

**STATE BAR OF NEW MEXICO
ETHICS ADVISORY COMMITTEE**

**RECOMMENDED CHANGES
TO THE PROPOSED REVISIONS TO
THE NEW MEXICO RULES OF PROFESSIONAL CONDUCT**

August 8, 2007

The New Mexico State Bar Ethics Advisory Committee (“EAC”) submits the following recommended changes to the proposed revisions to the New Mexico Rules of Professional Conduct, as advertised in the June 15, 2007, Bar Bulletin Special Issue. The EAC provides these recommendations for consideration by the New Mexico Supreme Court, and the Court’s Code of Professional Conduct Committee.

1. Number the COMMITTEE COMMENTARY consistent with the Model Rules.

The “Committee Commentary” following each rule is generally adapted verbatim from the ABA Comment. The paragraphs in the comment to the Model Rules of the American Bar Association (ABA) are numbered (i.e., [1], [2], ...). For ease of reference, the paragraphs of the Committee Commentary to the New Mexico Rules of Professional Conduct should be numbered. We urge that the ABA numbers remain with the paragraphs adopted from the ABA Comments. The Commentary is extensive, and is quite difficult to cite without numbers. The facility of numbering paragraphs has been employed in New Mexico reported court decisions. The New Mexico Supreme Court has had occasion to cite to the paragraph numbers of the Model Rule Comments. *See, In Re Estrada*, 2006-NMSC-047, ¶¶ 21, 24, 140 N.M. 492, 143 P.3d 731.

We ask that the numbering system of the ABA be preserved for ease and consistency in referencing and researching the paragraph language.

The Supreme Court Rules Committee has included Commentary paragraphs which are not found in the ABA Comments. These unique paragraphs indiscriminately have been placed at the beginning of the Committee Commentary, but in most cases would be better placed at the end of the Commentary. Alternatively, the unique paragraphs could remain unnumbered, could be merged with other Commentary paragraphs, or could be assigned sub paragraph numbers (e.g. 2.1, 2(a), etc.).

2. Move TERMINOLOGY section from the Preamble to Rule 16-100.

The terminology provides the “legal definition” or specific meaning of “terms of art” used in the rules. The terminology is critical to understanding the meaning and scope of the rules. The definitions are copied from the Model Rules. The Model Rules provide these definitions in a new rule, 1.0. The New Mexico proposed revision adopts the Model Rules’ language and commentary, but maintains the Terminology section in the introductory material after the Preamble. The Terminology section should be presented as Rule 16-100. Otherwise, these important terms lose prominence, and members of the bar logically may not regard the terminology as part of the rules, and may fail to consider these critical terms when referencing

the Rules.

3. General legal references in Commentary should reference New Mexico law.

The ABA Model Rule Comments cannot address the law and procedures in all jurisdictions. Therefore, comments referencing substantive law or procedures speak in terms of “the common law rule in most jurisdictions” or “applicable law.” The New Mexico Commentary should be modified or footnoted to cite New Mexico law or procedures, rather than the vague ABA references. The EAC has identified the following references which should be amplified:

--Rule 16-303, Commentary eighth proposed paragraph: This paragraph is a comment about procedure in “some jurisdictions” If it applies to New Mexico, then so state. If it does not, it should be deleted. The comment is not particularly helpful unless it provides guidance in New Mexico.

--Rule 16-304, Commentary second and third proposed paragraphs: References to “applicable law in many jurisdictions,” “general” criminal law, “applicable law may ...” and “the common law rule in most jurisdictions” are not helpful to the New Mexico practitioner. If the commentary is to include references to substantive law at all, it should be specific to New Mexico law. For example, that “the common law rule in most jurisdictions is that . . . it is improper to pay an expert witness a contingent fee” does not answer the question of whether paying an expert witness a contingent fee is improper in New Mexico. That very question recently was posed to the Ethics Advisory Committee.

--Rule 16-308, Commentary first proposed paragraph: The last two full sentences begin with “Many jurisdictions” and “Applicable law may” These comments are not helpful to New Mexico lawyers. The New Mexico Commentary should specify what New Mexico requires of its prosecutors. The Second proposed paragraph would more appropriately begin: “~~In some jurisdictions,~~ In New Mexico, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity. . . .”

--Rule 16-702, Commentary sixth paragraph states, “A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients.” The appropriate regulatory authority in New Mexico should be identified.

--Rule 16-704(D)(1), to avoid confusion, should set out what the “appropriate state authority” is for purposes of approving specializations.

--Rule 16-803(A), subject to Paragraph E, requires reporting of misconduct to “the appropriate professional authority.” Although the comment indicates that “A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate under the circumstances,” the language of Paragraph A causes consternation among lawyers trying to decide whether to report misconduct to the Disciplinary Board or another “agency,” or if the matter is in litigation, whether the reporting requirement is fulfilled by reporting to the court before which a matter is pending. However, NMRA Rule 17-201 places “exclusive disciplinary jurisdiction” with the “Supreme Court and the Disciplinary Board.”

Again, subject to Paragraph E, confusion would be avoided if the “appropriate professional authority” were specifically identified as “the New Mexico Disciplinary Board or the corresponding professional authority in other jurisdictions.”

4. SPECIFIC RULES

RULE 16-102

Recommended Changes to Proposed Rule:

Paragraph D: Change the word “court” to “tribunal.” Paragraph D has been changed to track the new Model Rule, with the retention of “or misleads the court” in the first sentence. The word “court” has been retained where “tribunal” would be preferable.

Paragraph E: Delete paragraph E because it has been restated in Rule 16-104(a)(5), and is out of place here. Paragraph E remains in the New Mexico revision, but was deleted from the Model Rule.

Recommended Changes to Commentary:

The first paragraph of the proposed Commentary addresses Paragraphs D of the Rule, and should be moved to its appropriate location under the Commentary heading “Criminal, Fraudulent and Prohibited Transactions.”

The second paragraph of the Commentary references paragraph E of the Rule, but seems more appropriately directed to Paragraph C, and should be incorporated in the Commentary section on “Agreements Limiting Scope of Representation.” Also, a sentence after the second sentence should be added to this paragraph to state as follows: “However, in preparing specific documents for use by a client in court in which the lawyer has not entered an appearance, the lawyer must not engage in conduct which misleads the court as prohibited in Paragraph D.” Ghost writing has been an issue of concern for our requestors. Therefore, a sentence on ghost writing should be added to this section of the Commentary. *See*, Rule 16-303 proposed Committee Commentary, first paragraph.

RULE 16-106

Recommended Changes to Proposed Rule:

Headings: Revise the headings of Paragraphs A and B of the Rule to track the headings in the Committee Commentary: “Authorized Disclosure” and “Disclosure Adverse to Client.” Otherwise, the dichotomy between the two paragraphs is lost.

Paragraph (B)(2): Revise to preserve the broader language of New Mexico’s current rule by omitting the clause “in furtherance of which the client has used or is using the lawyer’s services,” and omit the corresponding phrase from the Commentary’s paragraph beginning

“Subparagraph (2).” The new Model Rule added paragraphs b.2. and b.3. addressing disclosure to prevent, mitigate, or rectify economic harm, but only “in furtherance of which the client has used the lawyer’s services.” New Mexico’s rule has traditionally recognized the exception to prevent injury to financial interests, whether or not the client will use the lawyer’s services to further the anticipated crime. The restriction is more appropriate with respect to paragraph (B)(3), which deals with past rather than anticipated crimes or frauds.

Recommended Changes to Commentary: Delete or move to the end the first two added paragraphs of the Committee Commentary regarding insurance defense lawyers, and update the commentary to note, “This opinion is in accord with ethics opinions in almost all jurisdictions, including New Mexico. *See*, New Mexico State Bar Formal Ethics Advisory Opinion 2002-2.” The information in these paragraphs is outdated and inaccurate. Ethics committees in most states, including New Mexico and Nebraska, have since adopted the majority view.

RULE 16-109

Recommended Changes to Proposed Rule:

Heading: Change the heading of Paragraph C, “Former Representation,” to “Protection of Confidential Information,” to more accurately describe the confidentiality provisions of Paragraph C.

Recommended Changes to Commentary: Revise the first sentence of the last paragraph of the Commentary as follows: “The provisions of this rule are for the protection of former clients and can be waived in the **former** client gives informed consent, which consent must be confirmed in writing ~~under paragraphs A and B.~~” Most commentators agree that conflicts with former clients can always be cured with consent. The way that the sentence is cast creates an ambiguity as to which client must consent, and whether the waiver applies only to paragraphs A and B. Logically, the waiver under A and B must apply to the preservation of confidentiality in Paragraph C, but the rule and the commentary are somewhat confusing in this regard.

RULE 16-110

General Analysis: The non-consensual screening provisions in Paragraph C of the proposed revision represent a significant departure from the current Model Rule. The Model Rule and the current Paragraph D of 16-110 allow waiver of any imputed disqualification under this rule with consent of the affected client, so screening would be allowed by consent only). The Ethics 2000 Commission recommended adoption of the proposed Paragraph C, but 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. A question arises whether the New Mexico Supreme Court Rules Committee considered the ABA's rejection of the screening provisions, and instead adopted the

Ethics 2000 Commission's recommendations prior to the ABA's final decision.

The EAC agrees with the Ethics 2000 Commission's reasoning that non-consensual 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. The legal community in New Mexico is still quite small. The screening provisions strike an appropriate balance between the needs of the profession and client conflicts. Currently, 17 jurisdictions permit non consensual screening of laterals consistent with the proposed revisions of this rule. *See*, Martyn, S., Fox, L., Wendel, W., *The Law Governing Lawyers*, 2007-2008 ed. (Aspen).

Recommended Changes to Proposed Rule:

Heading: The heading to Paragraph C, "Previous Disqualification" is not descriptive of the paragraph. A better heading, consistent with paragraph B, is "Subsequent Firm Associations; Screening."

RULE 16-111

Recommended Changes to Proposed Rule:

Headings: Eliminate the word "private" in the headings to paragraphs A and B. A more descriptive heading for paragraph B is "Imputation of Conflict to Firm; Screening." The headings of paragraphs A and B are misleading and fail to consider the text of the proposed revisions. A and B reference subsequent "private" representation, but the rule title and text changes remove the word "private" to clarify that subsequent representation could be at a different government agency.

RULE 16-112

Recommended Changes to Proposed Rule:

Heading: The heading of paragraph C is not descriptive of the content. The heading should be changed to "Imputation of Conflict to Firm; Screening."

RULE 16-114

Recommended Changes to Proposed Rule: Change the first sentence of the second paragraph of the Commentary to read as follows: "The fact that a client suffers ~~a disability from~~ diminished capacity does not ~~diminish~~ change the lawyer's obligation..." The word "disability" appears too restrictive, and does not track the text of the new rule. It may have been

maintained from the old comment merely so that the word “diminish” was not used twice in the same sentence.

RULE 16-116

Recommended Changes to Commentary: The first paragraph of the Commentary regarding retaining liens, should be moved to the end, where the ABA comment references the matter. Because the unique paragraph restricts the ABA comment, it would be appropriate to begin the paragraph with “However, the imposition of a retaining lien may”

RULE 16-303

Recommended Changes to Commentary:

The first proposed paragraph is not found in the ABA Comment. It is directed to Paragraph E of the Rule. It should be moved to make it the penultimate paragraph in the commentary. That is, appearing just before the paragraph entitled “Withdrawal.” Title it, “Limited entry of appearance.”

The fifth proposed paragraph headed “Legal Argument,” would benefit from adding the admonition from *In re Richards*, 1999-NMSC-030, 127 N.M. 716: “Furthermore, a case upon which a lawyer relies must say what the lawyer says it says.”

The ninth and tenth proposed paragraphs, taken from the Model Rule, accurately state the status of the law in New Mexico prior to *In re Estrada*, 2006-NMSC-047, 140 N.M. 492, 143 P.3d 731. The EAC questions whether these paragraphs should be modified pursuant to this recent New Mexico Supreme Court opinion.

RULE 16-305

Recommended Changes to Commentary:

First proposed paragraph: The reference to the “ABA Model Code of Judicial Conduct” should be replaced with the “Code of Judicial Conduct” to make it more specific to New Mexico.

Fifth proposed paragraph: Application of the duty to refrain from disruptive conduct applies to any proceeding of a tribunal, *including depositions*, should include citation to Comment 1 of Rule 16-303 at the end of the paragraph thus: “*See* Paragraph M of Terminology of the Rules of Professional Conduct, and Rule of Professional Conduct 16-303 Committee Commentary, paragraph 1.

Additional paragraph: The Code of Professional Conduct Committee and the Supreme Court may want to consider elaborating on the addition to proposed 16-305 (D), that conduct “in

fact disrupts” a tribunal, inasmuch as the added language is not found in the ABA Model Rule.

Rule 16-306. Trial Publicity

General Analysis: The proposed revision represents a significant departure from the current rule, and significantly modifies the Model Rule. The current rule applies only to criminal proceedings that may be tried to a jury. The revision applies to all “matters” and all public communications which “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” The proposed revision removes language in paragraph (b) of the Model Rule identifying allowable public statements, and places the information in the proposed fourth paragraph of the Committee Commentary. The Model Rule Comments 4, 5, 6, 7, and 8 are removed from the proposed revised Committee Commentary. The EAC recommends that the New Mexico Rule and Committee Commentary track the Model Rule and Comment. The additional information provided in the Model Rule and Comment will aid New Mexico lawyers in understanding the significant changes to the Rule.

Recommended Changes to Proposed Rule:

Title: The title of the Rule should be changed from “Trial Publicity” to “Publicity Regarding Proceedings,” to clarify, according to the text of the Rule and the Commentary, that the rule applies to adjudicative proceedings, whether pre-trial or during trial, and not just “trials.”

Paragraph A: Change the heading to substitute Lawyer for ~~Attorney~~.

Recommended Changes to Commentary:

The first proposed paragraph contains typographical errors. The word “no” should be substituted for “not” thus: “If there were no such limits, the result would be . . .” In the same paragraph, the word “a” should be added thus: “It also has a legitimate interest in the conduct of judicial proceedings . . .”

Add Model Rule Comments 4, 5, 6, 7, and 8 as necessary to clarify this new rule.

Rule 16-504

Recommended Changes to Proposed Rule:

Paragraph (A)(5): Add a new Paragraph (A)(5) which states: “(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.” This provision was added to the Model Rule as part of the Ethics 2000 amendments. The Ethics 2000 Commission described the purpose of the amendment as follows:

This addition is proposed to clarify that a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter. The propriety of such fee-sharing arrangements was upheld in Formal Opinion 93-374 of the ABA Standing Committee on Ethics and Professional Responsibility. Other state ethics committees, however, while agreeing with the policy underlying the ABA Opinion, found violations of state versions of Rule 5.4 because the text of the Rule appeared to prohibit such fee-sharing. The Commission agrees with the ABA Standing Committee that the threat to independent professional judgment is less here than in circumstances where a for-profit organization is involved and is therefore recommending this change.

The practice currently is being used in New Mexico on a regular basis by lawyers cooperating with the American Civil Liberties Union. The EAC believes that removing the provision from the New Mexico Rule would prohibit the practice, and therefore recommends that it be restored.

RULE 16-601

Recommended Changes to Proposed Rule:

Paragraph (C): The deleted word “participation” in Paragraph C should be replaced with “participate.” It appears to have been deleted in error.

RULE 16-703

Recommended Changes to Proposed Rule:

Paragraph (A)(3): Add a new paragraph (A)(3) which allows direct real time solicitation if the person solicited:

(3) is contacted by the lawyer while the lawyer is participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

While the current rule contains a specific exception to the restrictions on communications made in association with public or charitable legal services organizations or political, social, civic, charitable, religious, fraternal, employee or trade organizations, the revised rule deletes this language and contains no such specific exception within the rule itself. Instead, the comment to the rule has been revised to explain that the rule does not intend to preclude the activities previously excepted by the rule. The rule and the comment should agree, with both excepting constitutionally protected activities described in the comment.

RULE 16-803

Recommended Changes to Proposed Rule:

Paragraph A: (subject to Paragraph E) requires reporting of misconduct to “the appropriate professional authority.” Although the comment indicates that “A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate under the circumstances,” the language of Paragraph A causes consternation among lawyers trying to decide whether to report misconduct to the Disciplinary Board or, for example, the court before which a matter is pending. Some of this consternation may be created by NM Adv. Opin. 1988-8. However, NMRA Rule 17-201 places “exclusive disciplinary jurisdiction” with the “Supreme Court and the Disciplinary Board.” Confusion would be avoided if the “appropriate professional authority” were specifically identified as the “New Mexico Disciplinary Board with regard to reportable misconduct committed by members of the New Mexico bar or unlicensed lawyers providing legal services in New Mexico, or the appropriate professional authority in other jurisdictions.”

Paragraph C: The confidentiality issues associated with participation in alcohol and substance abuse programs can be addressed by including the language that New Mexico has deleted from Model Rule 8.3(c), such that NMRA 16-803(C) would read (added language underlined):

This rule does not require a disclosure of information otherwise protected by Rule 16-106 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Paragraph E: If Paragraph E stands, it should be noted that it refers to “attorney” rather than “lawyer.” The Model Rules and the New Mexico Rules of Professional Conduct otherwise consistently use the term “lawyer.” The word “attorney” should be replaced with “lawyer” for purposes of consistency.

The text of paragraph E seems both overly complicated and confusing, and appears to conflict with Supreme Court Order No. 04-8200, *In the Matter of Reporting Judicial Misconduct Involving Unlawful Drugs*, Recently reprinted in the New Mexico Bar Bulletin, Vol. 46, No. 26, p. 51, June 25, 2007. The ABA Comment warns against the problems of attempting to set out more specific rules on the matter. In Order No. 04-8200, the Supreme Court provides guidance with regard to reporting unlawful drug use by members of the judiciary that would seem applicable in principle to reporting unlawful drug use by lawyers, and alcohol abuse by lawyers or members of the judiciary. Thus, it may be prudent to replace paragraph E with the following provision that clearly states the reporting requirements associated with alcohol and substance abuse:

Notwithstanding the requirements of Paragraphs A and B of this rule:

- (1) A lawyer who has specific objective and articulable facts and/or reasonable inferences that can be drawn from those facts, that a judge or lawyer is engaged in

alcohol or substance abuse shall report those facts to the Judicial Standards Commission if the conduct is committed by a judge or the Disciplinary Board if the conduct is committed by a lawyer;

- (2) A lawyer who has a good faith basis to believe a judge or a lawyer is engaged in alcohol or substance abuse, but does not have specific objective and articulable facts regarding such conduct, is encouraged to report such a belief to the Lawyers Assistance Committee hotline.

To assist lawyers in knowing which programs are “approved lawyers assistance programs” (including those presently identified in Paragraph E), a list of currently approved programs could either be included in Paragraph C, or identified in the Comment.

5. CONCLUSION

The members of the Ethics Advisory Committee ask that the above recommendations be carefully considered and that the proposed revisions be clarified as indicated above for the benefit of all lawyers practicing in New Mexico.

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