

## **ANALYSIS OF PROPOSED REVISIONS TO NEW MEXICO RULES OF PROFESSIONAL CONDUCT**

The New Mexico State Bar Ethics Advisory Committee (“EAC”) provides the following analysis of the proposed revisions to the New Mexico Rules of Professional Conduct, as advertised in the June 15, 2007, Bar Bulletin Special Issue.

### **Development of Revisions to the Rules of Professional Conduct**

In 1997, the American Bar Association (“ABA”) 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 (ALI) was developing the Restatement (Third) of the Law Governing Lawyers, which it published in 2000. The goal of the ABA Ethics 2000 Commission was to revise the Model Rules to correspond to the developed body of law. The Commission’s redline changes to the prior rules and the Ethics 2000 Commission Reporter’s explanatory memos of the changes to each rule can be located on the ABA Website.<sup>1</sup> Quotations herein attributed to the “Reporter” or the “Commission” refer to this information.

The ABA completed the Ethics 2000 revisions and adopted corresponding amendments to the Model Rules in 2002 and 2003. According to the ABA, 34 states and the District of Columbia have adopted revisions based on the new Model Rules.<sup>2</sup>

Until June of this year, New Mexico was one of only eight states yet to issue a report. The New Mexico Supreme Court Code of Professional Conduct Committee has provided recommended changes to the New Mexico Rules of Professional Conduct, which were advertised for public comment in the June 15, 2007, Bar Bulletin Special Issue.<sup>3</sup>

### **Similarities between the New Mexico Rules and ABA Model Rules**

The New Mexico Supreme Court has 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 1.15 corresponds to New Mexico Rule 16-115; Model Rule 8.3 corresponds to New Mexico Rule 16-803. Most of the proposed New Mexico rules and commentary track the text of the Model Rules. The analysis below identifies where the text of the proposed New Mexico rule differs from the Model Rule.

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<sup>1</sup> [http://www.abanet.org/cpr/e2k/e2k-report\\_home.html](http://www.abanet.org/cpr/e2k/e2k-report_home.html)

<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 EAC’s comments and recommendations to the proposed revisions are posted on the State Bar Website, [http://www.nmbar.org/Content/NavigationMenu/Attorney\\_Services\\_Practice\\_Resources/Risk\\_Management/Topical\\_Index/RPC\\_Recommendations\\_EthicsAdvisoryCommittee07.pdf](http://www.nmbar.org/Content/NavigationMenu/Attorney_Services_Practice_Resources/Risk_Management/Topical_Index/RPC_Recommendations_EthicsAdvisoryCommittee07.pdf)

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

## TERMINOLOGY

**Description of Revision:** The revisions are copied from the Model Rules. The most important change is the addition of “informed consent” rather than “consent after consultation,” and the new commentary which explains the terms.

**Comparison with Model Rule and Unique New Mexico Provisions:** The Model Rules provide these definitions in a new rule, 1.0. The New Mexico proposed revision adopts the Model Rules’ definitions and commentary, but maintains the Terminology in the introductory material after the preamble.

**Interpretation/Purpose:** 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.

## RULE 16-101

**Description of Revision:** No change to the rule is proposed. Paragraph 5 of the comment includes a new final sentence regarding agreements to limit scope of representation.

**Comparison with Model Rule and Unique New Mexico Provisions:** The Model and New Mexico rules are the same. The proposed New Mexico Committee Comment adds a final sentence: “If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.” This sentence was deleted from the Model Rules because it was considered to be “a precatory aspiration rather than a specification of conduct thought necessary for the competent representation of a client.”

**Interpretation/Purpose:** The Commentary changes are not substantive.

## RULE 16-102

**Description of Revision:** Caption has been modified for accuracy. The change in A clarifies that the restrictions of C-D apply to the entire rule, and not just to client decisions; adds a cross reference to 104; adds a sentence on implied authority; and broadens duty to abide by client’s decisions regarding *both* accepting *and* making offers to settle. As explained in Comment 2, no general duty to abide by the client’s instructions exists.

**Comparison with Model Rule and Unique New Mexico Provisions:** Paragraph D has been changed to track the new Model Rule, with the retention of “or misleads the court” in the first sentence. Paragraph E remains in the new revision, but was deleted from the Model Rule. The first two paragraphs of the Committee Commentary address D and E.

**Interpretation/Purpose:** The changes were made to track the Model Rule, except for the additions to D and E. The retention in Paragraph D retains the word “court” where “tribunal” would be preferable. Paragraph E has been restated in Rule 16-104(a)(5), and is out of place here. Also, the Committee Commentary regarding paragraph E seems more appropriately directed to Paragraph C, and should be incorporated in the Commentary section on “Agreements

Limiting Scope of Representation.” Ghost writing has been an issue of concern for our requestors. Therefore, a sentence on ghost writing should be added to the Commentary.

### **RULE 16-103**

**Description of Revision:** No change to the rule is proposed.

**Comparison with Model Rule and Unique New Mexico Provisions:** The text of the Rule and the Commentary are the same as in the Model Rules, with the exception that the ABA has recently added a new paragraph 5 of the Comment regarding diligence in.

**Interpretation/Purpose:** The Commentary was updated by the ABA for clarity. No substantive changes were intended. Paragraphs 1 and 3 of the Commentary support “civility” initiatives, toning down any negative results arising from “zealous representation” notions. The short paragraph about workload changes “should” to “must” regarding the duty to control workload.

### **RULE 16-104**

**Description of Revision:** Paragraph A has been divided into paragraphs A.1. to A.5 to clarify and list specific duties of communication.

A.1 lists duty to communicate about decisions that require client consent.

A.2 lists duty to consult about means to accomplish client’s objectives.

A.3 lists duty to keep client reasonable informed about status of matters.

A.4 lists duty to comply with reasonable requests for information.

A.5 lists duty to consult with the client about limitations on the lawyer’s conduct.

Paragraph B is unchanged.

**Comparison with Model Rule and Unique New Mexico Provisions:** The Proposed Rule 16-104 NMRA and current Model Rule 1.4 are identical except for paragraph headings contained in the New Mexico rule. The Committee Commentary is copied verbatim from the ABA Comment.

**Interpretation/Purpose:** The revision relocates all rules imposing a general duty to communicate with the client into one rule. The revision clarifies specific areas of consultation, and the scope of consultation necessary to obtain client consent and informed decision making.

### **RULE 16-105**

**Description of Revision:** Paragraph A changes the reasonable fee standard to a prohibition against entering into a contract for or charging for *both* unreasonable fees and *expenses*. Paragraph B adds a requirement that scope of representation and expenses with respect to the fee arrangement, and any changes in fee or expense rates shall be communicated to the client. Paragraph C adds the requirement that contingency fee agreements must be in writing and signed by the client, and must clearly notify of the client’s responsibility for expenses. Paragraph E regarding fee splitting was reworded, but not substantively changed.

**Comparison with Model Rule and Unique New Mexico Provisions:** The text of the proposed revision tracks the language of the Model Rule and ABA Comment.

**Interpretation/Purpose:** To clarify fee issues, and include scope of representation and expenses as elements of fee arrangements.

#### **RULE 16-106**

**Description of Revision:** The proposal reorganizes the Rule into two sections. Section A describes what information is confidential. Section B permits six exceptions to the confidentiality required in A, whether or not adverse to client interests, under the heading of “specific circumstances.” Four of these 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 the client’s criminal acts in furtherance of which the client has used the lawyer’s services.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposal tracks the current model rule. The Old 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, and by including an exception for financial or property related harm. The ABA Comment has been adopted verbatim, but the first two paragraphs of the Committee Commentary are outdated additions regarding disclosures required to be protected by insurance defense lawyers.

The proposed revision 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.” The old rule had no such restriction. Second, the new rule in Paragraph B.2 provides for disclosure of past acts as necessary to “prevent, mitigate, or rectify injury to financial interests. The old text only applies to prevent future acts.

**Interpretation/Purpose:** This Rule represents one of the most significant changes arising from the Ethics 2000 initiative. The purpose was to create more exceptions to confidentiality as necessary to allow lawyers to comply with corporate governance laws and other mandatory disclosure laws and regulations. The confidentiality exceptions permit but do not require disclosure. Other rules require disclosure in specific circumstances (see, 16-303(A-C) and 16-401(B)).

#### **RULE 16-107**

**Description of Revision:** The Rule has been completely reorganized, beginning with the title, to note that the Rule involves “current clients.” Paragraph A merely defines conflicts arising from multiple representations which are “directly adverse,” and representations which are “materially limited” by another current or former client, or the lawyer’s personal interests. Paragraph B explains when representation can proceed notwithstanding a concurrent conflict. In any event, each affected client must give informed consent, confirmed in writing.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed text of the Rule and Commentary copy the Model Rule and Comment verbatim. The old rule provides that the conflict can be waived if the lawyer reasonably believes the representation will not be adversely affected. The new text specifically prohibits waiver if the lawyer cannot provide competent or diligent representation, the representation is prohibited by law, or involves adverse clients in the same litigation or proceeding. The clients' consent to waiver must be confirmed in writing.

The new Commentary includes substantial new material. The sections on Prohibited Representations, Informed Consent, Consent Confirmed in Writing, Revoking Consent, Consent to Future Conflicts, Conflicts in Litigation, and Special Considerations in Common Representation are completely new. The cautionary language about raising conflicts of opposing counsel to gain advantage in litigation has been dropped.

**Interpretation/Purpose:** Reorganization of conflict rules and to provide clarity regarding when a conflict can be waived.

### **RULE 16-108**

**Description of Revision:** Title is revised to note the rule involves "Current Clients; Specific Rules." The format remains the same as the old rule. Almost all paragraphs contain stylistic changes not noted here. Paragraph A.2 regarding business transactions with or adverse to the client adds a requirement to advise the client in writing of the desirability to seek independent counsel. Paragraph A.3 adds requirements on the terms of the necessary client consent.

Paragraph B regarding use of information to the disadvantage of a client adds the "informed consent" requirement, and adds but rearranges "unless otherwise required by these rules" which previously was different from the Model Rule.

Paragraph C, regarding client gifts, is broadened to solicitation of gifts, not just preparing instruments giving the lawyer a gift, such as a testamentary gift. The exception of persons related to the client includes a litany of relationships for clarification.

Paragraph E is changed to conform to the Model Rule by removing "providing the client remain ultimately liable for such costs and expenses." The New Mexico Rule is no longer unique in this regard.

Paragraph G adds the requirement of informed consent confirmed in writing signed by the client for aggregate settlements on behalf of two or more clients or aggregate guilty pleas.

Paragraph H rewords advice regarding obtaining independent counsel and includes "potential" claims for malpractice.

The current paragraph I prohibiting adverse representations by lawyers related by blood or marriage is deleted. The substance of the language deleted from this rule is included in comment paragraph 11 of Rule 16-107.

Paragraphs J and K regarding prohibition against sexual relations and imputation of conflicts are added. Under K, conflicts described in all paragraphs but J are imputed to other lawyers in a firm.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed revisions adopt the Model Rule and Comment verbatim. Paragraphs B and E currently have language differing from the old Model Rules, as indicated above.

**Interpretation/Purpose:** To clarify specific conflicts in conformity with the Model Rules. The rule is most significantly changed by clarifying that imputation applies to all paragraphs except J regarding sexual relations. Under the current Model Rules, the imputation clause does not materially differ from the general imputation provisions of Rule 1.10. However, the proposed 16-110 provides for screening of personal interest conflicts in firms, while the current Model Rule does not allow for screening. Therefore, the proposed New Mexico configuration requires different treatment of imputation under 108 and 110, while the Model Rule does not.

The removal of paragraph I regarding representation of adverse clients by close relatives (e.g., public defender wife represents defendant and her DA husband prosecutes same defendant), and relegating the rule to the comments under 16-107 is not a significant change. Rather than being a specific conflict, the concern must now be analyzed as a general personal interest material limitation conflict under the new 16-107(A)(2), and in the case of a husband and wife, likely is non consentable. If I remained in the proposed rule 16-108, the new imputation provision would require consent in all cases where different firms employed relatives or significant others who represented clients having direct adversity in a matter. Thus, the proposed configuration could be considered to be slightly more restrictive, but also more confusing.

### **RULE 16-109**

**Description of Revision:** The title is modified to “Duties to Former Clients.” Where indicated, the revision substitutes “informed consent, confirmed in writing” for “consents after consultation.” The rule is reorganized to discuss prior representations in Paragraph A, prior law firm representations in Paragraph B, and use of confidential information in Paragraph C. C.2 represents a new sentence which prohibits revealing “information relating to the representation except as these rules would permit or require with respect to a client.”

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed revisions adopt the Model Rule and Comment verbatim.

**Interpretation/Purpose:** To divide the duties required of lawyers and law firm with respect to former clients, and to clarify the continuing prohibition against revealing confidential information. The heading of Paragraph C, “Former Representation,” does not describe the substance of the confidentiality provisions of Paragraph C. To accurately describe the substance of the paragraph, it should be changed to “Protection of Confidential Information.” The text of the last paragraph of the Committee Commentary states that the provisions of this rule can be waived if the client gives informed consent. The rule does not indicate that the waiver applying

to Paragraphs A and B applies to the confidentiality provisions of Paragraph C. If so, the rule should clarify this, and not the commentary.

## **RULE 16-110**

**Description of Revision:** The title is changed to “Imputation of Conflicts of Interest; general rule,” from “Imputed Disqualification.”

Paragraph (A): Eliminates imputation of conflicts references to other rules, and adds language to eliminate imputation of Rule 107(A)(2) "personal interest" conflicts.

The prohibition against hiring lateral transfers with a conflict is removed and replaced by the screening provisions of paragraph C, which only require written notice rather than consent or waiver under paragraph D.

Paragraph (E) adds language to note the relationship of this Rule to Rules 111 and 112.

**Comparison with Model Rule and Unique New Mexico Provisions:** The current New Mexico rule tracks the text of the old Model Rule. The proposed rule is substantially different from the current Model Rule in that paragraph C, regarding screening, and the portion of paragraph E referencing rule 112 are not included in the current model rule. The proposed rule also adds three paragraphs of commentary eliminated from the ABA Comment with the elimination of screening provisions.

**Interpretation/Purpose:** Revisions recognizing new terminology and new rules are not analyzed here. The proposed rule dovetails with proposed rule 1.8 with regard to imputation. Imputation of the prohibitions in Rule 1.8 are addressed by Rule 1.8 rather than by Rule 1.10. Under Rule 1.8(k) the prohibitions set forth in paragraphs 1.8(a) through (i), but not (j) (primarily financial personal interest conflicts), are imputed to other lawyers with whom the personally disqualified lawyer is associated. In paragraph A, the proposed reference to "personal interest" conflicts at the end of Rule 1.10(a) would eliminate imputation in the case of conflicts between a lawyer's own personal interest (not interests of current clients, third parties or former clients) and the interest of the client, at least where the usual concerns justifying imputation are not present. The exception applies only where the prohibited lawyer does not personally represent the client in the matter and no other circumstances suggest the conflict of the prohibited lawyer is likely to influence the others' work (the exception applies only when there is no significant risk that the personal-interest conflict will affect others in the lawyer's firm).

Paragraph C provides that former-client conflicts of lawyers who have moved laterally to a new firm are not imputed to the new law firm if the personally disqualified lawyer has been timely screened from participation in the matter and the former client is notified of the screen. This amendment permits nonconsensual screening of lawyers who have joined a law firm.

Paragraph (C)(1) provides for "timely" screening and written notice, and otherwise tracks proposed language in Rules 111(a), Rule 112(c) and Rule 118. The term "screened" is defined in Rule 1.0(k) and in Comments [8] - [10] of that Rule.

Paragraph E clarifies that Rules 111 and 112 are intended to be the exclusive Rules governing the imputation of conflicts of interests of current or former government lawyers or judges.

The most significant change to this rule and difference from the Model Rule is the allowance for non consensual screening in Paragraph C (the current Paragraph D allows 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 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. There are presently 17 jurisdictions that permit non consensual screening of laterals by Rule. 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 proposal considered the ABA's rejection of the screening provisions, and instead adopted the Ethics 2000 recommendations prior to the ABA's final decision.

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**

**Description of Revision:** The caption is changed to read "Special Conflicts of Interest for Former and Current Government Officers and Employees."

Paragraph (A) is reorganized to clarify that an individual lawyer who formerly served as public officer or government employee is subject only to the confidentiality of information provisions of 1.9(c) (but not 1.9A and B). The word "private" is no longer used as a modifier for the successive client. The text of the current Rule 111A suggests that the disqualification under that paragraph applies only when the lawyer moves from government service to private practice, and does not appear to apply to lawyers moving from one government agency to another. "Consent after consultation" replaces "gives its informed consent to the representation" throughout. Paragraphs A and D require consent to be "confirmed in writing" as defined in Terminology B.

Paragraphs (B)(1) and (C) require "timely" screening. Screening is a defined term (Terminology (K)). The paragraphs F definition of "screened" is deleted.

The current paragraph (E) defining "confidential government information" is relocated to Paragraph (C).

Paragraph (d): Clarifies that lawyers moving into non government practice must comply with rules 107 and 109. As with Rule 1.9 conflicts, Comment [2] states the expectation that such lawyers will in fact be screened where it is practicable to do so.

Paragraph G of the current rule regarding advocacy before a government agency also is deleted.

**Comparison with Model Rule and Unique New Mexico Provisions:** The new Model Rule and Comment are adopted verbatim. The current New Mexico rule was different from the old

Model Rule in requiring consent in writing, and defining “screened,” both of which are now incorporated into the proposed rule. New Mexico’s definition of “screened” in this rule differs from the model rule, and is perhaps more clear and concise.

**Interpretation/Purpose:** The changes are made to conform to the Model Rule. The change in caption reflects the fact that the Rule has traditionally been applied not only to lawyers moving from government service to private practice (and vice versa) but also to lawyers moving from one government agency to another. The rule clarifies that individual lawyers who have served as government officials or employees are subject to Rule 111(a) and not 109. The meaning of the term "matter" is clarified in new Comment [10]. Paragraph D2(ii) is broadened to clarify that judicial lawyers are subject to rule 112.

The headings of paragraphs A and B, which are not part of the rule, are misleading and fail to consider the text of the proposed revision. A and B reference subsequent "private" representation, but the rule title and text changes clarify that the subsequent representation could be at a different government agency.

### **RULE 16-112**

**Description of Revision:** The caption is changed to "Former Judge, Arbitrator, Mediator or Other Third-Party Neutral." Paragraph A is changed to reference third-party neutrals, consent after consultation, confirmed in writing. Paragraph B adds references mediators and other third-party neutrals and deleted "arbitrator" from the sentence addressing law clerks. Paragraph C adds "timely" to the non consensual screening requirement.

**Comparison with Model Rule and Unique New Mexico Provisions:** The current rule differs from the old model rule by omitting "and substantially" and adding "unless the court, if applicable," to paragraph A. These changes are not preserved in the proposed rule, which follows the Model Rule verbatim.

**Interpretation/Purpose:** The changes appear to be made to conform to the Model Rule.

**Application/Evaluation:** Most of the changes are necessity to make the text of the rule consistent with the remaining rules. The provisions which are unique to the current rule could be maintained without compromising the remaining rules, if the Supreme Court prefers the unique provisions. The heading of paragraph C is not descriptive of the content. The heading should be changed to "Imputation of Conflict to Firm; Screening." or "Subsequent Firm Associations; Screening."

### **RULE 16-113**

**Description of Revision:** The Current rule is amended to require the lawyer for an organizational client to report certain violations of law to higher organizational authority in certain circumstances unless reasonably believed not to be necessary in the best interest of the organization; to require the lawyer to proceed as reasonably believed necessary to assure that the organization’s highest authority is informed of the lawyer’s withdrawal or discharge in circumstances addressed in the proposed Rule; and to permit the lawyer to reveal client information to prevent reasonably certain substantial injury to the organization where the

organization's highest authority insists upon or fails to timely address a clear violation of law. The Comment to Rule has been amended to describe these proposed changes to the Rule.

Paragraph A is unchanged.

Paragraph B of the proposed rule now provides an objective test to trigger reporting action by the lawyer, namely, whether a reasonable lawyer who knows such facts would, in similar circumstances, conclude that the conduct in which a constituent is engaging or intends to engage constitutes a violation of law or duty to the organization that is likely to result in substantial injury to the organization. The proposal then deletes suggested courses of action available to the lawyer with knowledge of corporate misconduct, and replaces it with a mandatory requirement to report wrongdoing to higher authority in the organizational client. Currently, the rule identifies "reporting up" as a potential course of action when the lawyer has discerned an actual or threatened violation of law or violation of legal obligation to the organization, but the Rule imposes no clear obligation to pursue that course of action. The proposed rule requires that the lawyer refer the matter to higher authority in the organization - including, if warranted, the organization's highest authority -- unless the lawyer reasonably believes that it is not necessary to do so.

The current paragraph C, providing that a lawyer, in this circumstance, may choose to withdraw, is deleted. A new paragraph C is added to permit, but not require reporting outside the organization in some circumstances, with express limitations, whether or not permitted by rule 106.

A new paragraph D provides that the confidentiality exceptions of paragraph C shall not apply to a lawyer representing the organization with respect to the alleged misconduct.

Paragraph E is a new provision to assure that the organization's highest authority is made aware that a lawyer for the organization has withdrawn or is discharged in retaliation for taking action pursuant to paragraphs B and C. In some instances, the actions of the lawyer within the organization, pursuant to Rule 1.13(b), may fail to prevent or avoid action that seriously threatens the interest of the organization.

Language to proposed paragraph F (old D) changes "when it is apparent" to "the lawyer knows or reasonably should know." This change clarifies the scienter requirement in this paragraph, using defined terminology and a construction that appears elsewhere in the Rules.

**Comparison with Model Rule and Unique New Mexico Provisions:** The Current New Mexico rule has no provisions different from the old Model Rule. The proposed rule and committee commentary are adopted verbatim from the new Model Rule.

**Interpretation/Purpose:** Organizational lawyers, including government lawyers, now have more specific duties and permissions to report misconduct of corporate officials in the best interests of the entity or as required by law. The revisions of this rule and 16-106 allow significant exceptions to client confidentiality in the organizational setting. The Ethics 2000 proposed revisions to this rule were quite insignificant until corporate scandals began to rock the nation in 2001. The Securities and Exchange Commission implemented regulations requiring

corporate lawyers to report corporate misconduct “up the chain” of the corporation, and ultimately outside the corporation to the SEC if the highest authorities in the corporation took no action. To allow for affected lawyers to comply with the new regulations, or any other laws mandating disclosure of information by lawyers, this rule and Model Rule 1.6 were amended to allow exceptions to confidentiality in order to protect against harm to financial interests, and to comply with law.

## **RULE 16-114**

**Description of Revisions:** The Proposed Rule creates material changes. First, “disability” is changed to “diminished capacity” in the heading of the rule. Second, Paragraph A uses the terms “capacity” in place of a client’s “ability”; “diminished” in place of “impaired” and “impairment” in place of “disability to describe a lawyer’s obligation to maintain a normal client-lawyer relationship when the “client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason.”

Third, the Proposed Rule materially changes the considerations taken by a lawyer in determining whether the lawyer should take a protective action on behalf of the client. Instead of requiring only a lawyer’s reasonable belief that “the client cannot adequately act in the client’s own interest,” the Proposed Rule Paragraph B conditions the lawyer’s decision upon a reasonable belief that “the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest.” In addition, the Proposed Rule implies that a lawyer may take “reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client,” and “in appropriate cases” seek the appointment of a guardian ad litem, conservator, or guardian.

Finally, Paragraph C is an addition which clarifies the degree to which a lawyer may disclose client confidences under Rule 16-106, but “only to the extent reasonably necessary.”

The Committee Commentary adds additional language which provides guidance for consulting with family members or other representatives a client may want to have participate without generally affecting the applicability of the attorney-client evidentiary privilege. The comments also address the way in which a lawyer may disclose a client’s condition or take emergency legal assistance.

**Comparison with Provisions Unique to New Mexico Rules.** The requirements under Paragraph B have been replaced by the Proposed Rule. The Model Rule and Comment are adopted verbatim.

**Interpretation/Purpose:** The proposed rule attempts to clarify when and how a lawyer may take protective actions on behalf of his or her client. The changes leave undisturbed the obligations of the lawyer to clients with diminished capacity. The term “diminished capacity” may have been used in order to clarify that the ability of a client to adequately act on behalf of himself or herself may be affected considerations or conditions other than a disability.

The purpose of the changes to Paragraph B may have been to clarify when a lawyer may take protective action, but it creates a material change by enumerating conditions a lawyer must consider. Rather than exercising only a reasonable belief that the client has a diminished capacity under the old rule, a lawyer must form a reasonable belief that protective action is needed when the lawyer also reasonably believes that the client is at risk of causing physical, financial or other harm to himself or herself. This change likely reflects the realities that, while a client may have a “diminished capacity”, the client may have the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being or financial situation. Only at a point where the lawyer reasonably believes that the diminished capacity may cause harm to the client can the lawyer consider taking protective action.

In addition, the purpose of the additions suggests that a lawyer may take protection actions in ways other than through a legal proceeding, and in fact should take protective actions alternative to court proceedings, except in “appropriate cases.”

The purpose of the addition of Paragraph C encourages lawyers to be able to take protective actions on behalf of their clients whom the lawyer reasonably believe to have diminished capacities without the threat of violating confidentiality requirements, provided that only minimum amount of necessary information is disclosed. The comments suggest that, because the risk of an adverse action against the client for whom the lawyer seeks protective action (e.g., involuntary commitment), the lawyer must take extra caution not to disclose more than that which is reasonably necessary to protect the client. At a minimum, the comments suggest that the lawyer should determine “whether it is likely that the person or entity consulted with will act adversely to the client’s interest before discussing matters related to the client.”

### **RULE 16-115**

**Description of Revision:** Paragraph A continues to require a lawyer to maintain complete records of account funds and other property, but the Proposed Rule has deleted the language that the lawyer must keep this property “in a manner that conforms to the requirements of Rule 17-204 of the Rules Governing Discipline”. The Proposed Rule adds language in Paragraph E for purposes of clarifying that, when a dispute exists between a lawyer and “two or more persons”, the property which is not in dispute shall be promptly distributed by the lawyer. Grammatical changes were made in Paragraph F. The Proposed Rule also deletes language at the end of the paragraph which is largely redundant.

Proposed Rule paragraphs B and C are material additions. Paragraph B allows a lawyer, in his or her discretion, to deposit the lawyer’s own funds into a client trust account for the sole purpose of paying bank service charges on that account, but only an amount necessary for that purpose. Paragraph C creates a mandatory obligation of the lawyer to deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

The Committee Commentary contains changes which add to the clarification of language added by the Proposed Rules, but do not create material changes.

**Comparison with Model Rule and Unique New Mexico Provisions:** Reference to New Mexico Rules Governing Discipline was deleted from Proposed Rule Paragraph A. No other provisions unique to New Mexico were added or deleted. The IOLTA provisions (paragraphs F to H) are unique to New Mexico. No Comment accompanies these provisions. The remainder of the rule and all of the Committee Commentary are verbatim from the Model Rule.

**Interpretation/Purpose:** The addition of Paragraph B creates an exception to the general rules against a lawyer commingling funds. The addition may give a lawyer some additional flexibility for maintaining a client's trust account so that bank fees do not incur, if the lawyer decides to do so in his or her discretion. Paragraph C, although newly proposed, mirrors the requirement that pre-paid legal fees remain the property of the client until such fees have been incurred. Proposed Rule Paragraph E clarifies the lawyer's obligation to promptly distribute funds which are not in dispute.

### **RULE 16-116**

**Description of Revision:** The Proposed Rule makes minor language clarifications. The situations in which mandatory disqualification remain unchanged. Regarding permissive withdrawal, the Proposed Rules add an additional subparagraph, A(1), stating that a lawyer may withdraw "if withdrawal can be accomplished without material adverse effect on the interests of the client." However, this is provided for in the old comments, as well as the proposed commentary. Old subparagraph B(3) has been changed so that, now, a lawyer may withdraw if the client insists upon "taking action" (rather than pursuing an objective) that the lawyer considers repugnant or "with which the lawyer has a fundamental disagreement" (rather than imprudent). Paragraph C adds a sentence requiring a lawyer to comply with applicable law requiring notice to or permission of a tribunal when terminating representation.

The Committee Commentary makes minor changes. In the last sentence under the heading "Mandatory Withdrawal," the comments add language reminding lawyers of their obligations under Rule 16-106 and 16-303. The last paragraph of the old comments regarding a lawyer's representation of an organization has been deleted.

**Comparison with Model Rule and Unique New Mexico Provisions:** No provisions unique to New Mexico were added or deleted. The proposed rule and Commentary follow the Model Rule verbatim.

**Interpretation/Purpose:** The purpose of the most substantial change to this rule, the addition of subparagraph A(1), allows lawyers the ability to withdraw from representation for any reason, provided that the interests of the client are not materially and adversely affected.

### **RULE 16-117**

**Description of Revision:** The Proposed Rule creates material changes. Whereas the old rule governed procedural aspects of the sale of a practice, the Proposed Rules creates substantive, as well as procedural, requirements. Under Proposed Rule Paragraph A, the selling lawyer must

cease to engage in the private practice of law or in the area of practice sold in the jurisdiction in which the practice was conducted (the old rule does not contemplate that a the selling lawyer must cease private practice in the same areas of law sold).

Paragraph B requires that the entire practice or area of practice must be sold to one or more lawyers or law firms (the old rule contemplates the sale of only part of a practice or area of practice).

Paragraph C sets forth the requirements with which notice to clients must comply. Subparagraph C(4) states that the notice must give notice to the client of “the fact that the client’s consent of the transfer of the client’s files will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of receipt of the notice,” implying that a client may object to the transfer. The Proposed Rule shortens the notice given to clients who have been served, from 18 months under the old rule to 12 months prior to the date of sale.

Paragraph D of the Proposed Rule, like the old rule, allows for notice of publication, but only in certain circumstances. The content of the notice by publication incorporates the requirements under Proposed Rule Paragraph C. The Proposed Rule also increases the deadline in a published notice allowing a person to object to the proposed transfer or claim the files within sixty (60) days after the final date of publication.

The Proposed Rule also makes material changes to the issue of fees charged to a client when a practice or area of practice is sold. The old rule stated that the purchasing lawyer shall not increase fees by reason of the purchase, but that the purchasing lawyer could refuse continued representation of the client who did not consent to the fee change, unless the work performed was substantially similar prior to the initiation of the purchase negotiations or for those matters reasonably expected to be completed within 180 days after the sale. The Proposed Rule simply states that fees changed “shall not be increased by reason of the sale.”

The Proposed Rule deletes the language that a lawyers participating in the sale “shall remain subject to the Rules of Professional Conduct that apply when a lawyer terminates the representation of a client or involves another lawyer in the representation of a client.”

The Committee Commentary is a material addition to the Proposed Rule. The commentary contributes to the areas of Termination of Practice by the Seller; Sale of Entire Practice or Entire Area of Practice; Client Confidences, Consent and Notice; Fee Arrangements Between Client and Purchaser; Other Applicable Ethical Standards; and Applicability of the Rule.

**Comparison with Provisions Unique to New Mexico Rules.** The old rule has been replaced with the Model Rule, but text has been added to Paragraphs C, C(1), C(2), C(4)[90 changed to 60 days], the last paragraph of C is changed to the beginning of D, and D(2) is an addition allowing notice by publication. Text is deleted from Comment paragraphs 4 and 5, and added to paragraphs 7, 8, and 11. The Committee may have adopted a version of the model rule revision which was subsequently amended by the ABA.

**Interpretation/Purpose:** The Proposed Rule creates greater obligations on lawyers who sell

their legal practice or area of practice. However, the proposed changes appear to accomplish the stated purpose of preventing clients from being considered as commodities. The purpose of the changes is to allow the good will of a practice or area of practice to be sold, but to prevent clients from becoming mere commodities of the sale. According to the Committee Commentary, the new requirement that only an entire practice or area of practice be sold protects clients “whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters.” The Proposed Rule also protects clients by giving them the ability to object to the transfer to the purchasing lawyer. The requirement that fees not be increased by reason of the sale is to prevent the purchase of a practice or area of practice from being financed by the clients.

### **RULE 16-118**

**Description of Revision:** Proposed Rule 16-118 is a material addition, setting forth obligations a lawyer owes to “prospective clients”. The term “prospective client” is defined as “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.” The Committee Commentary does not define as a “prospective client” those persons who unilaterally communicate information without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.

Paragraph B of the Proposed Rule prohibits a lawyer from using or revealing information learned in the consultation, except as provided by Rule 16-109 with respect to information of a former client. Paragraph C of the Proposed Rule prohibits a lawyer from representing a client “with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in Paragraph D of the Proposed Rule”. Paragraph C also prohibits any person in the same firm as the disqualified lawyer from undertaking or continuing representation in such a matter.

Paragraph D creates an exception to the disqualifying circumstances set forth in Paragraph C. Representation is permissible if (1) both the affected client and prospective client have given informed consent, confirmed in writing; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information that was reasonably necessary to determine whether to represent the prospective client; and ( (a) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (b) written notice is promptly given to the prospective client.

The Committee Commentary is a material addition.

**Comparison with Provisions Unique to New Mexico Rules.** The proposed rule adopts the Model Rule verbatim. No provisions unique to New Mexico previously existed.

**Interpretation/Purpose:** The Proposed Rule provides limited protection to a prospective client who may need to disclose information or place documents or other information with a lawyer prior to the commencement of a client-lawyer relationship. According to the Committee Comment, a lawyer may “avoid acquiring disqualifying information from a prospective client by

limiting the initial interview to only such information as reasonably appears necessary,” and a lawyer should inform the prospective client when the information received indicates a conflict or decline the representation. The Comments also suggest that a lawyer may “condition” conversations with prospective clients “on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.” Such an agreement may also provide that the prospective client may consent to the lawyer’s subsequent use of information received from that person.

### **RULE 16-201**

**Description of Revision:** No change is proposed to the text of this Rule.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed rule and commentary track the Model Rule. The fifth paragraph of the Commentary is new. The ABA Commission designed the paragraph "to remind lawyers that informing a client of various forms of dispute resolution may be required under Rule 1.4, i.e., when a different form of dispute resolution would constitute a reasonable alternative to litigation. This addition is proposed in recognition of the increasingly important role being played by alternative dispute resolution in litigation."

### **RULE 16-202**

**Description of Revision:** The rule on lawyer serving as an intermediary is proposed for deletion.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed deletion follows the lead of the Model Rules.

**Interpretation/Purpose:** The ABA Commission Reporter notes "rather than amending Rule 2.2, the Commission believes that the ideas expressed therein are better dealt with in the Comment to Rule 1.7. There is much in Rule 2.2 and its Comment that applies to all examples of common representation and ought to appear in Rule 1.7. Moreover, there is less resistance to common representation today than there was in 1983; thus, there is no longer any particular need to establish the propriety of common representation through a separate Rule."

### **RULE 16-203**

**Description of Revision:** According to the ABA Commission Reporter, the proposed revision clarifies the application of the rule in two situations:

"The first is one where the evaluation poses no significant risk to the client. Here, the lawyer may be impliedly authorized to provide the evaluation, and paragraph (a) requires only that the lawyer determine that providing the evaluation is compatible with other aspects of the client-lawyer relationship. The second situation is one where there is a significant risk of material and adverse effect on the client's interests. Here, paragraph (b) provides that the lawyer may not

proceed without obtaining the client's informed consent. Paragraph (c) reminds lawyers that the disclosure of information pursuant to providing an evaluation is governed by Rule 1.6, under which disclosures may be impliedly or expressly authorized."

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed rule tracks the Model Rule.

**Interpretation/Purpose:** The Text is restructured to clarify circumstances in which lawyer may provide evaluation for use of third persons consistent with the Model Rule.

### **RULE 16-204**

**Description of Revision:** This is a new rule regarding the lawyer's role as a third-party neutral.

**Comparison with Model Rule and Unique New Mexico Provisions:** The rule is new, and is adopted verbatim from the Model Rule.

**Interpretation/Purpose:** The ABA Commission Reporter notes that lawyers are increasingly serving as mediators, and settlement facilitators, and that these roles create unique ethical problems.

"Unlike nonlawyers who serve as neutrals, lawyers may experience unique ethical problems, for example, those arising from possible confusion about the nature of the lawyer's role. The Commission notes that there have been a number of attempts by various organizations to promulgate codes of ethics for neutrals (e.g., aspirational codes for arbitrators or mediators or court enacted rules governing court-sponsored mediators), but such codes do not typically address the special problems of lawyers. The Commission's proposed approach is designed to promote dispute resolution parties' understanding of the lawyer-neutral's role."

### **RULE 16-300**

#### **Prohibition against invidious discrimination**

No revision to the text of the rule or the commentary is proposed

### **RULE 16-301**

#### **Meritorious claims and contentions**

**Description of revision:** Adds reference to "law and fact" This change makes explicit the requirement that a claim must have a nonfrivolous basis in both law and fact. No change in substance is intended.

**Description of revision to commentary:** A new sentence has been added to ¶2 to remind lawyers that they must act reasonably to inform themselves about the facts and law pertinent to a claim they will make on behalf of a client. The reference to a client's purpose to harass has been dropped because the client's purpose is not relevant to the objective merits of the client's claim.

New ¶3 acknowledges the primacy of constitutional law that might require a lawyer to take action on behalf of a criminal defendant that otherwise would violate this Rule.

**Comparison with Model Rule and Unique New Mexico Provisions:** Not applicable

**RULE 16-302**  
**Expediting litigation**

**Description of revision to text of rule:** No revision proposed.

**Description of revision to commentary and purpose:** The Commission concluded that the reference in the second sentence to indulging delay "merely for the convenience of the advocates" is too restrictive and modified it to recognize that there are circumstances where it is acceptable for a lawyer to request a postponement for personal reasons.

**Comparison with Model Rule and Unique New Mexico Provisions:** Not applicable

**Interpretation/Purpose:** This Rule is similar to Rule 16-103, which states that "A lawyer shall act with reasonable diligence and promptness in representing a client.." Every case annotated under Rule 16-302 is either repeated under Rule 16-103 or has reference to violation of Rule 103.

**RULE 16-303**  
**Candor toward the tribunal**

**Description of revision to text and purpose** (by the Reporter's explanation of changes):

The ABA Ethics 2000 Commission has revised and reorganized this Rule 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. In some particulars, the lawyer's obligations to the tribunal have been strengthened. For example, the Rule now makes clear that the lawyer must not allow the introduction of false evidence and must take remedial steps where the lawyer comes to know 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 existing Rule, the lawyer's obligations to the tribunal may require the lawyer to reveal information otherwise protected by Rule 106. The lawyer's obligation in the existing 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.

Paragraph (A)(1): Amplify lawyer's duty not to make false statements to tribunal and add obligation to correct false statements previously made. The Commission recommends deletion of the term "material" that presently qualifies the lawyer's duty not to knowingly make false statements of fact or law to a tribunal, bringing this duty into conformity with the duty not to offer false evidence set forth in paragraph (A)(3). A new phrase addresses the lawyer's duty to correct a false statement of material fact or law previously made to the tribunal, also paralleling the duty to take remedial measures in paragraph (A)(3).

Paragraph (A)(2): Delete existing provision on lawyer's duty to disclose client crime or fraud. The Commission is deleting current paragraph (A)(2), which provides that a lawyer shall not knowingly fail to disclose to the tribunal material facts when necessary to avoid assisting client crime or fraud. The lawyer's duty to disclose crime or fraud in connection with a proceeding before a tribunal is now addressed more comprehensively in paragraph (B). The lawyer also has disclosure obligations under paragraphs (A)(1) and (A)(3), where the lawyer comes to know of the falsity of statements previously made to the tribunal or evidence previously offered. A lawyer's general duty to avoid assisting client crime or fraud is addressed in Rules 102(d) and 401.

Paragraph (A)(3): Amplify duty to take remedial measures in connection with material evidence lawyer comes to know is false and include discretion to refuse to offer evidence lawyer reasonably believes is false. The Commission is amending current paragraph (A)(4) to extend its remedial obligations to situations where the lawyer's client or a witness called by the lawyer has offered material evidence that the lawyer subsequently comes to know is false. Required remedial measures may, if necessary, include disclosure to the tribunal. The Commission has also transferred to this paragraph the substance of current paragraph (C), which permits a lawyer to refuse to offer evidence that the lawyer reasonably believes (but does not know) is false. This grant of discretion, however, has been limited so it will not apply to the testimony of a client who is exercising the constitutional right to testify in a criminal case.

Paragraph (B): Duty to preserve integrity of adjudicative process. The Commission recommends adoption of a new provision (B) addressing the lawyer's obligation to take reasonable remedial measures, including disclosure if necessary, where the lawyer comes to know that a person is engaging or has engaged in any sort of criminal or fraudulent conduct related to the proceeding. This new provision incorporates the substance of current paragraph (A)(2), as well as ABA Model Code of Professional Responsibility DR 7\_102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7\_108(G) ("A lawyer shall

reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge").

Paragraph (C): Duration of duties in paragraphs (A) and (B). The Commission is not changing the scope and duration of the lawyer's duty of candor to the tribunal but extending it to paragraph (B).

Paragraph (D): Ex parte proceedings. One change in grammar with minor significance is proposed.

Paragraph (E): Limited entry of appearance. The word "court" is changed to "tribunal" for the sake of consistency.

**Comparison with Model Rule and Unique New Mexico Provisions:** The revision adopts the Model Rule, except that paragraph (E) is unique to New Mexico's rules and has been carried over to the revision.

#### **RULE 16-304**

##### **Fairness to opposing party and counsel**

**Description of revision to text and purpose:** Deletes the phrase "not supported by the evidence" from subsection E. No other changes proposed.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed rule tracks the Model Rule. The deletion from subsection E reflects an abandonment of that phrase which was unique to New Mexico's rule.

#### **RULE 16-305**

##### **Impartiality and decorum of the tribunal**

**Description of revision to text and purpose:** Paragraph (A): Deletes the phrase "these rules or the Code of Judicial Conduct." This phrase was unique to New Mexico's rule. Deletion of the phrase signals an abandonment of that uniqueness.

Paragraph (B): The change to specify communication "during the proceeding" was made in light of the Commission's decision to treat post-discharge communication with jurors in a new paragraph (C). The reference to "court order" has been added to alert lawyers to the availability of judicial relief in the rare situation in which an ex parte communication is needed.

New Paragraph (C): Rule 3.5(b) has been held to be unconstitutionally overbroad when applied to post-verdict communications with jurors. See *Rapp v. Disciplinary Board of the Hawaii Supreme Court*, 916 F. Supp. 1525 (D. Hawaii, 1996). The Commission has proposed the addition of a new paragraph (C) that permits such communications unless prohibited by law or

court order or the lawyer knows that the juror does not wish to be contacted. Also prohibited, of course, are communications involving misrepresentation, duress, coercion or harassment. The proposal permits more post-verdict communication with jurors than the current Rule but affords the juror greater protection than did ABA Model Code of Professional Responsibility DR 7-108(D) which provided, "After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service."

Paragraph (D) (formerly (C)): Adds a phrase: "engage in conduct intended to disrupt, and that in fact disrupts, a tribunal." I do not know the purpose for this addition which makes New Mexico's rule unique.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed revision tracks the Model Rule, with the addition of "and in fact disrupts" a tribunal in paragraph (D).

### **RULE 16-306** **Trial Publicity**

**Description of revision to text and purpose:** The rule is completely rewritten. The current rule applies to criminal jury trials only. The proposed revision applies to both civil and criminal "adjudicative proceedings." The proposed rule departs significantly from ABA Model Rule 3.6 by putting in the final paragraph of the commentary what the Model Rule includes in the text of the rule under subparagraph (b).

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed revision, like the Model Rule, has expanded the limitations on trial publicity to all adjudicated matters rather than just criminal proceedings. The proposed rule departs significantly from Model Rule 3.6 by putting in the final paragraph of the commentary what the ABA rule includes in the text of the rule under subparagraph (b).

**Application/Evaluation:** Civil lawyers must now consider trial publicity restrictions in their cases.

### **RULE 16-307** **Lawyer as witness**

**Description of revision to text and purpose:** Adds subparagraph (3) to paragraph (A) which was previously omitted in the New Mexico Rule. It says that a lawyer who is an advocate at a trial may also testify at that trial, if necessary, if disqualification of the lawyer would work substantial hardship on the client. Other minor changes are not substantive. The proposed rule mirrors ABA Model Rule 3.7.

**Description of revision to commentary and purpose:** The commentary now carries a helpful and lengthier discussion about how to apply the conflict of interest rules in 16-107 and 16-109

when a lawyer is faced with possibly being a witness in the trial in which the lawyer is also advocating.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed revision tracks the text of the Model Rule.

#### **RULE 16-308**

##### **Special responsibilities of a prosecutor**

**Description of revision to text and purpose:** Disclosure of mitigating evidence to the defense for sentencing purposes is now limited to “unprivileged” information in subsection (D). 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 comments “that have a substantial likelihood of heightening public condemnation of the accused. . .”

**Comparison with Model Rule and Unique New Mexico Provisions:** Changes in the rule track Model Rule 3.8.

**Application/Evaluation:** The changes may have a major effect on the way some prosecutors present cases to the grand jury or even at trial.

#### **RULE 16-309**

##### **Advocate in non-adjudicative proceeding**

**Description of revision to text and purpose:** The only change in the Rule text is the replacement of the reference to "legislative or administrative tribunal" with "legislative body or administrative agency." The term "tribunal" is defined in Terminology (M) as denoting courts and other agencies when those agencies are acting in an adjudicative capacity. This change is necessary to make clear that Rule 16-309 applies only when the lawyer is representing a client in a nonadjudicative proceeding of a legislative body or administrative agency. No change in substance is intended.

**Description of revision to commentary and purpose:** The third sentence has been modified to clarify that the lawyer must, rather than merely should, act honestly and comply with procedural rules, and cross-references to Rules 16-303(A) through (C), 304(A) through (C) and 305.

The addition of the new references to official hearings or meetings at which the lawyer or the lawyer’s client is presenting evidence or argument, applications for licenses, generally applicable reporting requirements and investigations or examinations is intended to clarify the limited situations in which Rule 16-309 is applicable.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed revision tracks the Model Rule.

## **RULE 16-401**

**Description of Revision:** The text of the rule itself is not altered in any material way. The only change from the prior language is to the end of Rule 16-401B, which adds the language “of the Rules of Professional Conduct”.

The Committee Commentary does have changes. The original comment regarding misrepresentations indicated that misrepresentations could also occur by failure to act. The comment now states that “misrepresentations can also occur by partially true, but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 16-804 of the Rules of Professional Conduct.”

Under Statements of Fact, the Committee Commentary now indicates that estimates of price or value placed in the subject of the transaction and the parties intentions as to acceptable settlement of a claim are “ordinarily” in the category of accepted conventions and negotiations which would not fall under this rule regarding misleading statements or omissions. The Committee Commentary also goes on to add that “[l]awyers should be mindful of their obligations under applicable law to avoid criminal and tortuous misrepresentation.”

The former Commentary regarding Crime or Fraud by Client spoke only to a lawyer’s requirement to disclose certain information to avoid being deemed to have assisted the client’s crime or fraud. The new Commentary language goes further specifically indicating that a lawyer is prohibited from counseling or assisting in a client’s conduct that the lawyer knows is criminal or fraudulent. The new Commentary language also indicates that a lawyer can ordinarily avoid assisting in a client’s crime or fraud by withdrawing. According to the Commentary, it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation, or the like. Extreme cases may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud.

**Comparison with Model Rule and Unique New Mexico Provisions:** New Mexico's rule tracks the Model Rule.

**Interpretation/Purpose:** As indicated above, the changes to the Committee Commentary regarding misrepresentation appear to slightly broaden the definition. Regarding the Statements of Fact portion of the Committee Commentary, the changes in this portion of the commentary now indicate that statements regarding estimates of price or value placed on the subject of a transaction, and a parties intentions as to an acceptable settlement of a claim are normally, but not always statements which are not taken as statements of material fact.

With respect to the third paragraph of comment, this includes substantial additional language regarding conduct related to crime or fraud by a client. In fact, the former title of this commentary was “fraud by client”, but now reads “crime or fraud by client.” The revision appears to broaden the scope of actions by an attorney which may be deemed to violate this rule.

## **RULE 16-402**

**Description of Revision:** The text of both the rule and the comment have been significantly altered. Specifically, with respect to the rule itself, 16-402 formally referred to communications with a “party”. The rule is now broadened to include a “person” who the lawyer knows to be represented by another lawyer in the matter. Additionally, the language in 402 allowing an attorney to have contact with members of an organization who are not in a managerial position, has now been deleted.

**Comparison with Model Rule and Unique New Mexico Provisions:** The language in the current 16-402 allowing an attorney to have contact with members of an organization who are not in a managerial position, is unique to the text of New Mexico's rule, but has always been and remains part of the ABA Comment. The proposed revision adopts the Model Rule and Commentary verbatim, and abandons New Mexico's unique provisions.

**Interpretation/Purpose:** Although the language in the original rule regarding communication with individuals having managerial responsibility for an organization have now been deleted, the new language in the commentary does provide guidance upon this particular situation. The new commentary language indicates that the rule prohibits communications with a constituent of an organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose authority to obligate the organization with respect to the matter, or whose act or omission to in connection with the matter may be imputed to the organizations for purposes of civil or criminal liability. The commentary does not require, however, that consent of the organization’s lawyer is required for communication with a former constituent. As such, the new Committee Commentary language appears to codify the general practice in New Mexico that one cannot speak to a current managerial officer of an organization that is represented by an attorney, but is allowed to speak to a former managerial employee.

## **RULE 16-403**

**Description of Revision:** The new proposed Rule 16-403 adds the following language at the end of the original Rule. “The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows, or reasonably should know, that the interests of such a person are or have a reasonable possibility of being in conflict with the interest of the client.”

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed revision tracks the Model Rule.

**Interpretation/Purpose:** The new language of the proposed Rule 16-403 tracts the model rule exactly. The new language indicates if a lawyer is aware, or should be aware, of a conflict of interest with his client and an unrepresented person, the lawyer shall not give legal advice to the unrepresented person other than to hire an attorney himself. The commentary language indicates that the rule distinguishes between situations involving unrepresented persons whose interests

may be adverse to the lawyer's client versus those person's whose interests are not in conflict with the client. In the first situation, the commentary indicates that there is such a great possibility that the lawyer will compromise the unrepresented person's interests, that the rule prohibits giving any advice to the unrepresented person, aside from the advice to obtain counsel. The proposed commentary language also recognizes that what is or is not impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the comments occur.

The new rule is more restrictive in that it changes the prohibition in providing advice to an unrepresented person from "should" to "shall". The rule also recognizes that there are situations where the determination of whether a lawyer is providing impermissible advice may depend on the experience and sophistication of the unrepresented person.

### **RULE 16-404**

**Description of Revision:** The proposed vision adds a second paragraph to the original Rule 16-404. The new proposed paragraph reads as follows: "Inadvertently sent documents." A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent, shall promptly notify the sender."

The proposed Committee Commentary language has also been expanded to include a discussion on addressing documents that have been mistakenly sent or produced by opposing parties or their lawyers.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed revision tracks the Model Rule.

**Interpretation/Purpose:** As indicated above, the new proposed Rule 16-404 speaks to receipt of documents which were sent to the lawyer inadvertently or by mistake. Under the proposed new commentary, the lawyer who receives the inadvertently or mistakenly sent documents is now required to promptly notify the sender. Interestingly, the rule indicates that the required notification is to allow the sender to take protective measures. However, the proposed commentary to the new rule does not speak to whether or not the lawyer who sees the inadvertently sent documents is required to take any additional steps such as returning the original document. The proposed commentary indicates that this question is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of the document inadvertently sent, has been waived. The proposed commentary also indicates that the rule does not address the legal duties of a lawyer who receives the document that the lawyer knows or reasonably should have known may have been inadvertently obtained. The proposed commentary indicates that some lawyers may choose to return documents unread, however, unless required to do so by law, the proposed commentary notes that the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. The proposed commentary then references Rule 16-102 and 16-104.

## **RULE 16-501**

**Description of Revision:** The Proposed Rule adds “managers” to the heading and body of the rule for clarification. The term “managers” is added to the heading for clarification. A material change is made to the Proposed Rule with the addition of a new Paragraph A, requiring partners in a law firm or lawyers who possess comparable managerial authority “to take 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.” Paragraph C adds language for purposes of clarification making a lawyer with managerial authority comparable to that of a partner in a law firm responsible under certain circumstances for the violations of another lawyer. The Committee Commentary adds a new paragraph commenting on new Paragraph A, and it also makes a few minor changes throughout the text.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed revision tracks the Model Rule.

**Interpretation/Purpose:** The proposed additions to Rule 501 create greater responsibilities for partners and/or those lawyers with managerial authority to create firm- or department- wide policies and procedures for ensuring compliance with the Rules. The inclusion of lawyers with managerial authority comparable to partners in a law firm clarifies that the rule applies to managing lawyers in corporate and government legal departments and legal service organizations, as well as to partners in private law firms.

The substantial addition of new paragraph A requires partners or lawyers possessing comparable managerial authority “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.” According to the new comments, this requirement requires the partners or managing lawyers to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules. The new comments identify several examples of recommended assurances, including policies and procedures “designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.” However, the comments suggest that the size, structure, and nature of the practice of a law firm may determine the extent to which partners or managers formalize the policies and procedures.

## **RULE 16-502**

**No changes proposed in the body or commentary of this rule.**

## **RULE 16-503**

**Description of Revision:** The Proposed Rule adds language to clarify that lawyers who possess managerial authority comparable to partners are responsible to ensure that conduct of non-lawyers is compatible with the Rules and can be responsible for a violation in certain

circumstances. The additional reference to managers is added to Paragraphs A and C(2). As with Rule 5.1, this change clarifies that the rule applies to managing lawyers in corporate and government legal departments and legal service organizations, as well as to partners in private law firms. The Committee Commentary adds a paragraph which mirrors the new comments in 16-501 suggesting that internal policies and procedures should be established to reasonably ensure that conduct of non-lawyers complies with the Rules.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed rule tracks the Model Rule. No provisions unique to New Mexico were added or deleted.

**Interpretation/Purpose:** The purpose of these changes is to clarify the responsibilities of lawyers in the positions with managing authority.

### **RULE 16-504**

**Description of Revision:** The Proposed Rule creates a material change regarding the circumstances in which fee sharing is permitted by adding Subparagraph A(2) to permit a lawyer who purchases the practice of another lawyer who is deceased, disabled, or disappeared to pay the estate or other representative of that lawyer to use fees to pay the purchase price. The Proposed Rule creates a material change to Old Rule Paragraph A(2) [Proposed Rule Paragraph A(3)], by allowing a lawyer to share fees with a lawyer whose case is undertaken because of disability or disappearance, in addition to death. Proposed Rule Paragraph D adds language to clarify that a lawyer is prohibited from practicing in a corporation or other similar association when a non-lawyer is a corporate director or officer “or occupies the position of similar responsibility in any form of association other than a corporation.” The Committee Commentary adds a paragraph clarifying the addition to Proposed Rule Paragraph D.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed rule retains and modifies proposed paragraph (A)(3) regarding a deceased, disabled or disappeared lawyer, which has been abandoned by the Model Rule. The proposed rule does not include the Model Rule's allowance of fee sharing with nonprofit organizations. 5.4(A)(4).

**Interpretation/Purpose:** The proposed changes which allow a lawyer taking over for a disabled or disappeared lawyer to share fees with the lawyer's estate or other representative is a practical change. The material changes to the Proposed Rule create greater flexibility for lawyers taking over the clients of other lawyers who have died, become disabled, or disappeared because it creates the opportunity to compensate the lawyer who has performed work prior to the death, disability or disappearance. This flexibility is also beneficial to the client because it increases continuity of representation.

The addition to C(3) clarifies the situations in which a lawyer is permitted from practicing so that the lawyer's professional judgment is not controlled or regulated by a non-lawyer.

The revision omits the provision from the Model Rule which provides 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 practice currently is being used in New Mexico by lawyers cooperating with the American Civil Liberties Union. Removing the provision from the New Mexico Rule indicates an intent by the Supreme Court to prohibit the practice.

#### **RULE 16-505**

No change has been proposed for this rule, regarding the unauthorized and multijurisdictional practice of law. The New Mexico Supreme Court adopted the Model Rule changes to part A of the rule in 2003, with minor revisions.

#### **RULE 16-506**

**Description of Revision:** The Proposed Rule adds language for clarification. Paragraph A adds references to shareholders, operating and other similar types of agreements in which a lawyer shall not engage if a condition of the agreement or relationship is to restrict the lawyer’s rights to practice. Paragraph B prohibits the restriction on a lawyer’s practice as part of a settlement of a “client” controversy, rather than one between private parties. The Committee Commentary makes some minor changes, as well as a new paragraph which suggests that restrictions on practice may be included in the terms of a sale of practice under Rule 16-117.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed revision tracks the Model Rule. No provisions unique to New Mexico were added or deleted.

**Interpretation/Purpose:** The purpose of the changes is to provide greater clarity to the situations in which a lawyer may or may not restrict his or her practice. The reference to a partnership agreement is underinclusive because lawyers also practice in professional corporations and professional limited liability companies. In essence the proposed changes attempt to state that, unless there is a sale of a law practice, a lawyer must not agree to restrict his or her practice, either in some type of business relationship with other lawyers or as a means to settling a claim with a client.

#### **RULE 16-507**

**Description of Revision:** The Proposed Rule is a material addition. The Rules of Professional Conduct now will apply to a lawyer’s “law related services” in certain circumstances. “Law related services” is defined in Paragraph B and “denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.” The Rules of Professional Conduct apply if the law-related services are provided “(1) by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.” The Committee Commentary is a material addition.

**Comparison with Model Rule and Unique New Mexico Provisions:** This rule tracks Model Rule 5.7, which has not existed in New Mexico prior to the Proposed Rule.

**Interpretation/Purpose:** The purpose of this Rule is expand the application of the Rules to conduct by lawyers when they engage in law-related services. This additional obligation should help prevent client confusion where a lawyer is using his or her professional knowledge or skills, but is not engaged in a formal lawyer-client relationship.

The comments suggest that it is possible for legal services and law-related services to be so closely intertwined that they are indistinguishable from one another so that the requirement of disclosure and consultation imposed by Subparagraph (2) of Paragraph A of the rule cannot be met. The comments suggest that “[i]n such a case a lawyer will be responsible for assuring that both the lawyer’s conduct and, to the extent required by Rule 16-503 of the Rules of Professional Conduct, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules.” The comments suggest specifically that a lawyer providing law-related services must take special care to address Rules 16-107 through 16-111, as well as 16-701 through 16-703.

#### **RULE 16-601**

**Description of Revision:** The primary change to this rule is the deletion of 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 to an organization that provides legal services. The revised rule now simply states lawyers have a “responsibility” to provide legal services without the expectation of a fee. A lawyer cannot now shirk that responsibility by offering money to a legal organization.

**Comparison with Model Rule and Unique New Mexico Provisions:** The Model Rule (i.e. 6.1) retains the 50 hour requirement. However, like New Mexico’s proposed rule, it also includes no language that would permit a lawyer to donate \$350 (or any amount) to a legal organization as an alternative to doing pro bono work. Rather, the proposed rule (like the Model Rule) states affirmatively that a lawyer should contribute financial support to organizations that provide legal services to persons of limited means.

**Interpretation/Purpose:** Rather than provide specific pro bono requirements, the proposed rule simply states lawyers have a “responsibility” to: provide legal services without the expectation of a fee; 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.

#### **RULE 16-602**

**Description of Revision:** No proposed change to this rule. New Mexico’s Rule reads exactly the same as the Model Rule (i.e. 6.2).

### **RULE 16-603**

**Description of Revision:** The proposed minor revisions are not substantive.

**Comparison with Model Rule and Unique New Mexico Provisions:** The text of the Rule and the Commentary are the same as in the Model Rules.

**Interpretation/Purpose:** No substantive changes were intended. Some very minor revisions were to track the Model Rule and reference the New Mexico Rules.

### **RULE 16-604**

**Description of Revision:** There are no proposed changes to the rule.

**Comparison with Model Rule and Unique New Mexico Provisions:** The text of the Rule and the Commentary are the same as in the Model Rule. The ABA Commentary to the Model Rule is proposed for adoption.

### **Model Rule 6.5**

ABA Model Rule 6.5, regarding nonprofit and court-annexed limited legal services programs, is not proposed for adoption. The ABA Commission Reporter describes the rule as follows.

"Rule 6.5 is a new Rule in response to the Commission's concern that a strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program. The paradigm is the legal-advice hotline or pro se clinic, the purpose of which is to provide short-term limited legal assistance to persons of limited means who otherwise would go unrepresented."

### **RULE 16-701**

**No revised rule is proposed (*Communications concerning a lawyer's services*).**

### **RULE 16-702**

**Description of Revision:** The rule has been significantly modified, with the entire existing rule being deleted and replaced by a shorter, more general rule. The existing rule is broken down into five sections, including public media advertising, record keeping requirements, payment for referrals, permissible content, and permissible fee information. The revised rule, by contrast, is broken down into only three sections: permitted advertising, payments for referrals, and required information in communications. The revised rule deletes the record keeping requirement set out in Section B of the existing rule. It also removes the Sections D and E of the existing rule related

to permissible content and permissible fee information, opting instead to include a much shorter section on required information. *See*, 16-702(C).

**A. Authorization to advertise.**

Section A of the revised rule is akin to Section A of the existing rule, in that it authorizes advertising; but, rather than providing examples of permissible forums for advertising, the revised rule takes a more generalized approach, permitting advertising through “written, recorded or electronic communication.” Furthermore, Section A of the existing rule makes the authorization to advertise subject to all of the Rules of Professional Conduct. The revised rule narrows the existing rule, making the authorization to advertise subject specifically to the requirements of Rules 16-701 and 16-703.

**B. Payments for Referrals**

Section B of the revised rule is similar to Section C of the existing rule in its content, though the revised rule has clarified the ambiguities of the existing rule by defining the terms contained therein, putting in list form the permissible circumstances under which a lawyer may pay for a referral, and adding two additional exceptions to the prohibition against giving anything of value in exchange for a referral:

**1. Reasonable costs**

The existing rule allows a lawyer to pay for “the reasonable cost of the advertising or the reasonable cost of *preparing* the communication which is permitted by this rule”. The revised rule deletes the word “preparing”.

**2. Usual charges for referral services**

While the existing rule allowed a lawyer to “pay the usual charges for a not-for-profit lawyer referral service or other legal service organization, the revised rule eliminates the term “other legal service organization” and provides that a lawyer may “pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service.” Furthermore, the revised rule defines a qualified lawyer referral service as “a lawyer referral service that has been approved by an appropriate regulatory authority.”

**3. Additional exceptions**

The revised rule adds two additional circumstances in which a lawyer may give something of value in exchange for recommending the lawyer’s services. In 16-702(B), the revised rule has added that a lawyer may:

- (3) pay for a law practice in accordance with Rule 16-117 of the Rules of Professional Conduct; and
- (4) refer clients to another lawyer or a non-lawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if

- (i) the reciprocal referral agreement is not exclusive, and
- (ii) the client is informed of the existence and nature of the agreement.

The ABA Ethics 2000 Commission has added a requirement that each advertisement include an office address for the law firm or lawyer named in the advertisement in response to the increasingly common circumstance of lawyers advertising in places where they do not maintain an office.

### **C. Comments**

The comment to the revised rule has been updated to recognize the importance of electronic media in reaching the public, adding the following language (additions in **bold**): **Similarly, electronic media, such as the internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this rule. But see Paragraph A of Rule 16-703 of the Rules of Professional Conduct for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.**

The comment is further modified to add an extensive four paragraph discussion about the exceptions to the prohibition against the payment for referrals. The comment also deletes the previous discussion about the requirement to keep a record of advertising, as this requirement has been deleted from the rule itself in the revised version.

**Comparison with Model Rule and Unique New Mexico Provisions:** The only unique provision of the existing New Mexico rule is related to the 5-year requirement during which a lawyer was obligated to retain a copy of advertisements, versus the 2-year requirement set out in the Model Rule; however, the requirement to retain a copy of an advertisement has been eliminated in its entirety from both the revised rule and the Model Rule.

**Interpretation/ Purpose:** The proposed revisions are clearly intended to recognize the pervasiveness of electronic media used by lawyers to market legal services to the public.

Furthermore, the revisions seek to rectify the confusion created by the existing rule regarding the organizations a lawyer is permitted to pay the usual charge for a referral. The ABA Ethics 2000 Commission states that the change in terminology, replacing "legal service organization" with "legal service plan" is intended to avoid confusion between a "legal services organization," which provides direct legal services to clients and is included in the definition of a law firm in the Terminology section of the New Mexico Preamble and Model Rule 1.0 and prepaid and group legal service plans whose usual charges are excepted from the prohibition against a lawyer giving anything of value to a person for recommending the lawyer's services set out in Rule 7.2(b), codified in New Mexico as NMRA 16-702(B).

The ABA Ethics 2000 Commission further states that the clarification permitting lawyers to pay the usual charges of a "not-for-profit or qualified lawyer referral service" recognizes the need to protect prospective clients who have come to think of lawyer referral services as consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint

procedures or malpractice insurance requirements. The effect of the proposal is to permit lawyers to pay the usual charges of a for-profit lawyer referral service, but only if it has been approved by an appropriate regulatory authority as affording adequate protections for prospective clients. The ABA Commission Reporter further states that the regulatory requirement is only applicable to a for-profit organization that holds itself out to the public as a lawyer referral service.

The added requirement that advertisements include the name and office address of at least one lawyer or law firm assists disciplinary authorities in identifying those who are responsible for an advertisement and provides prospective clients with important information about where the lawyer or law firm is located.

The language in the committee commentary, referencing "lawful" electronic mail was included to require lawyers to comply with any law that might prohibit "spamming". A cross-reference to Rule 16-703(A) has been added to alert lawyers to the proposed prohibition of solicitation by real-time electronic contact.

The revised rule simplifies the existing rule in several ways. First, it eliminates the long, but not exhaustive list of information which might be included in a legal advertisement, opting instead, to set out the minimum requirements of such advertisements, which is not included in the existing rule. Second, the revised rule resolves confusion about payment for referral services. While it was previously unclear as to whether the language in the rule permitting a lawyer to pay the usual fee to a legal service organization allowed a lawyer to participate in a for-profit lawyer referral service, the revised rule specifies that a lawyer may only participate in a legal service plan, a not-for-profit or a qualified lawyer referral service, defining the meaning of a "qualified lawyer referral service" as one that has been approved by the appropriate regulatory authority, presumably the Bar or a committee organized by the Bar.

The revised rule further simplifies the existing rule by deleting any record keeping requirement on the part of a lawyer. While a prudent lawyer would likely maintain such records, this deletion may complicate later attempts to defend claims of false representations on the part of the lawyer or address other issues of accountability on the part of the lawyer. Notwithstanding this, the ABA Ethics 2000 Commission found that the requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes. Consequently, the ABA Commission recommended its removal from the rule.

### **RULE 16-703**

**Description of Revision:** The title of the rule has been revised to delete reference to "in-person or telephone." Instead, the revised rule is entitled, "Direct contact with prospective clients."

The entire text of the existing rule has been deleted and replaced with a rule containing more specific guidelines for direct contact with prospective clients, including contact by means other than in person or by telephone. The revised rule further seeks to address the issues created by the prevalence of electronic media, including real-time communications such as internet chat rooms.

The revised rule does four things:

1. Prohibits in-person, live, telephone or real time contact with a prospective client unless the prospective client is a lawyer, family member, a close personal friend or prior professional relationship;
2. Prohibits all direct contact of any kind if:
  - (a) the prospective client has made known the client's desire not to be solicited;
  - (b) thirty (30) days have not passed since an accident involving a potential personal injury client; or
  - (c) the solicitation involves coercion, duress or harassment.
3. Requires that every written, recorded, or electronic communication contain language identifying it as "Advertising Material", unless the prospective client is a lawyer, family member, or has a close personal or prior professional relationship with the lawyer sending the communication.
4. Excludes from the provisions of the rule, solicitations for membership or subscriptions to pre-paid legal programs.

The comment to the rule is significantly similar to the existing comment; however, it has been revised throughout to include real-time electronic communications in the type of communications addressed by the rule. Furthermore, any reference to the rules has been revised to specifically refer to the Rules of Professional Conduct.

The comment to the existing rule has also been modified in the revised rule at paragraph 4, as follows (additions in **bold**): "There is far less likelihood that a lawyer would engage in abusive practices against an individual **who is a former client or with whom the lawyer has a close personal or family relationship** or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. **Nor is there a serious potential for abuse when the person contacted is a lawyer.** Consequently, the general prohibition in Paragraph A of Rule 16-703 of the **Rules of Professional Conduct** and the requirements of Paragraph C of that rule are not applicable in those situations. **Also, Paragraph A is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.**"

**Comparison With Model Rule And Unique New Mexico Provisions:** The New Mexico version of the rule was unique in that it did not previously except from the prohibition against direct in-person or telephone solicitations, contacts for the purpose of selling membership or subscription to legal services plans. This anomaly has been remedied by the adoption of the exception in the revised rule.

**Interpretation/ Purpose:** The revisions address the issues presented by prevalence of electronic media by regulating real-time electronic contact. Furthermore, the revised rule adds regulation

of all written, recorded or electronic communication, rather than just in-person or telephone communications referenced in the existing 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. Furthermore, the rule now imposes restrictions on lawyers engaging in written, recorded or other electronic communications. Most significantly, personal injury lawyers must now wait a period of thirty (30) days before directly soliciting a potential client in any manner. Any written, recorded, and electronic communication from a lawyer soliciting professional employment must now be labeled as "Advertising material". Finally, lawyers participating in pre-paid legal plans are now permitted to contact prospective clients directly to sell memberships or subscriptions in the plan, provided the prospective client is not known to need legal services in a particular matter covered by the plan.

### **RULE 16-704**

**Description of Revisions:** The revised rule adds the term "Specialization" to the caption. Furthermore, the revised rule is reorganized to separate provisions related to representations about a lawyer's field of practice from provisions related to communications related to specialization. To that end, the revised rule deletes language from Section A, providing that a lawyer shall not state or imply that the lawyer is a specialist, except under certain circumstances. The deleted language related to specialization, however, is subsequently reincorporated into the rule at paragraph D, which is a new addition to the revised rule.

The revised rule contains a significant revision in that it deletes the existing paragraph D, which permits a lawyer who is certified in a particular area of the law by an organization other than the New Mexico Board of Legal Specialization to communicate that certification under the circumstances set out in that paragraph. The deleted paragraph D is replaced by a newly-added paragraph D, which provides that a lawyer shall not state or imply that a lawyer is certified as a specialist in a field of law unless the lawyer has been certified as a specialist by an organization approved by an appropriate state authority or that has been accredited by the ABA and the name of the certifying organization is clearly identified in any communication.

The committee commentary in the revised rule has been modified to provide that a lawyer may state that the lawyer is a specialist or practices a specialty; however, such communications are subject to the "false and misleading" standard set out in Rule 16-701. Furthermore, the final paragraph of the committee commentary addresses the revised paragraph D, defining the circumstances under which a lawyer may communicate the lawyer is a specialist in a particular field of law.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed rule was revised to track the Model Rule, and contains no unique provisions.

**Interpretation/ Purpose:** As 16-704 addresses both fields of law in which the lawyer practices and fields of law in which the lawyer claims to be a specialist, the caption of the existing rule is under inclusive; and the change is intended to more specifically describe the contents of the rule.

The revised rule's removal of language from Section A, related to a lawyer's communication that he is a specialist and reincorporation at paragraph D separates the issues related to

communications of fields of law in which the lawyer practices from communication of fields of law in which the lawyer claims to be certified as a specialist. No change in substance is intended.

The key substantive change in Rule 16-704 is to eliminate the provisions in the existing rule that allow lawyers to claim certification as a specialist even though the certifying organization is not approved by an appropriate state authority or accredited by the ABA. This is currently permitted so long as the lawyer indicates the absence of such approval in the same sentence as the claim. The Ethics 2000 Commission has expressed concern that the disclaimer called for by current paragraph C provides inadequate safeguard against potentially misleading claims of certification by an unapproved organization. The Ethics 2000 Commission believes it is both necessary and constitutionally permissible for the states to protect prospective clients against potentially misleading claims of certification by requiring the organizations conferring the certification to be approved by an appropriate state authority or accredited by the ABA.

Paragraph D also contains a new requirement that the name of the certifying organization be clearly identified, enabling prospective clients to make further inquiry about the certification program.

The revised rule may require some lawyers to remove language from their communications identifying them as specialists, if the organization recognizing their specialization is not approved by the appropriate state authority or the ABA.

### **RULE 16-705**

**Description of Revisions:** Section A of the rule is revised only to add the phrase “of the Rules of Professional Conduct” to follow references to specific rules.

Section B of the rule regarding multi-jurisdictional law firms contains one minor change, stating, “A law firm with offices in more than one jurisdiction may use the same name **or other professional designation** in each jurisdiction. . . .”

Section C of the rule has been recast from a prohibition against implying that a lawyer practices in a partnership or organization unless it is a fact, to a permissive statement allowing a lawyer to state or imply that the lawyer practices in a partnership or organization only when that is the case.

The committee commentary also makes three small modifications: The first paragraph adds a sentence, stating, “A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation.” The final sentence in that same paragraph adds language at the end of the sentence, “However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, **or the name of a non-lawyer,**” referencing the requirements of NMRA 16-701. Finally, the last paragraph of the committee commentary replaces the prohibition of lawyers who are not “partners” with a reference to lawyers who are not “associated with each other in a law firm” from denominating themselves as such.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed rule tracks the Model Rule and contains no unique provisions.

**Interpretation/ Purpose:** The proposed revisions do not constitute material changes to the rule. Instead, the revisions address new trends of identifying firms by trade names and web addresses and other ways of identifying those firms in connection with their use of electronic media. Finally, the corrections to the committee commentary appear to correct an imprecise reference to partnerships in light of the variety of business entities utilized by lawyers practicing in a law firm.

The proposed revision will have little effect on the conduct of lawyers; however, the revisions are appropriate, as they update the rule to take into consideration the pervasive nature of electronic communications in the profession and among the public. Furthermore, the revisions correct the lack of precision in the existing rule, as it pertains to the designation of business entities by law firms.

### **Model Rule 7.6**

Model Rule 7.6, “Political Contributions to Obtain Government Legal Engagements or Appointments by Judges,” has not been advertised for adoption. This rule 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.

### **RULE 16-801**

**Description of Revision:** The text of the rule itself is not altered in any material way. The only change from the prior language is to the very end of Rule 16-801.A., where there is an addition of “of the Rules of Professional Conduct” following the reference to Rule 16-106.

The Committee Commentary has some changes. In the last sentence of the first paragraph of the comment, reference to “Paragraph B of this rule” has been added.

The Committee Commentary adds language to the third paragraph of the comment so that it would read (addition in **bold**):

A lawyer representing an applicant for the admission to the bar or representing a lawyer who is the subject of a disciplinary inquiry or proceeding is governed by the rules applicable to the client-lawyer relationship, **including Rule 16-106 of the Rules of Professional Conduct and, in some cases, Rule 16-303 of the Rules of Professional Conduct.**

**Comparison with Model Rule and Unique New Mexico Provisions:** There are no unique provisions to the current rule 16-801 or comment other than the codification of the rules (e.g., Model Rule 8.1 is codified in New Mexico as Rule 16-801).

**Interpretation/Purpose:** Change to first paragraph of comment: The reporter for the ABA Ethics 2000 Commission indicates that, “No change in substance is intended.” It is merely a clarification that “there is a duty to supplement an answer later found to be wrong.” *Reporter’s Explanation of Changes*, Model Rule 8.1.

Change to third paragraph of comment:

The existing comment indicates that lawyers who are representing an applicant for the admission to the bar or representing a lawyer who is the subject of a disciplinary inquiry are not, with regard to the lawyer they represent, governed by the provisions of Rule 16-801 during the course of that representation, but by the rules applicable to the client-attorney relationship. The revision maintains that position, but focuses non-exclusive attention upon Rules 16-106, regarding the maintenance of the confidentiality of information, and 16-303, regarding candor toward a tribunal (including additional circumstances during which the duty of protection of confidentiality under Rule 16-106 may be superseded). The reporter for the Commission offers the following comments:

This change reminds lawyers that bar admission and professional discipline are judicial proceedings subject to the requirements of Rules 1.6 [NMRA 16-106] and 3.3 [NMRA 16-303]. Although Rule 1.6 [NMRA 16-106] does not require a lawyer to come forward with adverse evidence, in a limited number of cases, the requirements of Rule 3.3 [NMRA 16-303] may do so. No change in substance is intended.

*Reporter’s Explanation of Changes*, Model Rule 8.1.

The proposed revision to the comment should not affect conduct of lawyers. It appears to be an effort to direct particular, but not exclusive, attention to rules that must guide a lawyer’s conduct when the lawyer is representing an applicant for the admission to the bar or representing a lawyer who is the subject of a disciplinary inquiry.

### **RULE 16-802**

**Description of Revision:** The text of the rule and comment are not altered.

**Comparison with Model Rule and Unique New Mexico Provisions:** There are no unique provisions to the current rule 16-802 or comment other than the codification of the rules (e.g., Model Rule 8.2 is codified in New Mexico as Rule 16-802).

**Interpretation/Purpose:** Not applicable.

### **RULE 16-803**

**Description of Revision:** Paragraph A - Replaces “having knowledge” with “who knows.” However, this is not a material change.

Paragraph B - Replaces “having knowledge” with “who knows,” and deletes “or has engaged in conduct.” However, these are not material changes.

Paragraph C - No material additions, deletions, or rephrasing.

Paragraph D - Replaces the possessive pronoun “their” with the more consistent and clear “the lawyer’s.” This is not a material change.

Paragraph E - Deletes subparagraph (1) “intended to be confidential;” and in newly codified subparagraph (2) replaces “a lawyer’s support group” with “the Lawyer’s Assistance Committee of the State Bar.”

Comment - The proposed comment includes the addition of a fifth paragraph, which is identical to a paragraph added by the ABA Ethics 2000 Commission.

**Comparison with Model Rule and Unique New Mexico Provisions:** Paragraph C of the New Mexico Rules of Professional Conduct does not contain the language “or information obtained by a lawyer or judge while participating in an approved lawyers assistance program.” Instead, Paragraph E of the New Mexico Rules of Professional Conduct, which is not contained in the Model Rules, addresses the “alcohol and substance abuse exception” to reporting. Paragraph D of the New Mexico Rules of Professional Conduct is not included in Model Rule 8.3. Additionally, the codification of the New Mexico Rules of Professional Conduct differs from the Model Rules (e.g., Model Rule 8.3 is codified in New Mexico as Rule 16-803).

**Interpretation/Purpose:** Paragraphs A and B - These changes are incorporated from Model Rule 8.3. The ABA Ethics 2000 Commission did not intend substantive changes when it replaced “having knowledge” with “who knows,” and deleted “or has engaged in conduct.” *Reporter’s Explanation of Changes*, Model Rule 8.3. Instead, the Commission sought only to replace old terminology that was a carryover from the Model Code, with language for which the Model Rules provide definitions. *Id.*

Paragraph D - This rule is not a part of the Model Rules. The change does not appear to create any substantive change.

Paragraph E - This rule is not a part of the Model Rules. Paragraph E creates an exception to reporting to the Disciplinary Board if the basis for reporting is alcohol or substance abuse. Under the old rule, this was a three part test regarding such communications: (1) communication intended to be confidential, (2) made for the purpose of reporting or treating substance abuse, and (3) made to a number of specified and unspecified support groups. Under the new rule, the first factor is deleted, so that the communication need not have been intended as confidential. This would appear to be a modification making it clear that the information regarding alcohol or substance abuse need not be confidential in order for a lawyer to meet the lawyer’s reporting obligations by reporting to one of the support groups. The other change is to replace “a lawyers’ support group” with “the Lawyers’ Assistance Committee of the State Bar.” To the extent this is a substantive change, it clarifies that the only “lawyer’s support group” specifically recognized as satisfying the reporting requirements is the Lawyer’s Assistance Committee of the State Bar.

However, the other support groups available to the general population (i.e., Alcoholics Anonymous and Narcotics Anonymous) remain an option as does any “other support group recognized by the Judicial Standards Commission or the Disciplinary Board.” Lawyers may seek guidance on any such groups by contacting those entities or making note of the recognition of such groups as reported in the Bar Bulletin.

Comment - The addition of the fifth paragraph to the comment includes Model Rules comment language that, with the exception of the last sentence of the comment, predated the Ethics 2000 changes. This addition is helpful and provides guidance to lawyers in understanding their obligations to report alcohol and substance abuse and the provision of an exception to reporting to the disciplinary authority for such matters.

The addition of the last sentence of the fifth paragraph of the comment has a specific purpose according to the ABA Ethics 2000 Commission:

The changes in the fourth sentence are intended to make clear that Rule 1.6 is the operative standard, not the attorney-client privilege. The last sentence of current Comment [5] has been deleted because it is inaccurate. It is not a violation of the Model Rules for a lawyer, impaired or otherwise, to "intend" to do something wrong, so it would not be reportable "professional misconduct" under any construction of the Rules. As drafted by the Commission, Rule 1.6 permits but does not require disclosure in certain circumstances. The changes also clarify that paragraph (c) of this Rule does not generally address the confidentiality obligations of a lawyer or judge who participates in a lawyers' assistance program, but merely creates an exception to the reporting obligation under paragraphs (a) and (b). Whether an obligation of confidentiality is incurred depends on the rules of the particular program as well as law external to these Rules.

*Reporter's Explanation of Changes, Model Rule 8.3.*

Paragraph E -- Lawyers who felt constrained by the requirement that a communication be confidential before there was a basis for reporting alcohol or substance abuse to a support group, rather than to the appropriate disciplinary authority, should no longer feel constrained. Additionally, to the degree there was any uncertainty as to the “lawyers support group” to which the rule applies, that uncertainty is eliminated. The “lawyers support group” is the Lawyer’s Assistance Committee of the State Bar; however, other specified support groups not specific to lawyers remain viable, as would any other support group recognized by the Judicial Standards Commission or the Disciplinary Board.

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.” Again, subject to Paragraph E, confusion

would be avoided if the “appropriate professional authority” were specifically identified as the Disciplinary Board.

Although Paragraph E indicates that it is an exception to reporting under Paragraphs A and B, it remains somewhat confusing with its reference to the requirement not applying to “any communication concerning alcohol or substance abuse.” 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 in bold):

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.**

The reporting requirements associated with alcohol and substance abuse might be better stated as follows:

Notwithstanding the requirements of Paragraphs A and B of this rule, the reporting requirements of those paragraphs do not apply to alcohol and substance abuse by a judge or lawyer if made to the Lawyer’s Assistance Program of the State Bar, Alcoholics Anonymous, Narcotics Anonymous, or other support group recognized by the Judicial Standards Commission or the Disciplinary Board. Recognition of any additional support group by the Judicial Standards Commission or Disciplinary Board shall be published in the Bar Bulletin.

#### **RULE 16-804**

**Description of Revision:** The proposed rule defines “professional misconduct.” The proposed rule deletes current paragraphs E (willful violation of rules applicable to MCLE or specialization) and H (conduct that adversely reflects on the lawyer’s fitness to practice law). It also adds language contained in Model Rule 8.4 to newly codified Paragraph E, such that it includes within the definition of “professional misconduct” (new language in **bold**):

State or imply an ability to influence improperly a government agency or official **or to achieve results by means that violate the Rules of Professional Conduct or other law**

Comment: A new first paragraph is added to the proposed comment. This addition to the comment addresses issues of when a lawyer is engaged in misconduct through the acts of another.

**Comparison with Model Rule and Unique New Mexico Provisions:** The proposed rule deletes current paragraphs E and H, which are unique to the New Mexico Rules of Professional Conduct. The proposed rule continues the unique codification of the rules (e.g., Model Rule 8.4 is codified in New Mexico as Rule 16-804).

**Interpretation/Purpose:** The apparent purpose of deleting current paragraphs E and H is to

bring the New Mexico rule in line with the Model Rule.

The reporter provides the purpose of the additional paragraph added to the comment:

The purpose of this new Comment is to explain when a lawyer is subject to discipline for violating or attempting to violate the Rules "through the acts of another" and to distinguish such conduct from advising a client concerning action the client is lawfully entitled to take.

*Reporter's Explanation of Changes, Model Rule 8.4*

Lawyers will remain responsible to comply with rules regarding MCLE or specialization. However, failure to comply will be governed by rules outside of the Rules of Professional Conduct. The addition to proposed paragraph E (current paragraph F) is made as a result of similar language previously being removed from Rule 16-701 (Model Rule 7.1) regarding advertising, which had been previously modified in accordance with the revisions to the Model Rules. Thus, the proposed rule makes it clear that lawyers cannot, in marketing or otherwise, state or imply that they can achieve results by means that violate the Rules or other law.

The new comment clarifies the responsibilities of lawyers for actions of third parties, and further clarifies that lawyers may advise a client on actions that the client is lawfully entitled to undertake.

**RULE 16-805**

No change has been proposed for this rule. The New Mexico Supreme Court adopted the Model Rule changes to part A of the rule in 2003, but did not adopt the Model Rule's choice of law provisions (Model Rule 8.5(b)).

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