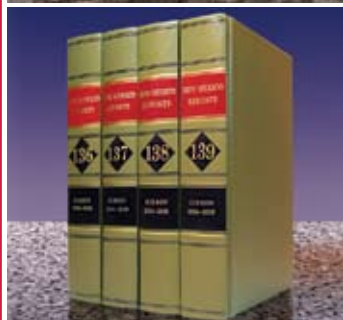
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