PROPOSED REVISIONS
TO THE
CODE OF PROFESSIONAL CONDUCT
Ethics Advisory Opinions

Visit the State Bar advisory opinion archive and topical index on the State Bar Web site,* www.nmbar.org, for assistance in interpreting the New Mexico Rules of Professional Conduct.

Easy to Use

• 80 indexed, summarized opinions.
• Select Attorney Services/Practice Resources then Risk Management.

More Resources

• Risk Management Hotline, (800) 326-8155.
• Original questions, involving one’s own conduct, should be sent to the Ethics Advisory Committee, c/o State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860 or membership@nmbar.org.

* The published advisory opinions are also available at the UNM School of Law Library and the Supreme Court Library.
Within this special issue of the *Bar Bulletin*, the Supreme Court’s Code of Professional Conduct Committee is proposing comprehensive amendments to New Mexico’s Rules of Professional Conduct. The committee’s extensive proposed amendments could not be published in a single, regular edition of the *Bar Bulletin*. In an effort to allow the bench and bar to review the totality of the proposal before submitting comments on any particular proposed amendment, the committee’s entire proposal is published in this special edition. Hopefully, doing so will facilitate a more informed response to the thoughtful proposal that the committee has worked very hard to develop.

With some variations, the proposed amendments reflect the America Bar Association’s *Ethics 2000* revisions to its *Model Rules of Professional Conduct*. The committee followed the ABA’s version of each rule unless it found good reason to deviate. The ABA’s *Ethics 2000* versions are found at www.abanet.org.

While the committee has already devoted a great deal of time and effort to the proposed amendments that follow, the work of the committee is not complete. Before considering whether to recommend these proposed amendments to the Supreme Court for its consideration, the committee needs and encourages input from the rest of the bench and bar. Accordingly, to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, send written comments to:

Kathleen J. Gibson, Clerk  
New Mexico Supreme Court  
PO Box 848  
Santa Fe, New Mexico 87504-0848

Comments must be received by the clerk on or before July 16, 2007, to be considered by the Court.
Preamble – A Lawyer’s Responsibilities

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

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

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

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

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

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

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

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

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

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

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

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

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

Scope

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

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

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

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

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

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

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. [Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra disciplinary consequences of violating such a duty.] Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer’s violation of a rule may be evidence of breach of the applicable standard of conduct.

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

The lawyer’s exercise of discretion not to disclose information under Rule 16-106 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assumptions that communications will be protected against disclosure.] The [comment] committee commentary accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and [this note on] Scope provide general orientation. The


**[comments] commentaries are intended as guides to interpretation, but the text of each rule is authoritative. [Research notes were prepared to compare counterparts in the ABA Model Code of Professional Responsibility (adopted 1969, as amended) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the model rules, and are not intended to affect the application or interpretation of the rules and comments.]

**Terminology**

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

B. “Consulted” or “Consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

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

D. “Fraud” or “Fraudulent” denotes conduct [having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information] that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

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

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

G. “Partner” denotes a member of a partnership, or a person in control of a law firm organized as a professional corporation or a member of an association authorized to practice law.

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

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

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

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

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

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

N. “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A signed writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

**COMMITTEE COMMENTARY**

**Confirmed in Writing**

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

**Firm**

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

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

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

**Fraud**

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

**Informed Consent**

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

Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules require that a person’s consent be confirmed in writing. See Paragraph B of Rule 16-107 and Paragraph A of Rule 16-109 of the Rules of Professional Conduct. Other rules require that a client’s consent be obtained in a writing signed by the client. See, e.g., Paragraphs A and G of Rule 16-108 of the Rules of Professional Conduct.

**Screened**

This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 16-101, 16-112 or 16-118 of the Rules of Professional Conduct. The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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

**16-101. Competence.**

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

**ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED**

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

**COMMITTEE COMMENTARY**

**Legal Knowledge and Skill**

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

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

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client’s interest.
A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 16-602 of the Rules of Professional Conduct.

**Thoroughness and Preparation**

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

**Maintaining Competence**

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

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

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

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

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

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

E. **Consultation on limitations of assistance.** When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.

[As amended, effective March 15, 2001; amended, effective ___________.]

**ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED**

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

**COMMITTEE COMMENTARY**

Paragraph D of this rule differs from the ABA model rule in that this rule keeps the language “misleads the court” in Paragraph D.

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

**Allocation of Authority between Client and Lawyer**

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

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

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

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

**Independence from Client’s Views or Activities**

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

**Agreements Limiting Scope of Representation**

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

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


**Criminal, Fraudulent and Prohibited Transactions**

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

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

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

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

If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client’s instructions, the lawyer must consult with the client regarding the limitations on the lawyer’s conduct. See Subparagraph (5) of Paragraph A of Rule 16-104 of the Rules of Professional Conduct.

**16-103. Diligence.**

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

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

**COMMITTEE COMMENTARY**

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

A lawyer’s workload must be controlled so that each matter can be handled competently.

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

Unless the relationship is terminated as provided in Rule 16-116 of the Rules of Professional Conduct, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Subparagraph (2) of Paragraph A of Rule 16-104 of the Rules of Professional Conduct. Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 16-102 of the Rules of Professional Conduct.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

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

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

A lawyer’s regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, Paragraph A(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer’s staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

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

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

Withholding Information

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

16-105. Fees.

A. Determination of reasonableness. [A lawyer’s fee shall be reasonable.] A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

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

B. Basis or rate of fees. [When the lawyer has not regularly represented the client.] The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

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

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

1. any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
2. a contingent fee for representing a defendant in a criminal case.

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

1. the division is in proportion to the services performed by each lawyer [or, by written agreement with the client];
2. the client [is advised of and does not object to the participation of all the lawyers involved] agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
3. the total fee is reasonable.

[Amended, effective _________________.]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY
Reasonableness of Fee and Expenses

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

Basis or Rate of Fee

When the lawyer has regularly represented a client, the lawyer and client ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however,
Division of Fee

A division of fee is a single billing to a client covering the fee for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with Paragraph C of this rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 16-101 of the Rules of Professional Conduct.

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

Disputes over Fees

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

16-106. Confidentiality of information.

A. Disclosure of information generally. A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are given informed consent, the disclosure is impliedly authorized in order to carry out the representation, and except as stated in Paragraphs B, C and D or the disclosure is permitted by Paragraph B of this rule.

B. Disclosure of information [to prevent harm to others]; specific circumstances. [To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; (1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services; (4) to secure legal advice about the lawyer’s compliance with these rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
(C) Disclosure to prevent financial or property-related harm. To prevent the client from committing a criminal act that the lawyer reasonably believes is likely to result in substantial injury to the financial interest or property of another, a lawyer may reveal such information to the extent the lawyer reasonably believes necessary.

D. Disclosure in lawyer-client controversy. To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client, a lawyer may reveal such information to the extent the lawyer reasonably believes necessary.

[Amended, effective ______________.]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

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

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

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

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

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

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

Authorized Disclosure

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

Disclosure Adverse to Client

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Subparagraph (1) of Paragraph B recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities if there is
Paragraph B and the disclosure to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Paragraph D of Terminology of the Rules of Professional Conduct, that is reasonably certain to result in substantial injury to the financial or property interests of another and in a person claiming to have been defrauded by the lawyer and client the client or on a wrong alleged by a third person, for example, a defense. The same is true with respect to a claim involving the extent the lawyer reasonably believes necessary to establish the offense.

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

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client’s conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer’s right to respond arises when an assertion of such complicity has been made. Subparagraph (5) of Paragraph B does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

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

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

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

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

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

**Acting Competently to Preserve Confidentiality**

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

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

**Former Client**

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

---

### 16-107. Conflict of interest; current clients

A. Representation [adverse to other client considered involving concurrent conflict of interest. Except as provided in Paragraph B of this rule, a [A] lawyer shall not represent a client if the representation [of that client will be directly or substantially adverse to another client, unless] involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1. [the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and] the representation of one client will be directly adverse to another client; or

2. [each client consents after consultation. The consultation shall include explanation of the implications of the common representation and the advantages and risks involved.] there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

B. [Lawyer’s other responsibilities considered] Permissible representation when concurrent conflict exists. [Unless otherwise required by these rules, a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless] Notwithstanding the existence of a concurrent conflict of interest under Paragraph A of this rule, a lawyer may represent a client if:

1. [the lawyer reasonably believes the representation will not be adversely affected; and] the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

2. [the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.] the representation is not prohibited by law;

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

4. [each affected client gives informed consent, confirmed in writing. [Amended, effective _______________.]]

---

### Committee Commentary

**General Principles**

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

Resolution of a conflict of interest problem under this rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consensable; and 4) if so, consult with the clients affected under Paragraph A and obtain their informed consent, confirmed in writing. The clients affected under Paragraph A include both of the clients referred to in Subparagraph (1) of Paragraph A and the one or more clients whose representation might be materially limited under Subparagraph (2) of Paragraph A.

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

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

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

Identifying Conflicts of Interest: Directly Adverse

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer’s interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of other persons, such as fiduciary duties arising from a lawyer’s responsibilities to former clients under Rule 16-109 of the Rules of Professional Conduct or by the lawyer’s responsibilities to other persons, such as fiduciary duties arising from a lawyer’s service as a trustee, executor or corporate director.

Personal Interest Conflicts

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

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

A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Paragraph J of Rule 16-108 of the Rules of Professional Conduct.

Interest of Person Paying for a Lawyer’s Service

A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client. See Paragraph F of Rule 16-108 of the Rules of Professional Conduct.

If acceptance of the payment from any other source presents a significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in accommodating the person paying the lawyer’s fee or by the lawyer’s responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of Paragraph B before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information.
about the material risks of the representation.

Prohibited Representations

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

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

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

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

Informed Consent

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

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

Consent Confirmed in Writing

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

Revoking Consent

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

Consent to Future Conflict

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

Conflicts in Litigation

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

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

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

Non-litigation Conflicts

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

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

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

Special Considerations in Common Representation

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

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

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

When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer’s role is not that of a partisan normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Paragraph C of Rule 16-102 of the Rules of Professional Conduct.

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

Organizational Clients

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

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

16-108. Conflict of interest; prohibited transactions; specific rules.

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

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

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

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

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

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

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

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

1. [A] a lawyer may advance court costs and expenses of litigation, [provided the client remain ultimately liable for such costs and expenses], the repayment of which may be contingent on the outcome of the matter; and

2. [A] a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

1. the client gives informed consent;

2. there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and

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

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

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

(1) make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless [permitted by law and] the client is independently represented in making the agreement[;]; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client [without first advising that person in writing that independent representation is appropriate] unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.

COMMITTEE COMMENTARY

Business Transactions Between Client and Lawyer

A lawyer’s legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of Paragraph A must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer’s legal practice. See Rule 16-507 of the Rules of Professional Conduct. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 16-105 of the Rules of Professional Conduct, although its requirements must be met when the lawyer accepts an interest in the client’s business or other non-monetary property as payment of all or part of a fee. In addition, the rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities’ services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in Paragraph A are unnecessary and impracticable.

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

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

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

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

Gifts to Lawyers

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

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

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

Literary Rights

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph D does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer’s fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 16-105 of the Rules of Professional Conduct and Paragraphs A and I of this rule.

Financial Assistance

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

Person Paying for a Lawyer’s Services

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

Sometimes, it will be sufficient for the lawyer to obtain the client’s informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 16-107 of the Rules of Professional Conduct. The lawyer must also conform to the requirements of Rule 16-106 of the Rules of Professional Conduct concerning confidentiality. Under Paragraph A of Rule 16-107 of the Rules of Professional Conduct, a conflict of interest exists if there is significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in the fee arrangement or by the lawyer’s responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Paragraph B of Rule 16-107 of the Rules of Professional Conduct, the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non-consentable under that paragraph. Under Paragraph B of Rule 16-107 of the Rules of Professional Conduct, the informed consent must be confirmed in writing.

Aggregate Settlements

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

Limiting Liability and Settling Malpractice Claims

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

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

Acquiring Proprietary Interest in Litigation

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

Client-Lawyer Sexual Relationships

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer’s fiduciary role, in violation of the lawyer’s basic ethical obligation not to use the trust of the client to the client’s disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer’s emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege because client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client’s own emotional involvement renders it unlikely that the client could give adequate informed consent, this rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer’s ability to represent the client will be materially limited by the relationship. See Subparagraph (2) of Paragraph A of Rule 16-107 of the Rules of Professional Conduct.

When the client is an organization, Paragraph J of this rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization’s legal matters.

Imputation of Prohibitions

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

16-109. [Conflict of interest; former client] Duties to former clients.

A. Subsequent representation. A lawyer who has formerly represented a client in a matter shall not thereafter—
   —A—represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
   —B—use information relating to the representation to the disadvantage of the former client except as Rule 16-106 would permit with respect to a client or when the information has become generally known] gives informed consent, confirmed in writing.
B. Subsequent representation: former law firm. A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

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

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

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

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

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

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this rule. Under this rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. Current and former government lawyers must comply with this rule to the extent required by Rule 16-111 of the Rules of Professional Conduct.

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

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

Lawyers Moving Between Firms

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

Paragraph B operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rule 16-106 and Paragraph C of Rule 16-109 of the Rules of Professional Conduct. Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Paragraph B of Rule 16-110 of the Rules of Professional Conduct for the restrictions on a firm once a lawyer has terminated association with the firm.
Application of Paragraph B of this rule depends on a situation’s particular facts, aided by inferences, deductions or working assumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs. It should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients. In the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

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

Paragraph C of this rule provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

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

16-110. [Imputed disqualification] Imputation of conflicts of interest: general rule.

A. Firm association. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 16-107, 16-108, 16-109 or 16-109 of the Rules of Professional Conduct, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

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

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

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

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

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

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

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

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

E. Other rules. The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 16-111 of the Rules of Professional Conduct, and the disqualification of lawyers associated in a firm with former judges, arbitrators, mediators or other third-party neutrals is governed by Rule 16-112 of the Rules of Professional Conduct.

[Amended, effective _______________.]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

Definition of “Firm”

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

Principles of Imputed Disqualification

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

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

The rule stated in Paragraph A also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a non-lawyer, such as a paralegal or legal secretary. Nor does Paragraph A prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the non-lawyers and the firm have a legal duty to protect. See Paragraph K of Terminology of the Rules of Professional Conduct.

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

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

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

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

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

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

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

16-111. [Successive government and private employment:] Special conflicts of interest for former and current government officers and employees.

A. Subsequent private representation. Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents in writing after consultation; who has formerly served as a public officer or employee of the government:

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

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

B. Subsequent private representation: requirements. When a lawyer is disqualified from representation under Paragraph A, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

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

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

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

(E) Subsequent government employment. Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee [shall not]:

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

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless [under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter] the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as [attorney] lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Paragraph B of Rule 16-112 of the Rules of Professional Conduct and subject to the conditions stated in Paragraph B of Rule 16-112.

(B) Matter defined. As used in this rule, the term “matter” includes:

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

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

(E) Confidential government information defined. As used in this rule, the term “confidential government information” means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

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

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

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

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

[Amended, effective ___________________]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

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

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

Subparagraph (2) of Paragraph A and Subparagraph (2) of Paragraph D apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under Paragraph A. Similarly, a lawyer who has served or is currently serving as an officer or employee of the government may not pursue the claim on behalf of a private client except when authorized to do so by Paragraph D. As with Subparagraph (1) of Paragraph A and Subparagraph (1) of Paragraph D, Rule 16-110 of the Rules of Professional Conduct is not applicable to the conflicts of interest addressed by these paragraphs.

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

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

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

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

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

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

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

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

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

B. Negotiation for employment. A lawyer shall not negotiate for employment with a party or [attorney] lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge[;] or other adjudicative officer [or arbitrator].

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

1. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
2. written notice is promptly given to the parties and any appropriate tribunal to enable [they] to ascertain compliance with the provisions of this rule.

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

[Amended, effective _________________.]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

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

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

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

Requirements for screening procedures are stated in Paragraph K of Terminology of the Rules of Professional Conduct. Subparagraph (1) of Paragraph C does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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

16-113. Organization as client.

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

B. Acting in best interest of organization. If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law [which] that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to a higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant consideration. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to person outside the organization. Such measures may include among others:

— (1) asking reconsideration of the matter;
— (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
— (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

C. [Terminating representation. If, despite the lawyer’s efforts in accordance with Paragraph B, the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 16-116.] Authority to reveal information. Except as provided in Paragraph D of this rule, if:

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

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

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

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

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

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY
The Entity as the Client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this committee commentary apply equally to unincorporated associations. “Other constituents” as used in this commentary means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 16-106 of the Rules of Professional Conduct. Thus, by way of

28 Bar Bulletin - June 15, 2007 - Volume 46, Special Issue
example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 16-106 of the Rules of Professional Conduct. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 16-106 of the Rules of Professional Conduct.

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

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

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

Relation to Other Rules

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

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

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

Government Agency

The duty defined in this rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. See Scope of the Rules of Professional Conduct. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is
Clarifying the Lawyer’s Role

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

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

Dual Representation

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

Derivative Actions

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

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

16-114. Client [under a disability] with diminished capacity.

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

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

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

[Amended, effective _________________.]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

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

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

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

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward’s interest, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct. See Paragraph D of Rule 16-102 of the Rules of Professional Conduct.

Taking Protective Action

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

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

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

Disclosure of the Client’s Condition

Disclosure of the client’s diminished capacity could adversely
affect the client’s interests. For example, raising the question of
diminished capacity could, in some circumstances, lead to
proceedings for involuntary commitment. Information relating to
the representation is protected by Rule 16-106 of the Rules of
Professional Conduct. Therefore, unless authorized to do so, the
lawyer may not disclose such information. When taking protective
action pursuant to Paragraph B, the lawyer is implicitly authorized
to make the necessary disclosures, even when the client directs the
lawyer to the contrary. Nevertheless, given the risks of disclosure,
Paragraph C limits what the lawyer may disclose in consulting
with other individuals or entities or seeking the appointment of a
legal representative. At the very least, the lawyer should determine
whether it is likely that the person or entity consulted with will act adversely to the client’s interests before discussing matters
related to the client. The lawyer’s position in such cases is an
unavoidably difficult one.

Emergency Legal Assistance

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

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

16-115. Safekeeping property.

A. Holding another’s property separately. A lawyer shall
hold property of clients or third persons that is in a lawyer’s
possession in connection with a representation separate from the
lawyer’s own property. Funds shall be kept in a separate account
maintained in the state where the lawyer’s office is situated, or
elsewhere with the consent of the client or third person. Other
property shall be identified as such and appropriately safeguarded.
Complete records of such account funds and other property shall
be kept by the lawyer [in a manner that conforms to the require-
ments of Rule 17-204 of the Rules Governing Discipline] and
shall be preserved for a period of five (5) years after termination of
the representation [of the client in the matter or the termination of
the fiduciary or trust relationship].

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

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

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

[E]. Severance of interest. When in the course of representa-
tion a lawyer is in possession of property in which [both the lawyer
and another person] two or more persons (one of whom may be the
lawyer) claim interests, the property shall be kept separate by the
lawyer until [there is an accounting and severance of their interests]
the dispute is resolved. If a dispute arises concerning their respective interest, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(b) Pooled interest-bearing trust accounts. Except as provided in Subparagraph (8) of this paragraph, a lawyer or law firm shall create and maintain a pooled interest-bearing trust account for clients’ funds [which] are nominal in amount or to be held for a short period of time in compliance with the following provisions. This account may be referred to as an IOLTA account.

1. No interest income from an IOLTA account shall be made available to a lawyer or law firm.

2. The IOLTA account shall include all clients’ funds [which] are nominal in amount or to be held for a short period of time.

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

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

5. Lawyers or law firms depositing client funds in an IOLTA trust account established pursuant to this paragraph shall direct the depository institution:

(a) to remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with the institution’s standard accounting practice, at least quarterly, to the Center for Civic Values ("center"), which shall hold such funds as trustee for the benefit of the programs set forth below;

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

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

6. All interest transmitted to the “center” shall be distributed periodically in accordance with a plan of distribution [which] shall be prepared at least annually and approved by the Supreme Court of New Mexico for the following purposes:

(a) to provide legal assistance to the poor;

(b) to provide legal education;

(c) to improve the administration of justice; and

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

7. Every lawyer subject to these rules shall include in the annual certificate of compliance required by Rule 17-204 of the Rules Governing Discipline that all clients’ funds [which] that

are nominal in amount or are to be held for a short period of time are deposited in an IOLTA account unless the lawyer or law firm to which the funds belong to the lawyer.

(8) A lawyer or law firm may decline to maintain an IOLTA account by submitting in writing a letter to the clerk of the Supreme Court on or before January 10 of each calendar year advising that the lawyer wishes to decline participation in the IOLTA program.

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

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

1. the amount of interest [which] that the funds would earn during the period they are expected to be deposited;

2. the cost of establishing and administering the account, including the cost of the lawyer’s services, accounting fees and tax reporting procedures; and

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

[As amended, effective February 15, 1988; and effective January 1, 1990; March 4, 1999; July 31, 2000; April 1, 2002; ________]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

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

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

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

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

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

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

16-116. Declining or terminating representation.

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

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

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

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

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

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

[Amended, effective ________________ .]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

The imposition of a retaining lien may hinder the orderly administration of justice. A lawyer may not withhold papers until satisfactory arrangements for payment have been made unless the client has given informed consent in writing to a retaining lien and enforcement of the lien will not hinder the orderly administration of justice. A client’s refusal to pay an attorney for services or costs advanced for reasons other than financial inability should not invalidate a written, consensual retaining lien. If a court determines that the client is presently financially unable to pay the attorney and discharge the lien, and that the orderly administration of justice requires release of documents to the client that are subject to the lien, the court may make such other provision for payment of the attorney, including, but not limited to, the imposition of a charging lien, as the court deems equitable.

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

Mandatory Withdrawal

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

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 16-602 of the Rules of Professional Conduct. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client’s demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be
mindful of their obligations both to clients and to the court under Rules 16-106 and 16-303 of the Rules of Professional Conduct.

Discharge

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

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

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

Optional Withdrawal

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

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

Assisting the Client upon Withdrawal

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

16-117. Sale of a law practice.

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

[A. Sixty (60) days written notice is given to each of the seller’s clients for whom the attorney is performing ongoing legal services at the time of the sale or for whom the attorney has performed any legal services within eighteen (18) months prior to the date of sale. The notice shall advise the client of:

(1) the seller’s complete or partial cessation of practice; whichever is applicable, and the proposed sale;

(2) the terms of any proposed change in the fee arrangement authorized by Paragraph C of this rule; and

(3) the client’s right to retain other counsel or to take possession of the file.

For good cause shown the district court, upon application, may enter an order reducing the sixty (60) day time period.

B. The sale of the practice of law by the seller shall be published once a week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the seller’s principal office location. The notice shall contain the names, addresses and telephone numbers of the seller and the purchaser and the address where any person entitled to do so may claim the files within thirty (30) days after the final date of publication.

C. The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation unless the client consents to a fee increase provided the fee shall not exceed the fee charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations. No change in fee arrangement shall be made with respect to matters that are reasonably expected to be completed within one hundred eighty (180) days after the sale and the client is unable to obtain other counsel.

D. Each lawyer participating in the sale of a law practice, or a portion thereof, 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.

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

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

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

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

(2) the name and address of the purchaser;

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

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

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

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

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

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

[Approved, effective February 6, 2002; amended, effective ___]
COMMITTEE COMMENTARY

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

Termination of Practice by the Seller

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

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

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

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

Sale of Entire Practice or Entire Area of Practice

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

Client Confidences, Consent and Notice

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

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

All the elements of client autonomy, including the client’s absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

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

Other Applicable Ethical Standards

Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller’s obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser’s obligation to undertake the representation competently, see Rule 16-101 of the Rules of Professional Conduct; the obligation to avoid disqualifying conflicts, and to secure the client’s informed consent for those conflicts that can be agreed to, see Rule 16-107 of the Rules of Professional Conduct (regarding conflicts) and Paragraph E of Terminology of the Rules of Professional Conduct (for the definition of “informed consent”); and the obligation to protect information relating to the representation, see Rule 16-106, Rule 16-109 and Paragraph B of Rule 16-108 of the Rules of Professional Conduct (regarding conflicts).

If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. See Rule 16-116 of the Rules of Professional Conduct.

Applicability of the Rule

This rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these rules. Since, however, no lawyer may participate in a sale of a law practice that does not conform to the requirements of this rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements and a sale of tangible assets of a law practice do not constitute a sale or purchase governed by this rule.

This rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.
16-118. Duties to prospective client.

A. Definition of “prospective client”. A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

B. Confidential information. Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 16-109 of the Rules of Professional Conduct would permit with respect to information of a former client.

C. Certain representations prohibited. A lawyer subject to Paragraph B of this rule shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in Paragraph D of this rule. If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in Paragraph D.

D. When representation is permitted. When the lawyer has received disqualifying information as defined in Paragraph C, representation is permissible if:

1. both the affected client and the prospective client have given informed consent, confirmed in writing, or;
2. the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
   a. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
   b. written notice is promptly given to the prospective client.

[Approved, effective __________________.]

COMMITTEE COMMENTARY

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer’s custody or rely on the lawyer’s advice. A lawyer’s discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a “prospective client” within the meaning of Paragraph A.

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph B prohibits the lawyer from using or revealing that information, except as permitted by Rule 16-109 of the Rules of Professional Conduct, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 16-107 of the Rules of Professional Conduct, then consent from all affected present or former clients must be obtained before accepting the representation.

A lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Paragraph E of Terminology of the Rules of Professional Conduct for the definition of “informed consent”. If the agreement expressly so provides, the prospective client may also consent to the lawyer’s subsequent use of information received from the prospective client.

Even in the absence of an agreement, under Paragraph C, the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

Under Paragraph C, the prohibition in this rule is imputed to other lawyers as provided in Rule 16-110 of the Rules of Professional Conduct, but under Subparagraph (1) of Paragraph D, imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of Subparagraph (2) of Paragraph D are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Paragraph K of Terminology of the Rules of Professional Conduct (requirements for screening procedures). Sentence (a) of Subparagraph (2) of Paragraph D does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 16-101 of the Rules of Professional Conduct. For a lawyer’s duties when a prospective client entrusts valuables or papers to the lawyer’s care, see Rule 16-115 of the Rules of Professional Conduct.

16-201. Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]
COMMITTEE COMMENTARY

Scope of Advice
A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that may confront a client. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may express an interest in purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer’s responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer’s advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice
In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 16-104 of the Rules of Professional Conduct may require that the lawyer offer advice if the client’s course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 16-104 of the Rules of Professional Conduct to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate an investigation of a client’s affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client’s interest.


If approved by each client in writing:

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

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

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

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

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

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

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated.]

16-203. Evaluations for use by third persons.

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

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

(2) the client consents after consultation.

B. Client consent required. When the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

[Commentary required. Except as disclosure is required, authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 16-106 of the Rules of Professional Conduct.]

[Amended, effective _____________.]
instances, the evaluation may be required by a third person, such as a purchaser of a business.

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor’s title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person’s affairs by a government lawyer or by special counsel employed by the government is not an evaluation as that term is used in this rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to the client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer’s responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the non-cooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer’s obligations are determined by law, having reference to the terms of the client’s agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this rule. See Rule 16-401 of the Rules of Professional Conduct.

Obtaining Client’s Informed Consent

Information relating to an evaluation is protected by Rule 16-106 of the Rules of Professional Conduct. In many situations, providing an evaluation to a third party poses no significant risk to the client. Thus, the lawyer may be implicitly authorized to disclose information to carry out the representation. See Paragraph A of Rule 16-106 of the Rules of Professional Conduct. Where, however, it is reasonably likely that providing the evaluation will affect the client’s interests materially and adversely, the lawyer must first obtain the client’s consent after the client has been adequately informed concerning the important possible effects on the client’s interests. See Paragraph A of Rule 16-106 and Paragraph E of Terminology of the Rules of Professional Conduct.

Financial Auditors’ Requests for Information

When a question concerning the legal situation of a client arises at the instance of the client’s financial auditor and the question is referred to the lawyer, the lawyer’s response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information, adopted in 1975.

16-204. Lawyer serving as third-party neutral.

A. Definition of “third-party neutral”.

A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

B. Explanation of lawyer’s role.

A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.

[Approved, effective ______________.]

COMMITTEE COMMENTARY

Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision-maker depends on the particular process that is either selected by the parties or mandated by a court.

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

Unlike non-lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer’s service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, Paragraph B requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties,
particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer’s role as third-party neutral and a lawyer’s role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer’s law firm are addressed in Rule 16-112 of the Rules of Professional Conduct.

Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, see Paragraph M of Terminology of the Rules of Professional Conduct, the lawyer’s duty of candor is governed by Rule 16-303 of the Rules of Professional Conduct. Otherwise, the lawyer’s duty of candor toward both the third-party neutral and other parties is governed by Rule 16-401 of the Rules of Professional Conduct.

16-300. Prohibition against invidious discrimination.

In the course of any judicial or quasi-judicial proceeding before a tribunal, a lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, age[,] or sexual orientation against the judge, court personnel, parties, witnesses, counsel or others. This rule does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age or sexual orientation is material to the issues in the proceeding.

[STATE BAR COMMENTARY]

For purposes of this rule, the terms “judicial or quasi-judicial proceeding” shall refer to any and all courts, regardless of their jurisdiction or location, as well as any governmental agency, board, commission, or department before whom the lawyer is engaged in the practice of law. The rule also encompasses arbitration or mediation proceedings, whether or not court ordered.

For purposes of this rule, the term “proceeding” shall mean any judicial or administrative process relating to the adjudication or resolution of legal disputes (including, but not limited to, discovery procedures, arbitration and mediation), rule making, licensing, lobbying, the imposition or withholding of sanctions, or the granting or withholding of relief.

For purposes of this rule, the term “sexual orientation” shall mean heterosexuality, bisexuality or homosexuality.

COMMITTEE COMMENTARY

For purposes of this rule, the terms “judicial or quasi-judicial proceeding” shall refer to any and all courts, regardless of their jurisdiction or location, as well as any governmental agency, board, commission, or department before whom the lawyer is engaged in the practice of law. The rule also encompasses arbitration or mediation proceedings, whether or not court ordered.

For purposes of this rule, the term “proceeding” shall mean any judicial or administrative process relating to the adjudication or resolution of legal disputes (including, but not limited to, discovery procedures, arbitration and mediation), rule making, licensing, lobbying, the imposition or withholding of sanctions, or the granting or withholding of relief. For purposes of this rule, the term “sexual orientation” shall mean heterosexuality, bisexuality or homosexuality.

16-301. Meritorious claims and contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[Amended, effective ___________.]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions. Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

The lawyer’s obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

16-302. Expediting litigation.

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

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]
COMMITTEE COMMENTARY

Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

16-303. Candor toward the tribunal.

A. Duties. A lawyer shall not knowingly:

1. make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
2. fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
3. fail to disclose to the tribunal the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
4. offer evidence that the lawyer knows to be false.

B. Criminal conduct of client. A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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

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

E. Limited entry of appearance; lawyer’s duty. In all proceedings where a lawyer appears for a client in a limited manner, that lawyer shall disclose to the tribunal the scope of representation.

[As amended, effective March 15, 2001; amended, effective .]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Committee, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

The purpose of Paragraph E of this rule is to permit lawyers to appear for clients in a limited manner and to alert the tribunal and opposing counsel of that limited role. In New Mexico courts, attorneys and self-represented litigants are held to the same standards. New Mexico courts are lenient with both attorneys and self-represented litigants when deemed appropriate so that cases may be decided on their merits. Attorneys may give technical assistance and, when not prohibited by the rules of the tribunal, may prepare, without attribution, papers for filing by a self-represented litigant without violating the duty of candor. Even though an attorney’s role may be limited to drafting a single document, the attorney is, however, bound by all of the rules that govern attorney conduct, including, but not limited to Subparagraph (1) of Paragraph A of Rule 16-303 of the Rules of Professional Conduct, which states that an attorney shall not knowingly make a false statement of law or fact to a tribunal. Note, however, that current federal practice prohibits the filing of anonymously drafted documents. See, e.g., Duran v. Carris, 238 F.3d 1268, 1271-73 (10th Cir. 2001).

This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Paragraph M of Terminology of the Rules of Professional Conduct for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, Subparagraph (3) of Paragraph A requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client or by someone on the client’s behalf and not assertions by the lawyer. Compare Rule 16-301 of the Rules of Professional Conduct. However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Paragraph D of Rule 16-102 of the Rules of Professional Conduct...
not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Paragraph D of Rule 16-102, see the committee commentary to that rule. See also Committee Commentary to Paragraph B of Rule 16-804 of the Rules of Professional Conduct.

Legal Argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in Subparagraph (2) of Paragraph A, an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

Subparagraph (3) of Paragraph A requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness’s testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

The duties stated in Paragraphs A and B apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer’s knowledge that evidence is false, however, can be inferred from the circumstances. See Paragraph F of Terminology of the Rules of Professional Conduct. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Although Subparagraph (3) of Paragraph A only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer’s ability to discriminate in the quality of evidence and thus impair the lawyer’s effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client’s decision to testify.

Remedial Measures

Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer’s client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer’s direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate’s proper course is to remonstrate with the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal and seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 16-106 of the Rules of Professional Conduct. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

The disclosure of a client’s false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process that the adversary system is designed to implement. See Paragraph D of Rule 16-102 of the Rules of Professional Conduct. Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, Paragraph B requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer’s client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision. The conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility
to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

Normally, a lawyer’s compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer’s disclosure. The lawyer may, however, be required by Paragraph A of Rule 16-116 of the Rules of Professional Conduct to seek permission of the tribunal to withdraw if the lawyer’s compliance with this rule’s duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Paragraph B of Rule 16-116 of the Rules of Professional Conduct for the circumstances in which a lawyer will be permitted to seek a tribunal’s permission to withdraw. In connection with a request for permission to withdraw that is premised on a client’s misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 16-106 of the Rules of Professional Conduct.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph A applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

With regard to Paragraph B, it is not improper to pay a witness’s expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph F permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 16-402 of the Rules of Professional Conduct.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model...
16-306. Trial publicity.

[A. Extradjudicial statements. A lawyer shall not make any extrajudicial or out-of-court statements in a criminal proceeding that may be used to try a jury that the lawyer knows or reasonably should know:
   (1) is false; or
   (2) creates a clear and present danger of prejudicing the proceeding.]

[B] A. Attorney’s obligations with respect to other persons.
[A lawyer shall make reasonable efforts to prevent compliance with this rule by associated attorneys, employees and members of law enforcement and investigative agencies.] A lawyer who is participating in or has participated in the investigation or litigation of a matter shall not make an extradjudicial statement that the lawyers knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

B. Adverse publicity exception. Notwithstanding Paragraph A of this rule, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a right from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

C. Application of rule to associated lawyers. No lawyer associated in a firm or government agency with a lawyer subject to Paragraph A of this rule shall make a statement prohibited by Paragraph A.
[As amended, effective October 1, 1991; amended, effective __________.]
16-307. Lawyer as witness.

A. Necessary witnesses. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness
except where: unless:
   (1) the testimony relates to an uncontested issue; [or]
   (2) the testimony relates to the nature and value of legal services rendered in the case; or
   (3) disqualification of the lawyer would work substantial hardship on the client.

B. Associate lawyer. A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 16-107 or

[Amended, effective ________________ .]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

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

Advocate-Witness Rule

The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party’s rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

To protect the tribunal, Paragraph A prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in Subparagraphs (1) through (3) of Paragraph A. Subparagraph (1) of Paragraph A recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Subparagraph (2) of Paragraph A recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue. Hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, Subparagraph (3) of Paragraph A recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer’s testimony and the probability that the lawyer’s testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer’s client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest

principles stated in Rules 16-107, 16-109 and 16-110 of the Rules of Professional Conduct have no application to this aspect of the problem.

Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer’s firm will testify as a necessary witness, Paragraph B permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 16-107 or Rule 16-109 of the Rules of Professional Conduct. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 16-107 of the Rules of Professional Conduct. This would be true even though the lawyer might not be prohibited by Paragraph A from simultaneously serving as advocate and witness because the lawyer’s disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by Subparagraph (3) of Paragraph A might be precluded from doing so by Rule 16-109 of the Rules of Professional Conduct. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client’s informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client’s consent. See Rule 16-107 of the Rules of Professional Conduct. See Paragraph B of Terminology of the Rules of Professional Conduct for the definition of “confirmed in writing” and Paragraph E of Terminology of the Rules of Professional Conduct for the definition of “informed consent”.

Paragraph B of this rule provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by Paragraph A. If, however, the testifying lawyer would also be disqualified by Rule 16-107 or Rule 16-109 of the Rules of Professional Conduct from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 16-110 of the Rules of Professional Conduct unless the client gives informed consent under the conditions stated in Rule 16-107 of the Rules of Professional Conduct.

16-308. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

A. refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

B. [prior to appearing in a court proceeding where a defendant appears without counsel,] make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel;[;] and has been given reasonable opportunity to obtain counsel;

C. not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

D. make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection
with sentencing, disclose to the defense and to the tribunal all 
[reasonably relevant] unprivileged mitigating information known 
to the prosecutor, except when the prosecutor is relieved of this 
responsibility by a protective order of the tribunal; [and]  
E. not subpoena a lawyer in a grand jury or other criminal 
proceeding to present evidence about a past or present client un-
less the prosecutor reasonably believes: 
(1) the information sought is not protected from disclosure 
by any applicable privilege; 
(2) the evidence sought is essential to the successful 
completion of an ongoing investigation or prosecution; and 
(3) there is no other feasible alternative to obtain the in-
formation; and  
F. except for statements that are necessary to inform the public 
of the nature and extent of the prosecutor’s action and that serve a 
legitimate law enforcement purpose, refrain from making extraju-
dicial comments that have a substantial likelihood of heightening 
public condemnation of the accused and exercise reasonable care 
to prevent investigators, law enforcement personnel, employees 
or other persons assisting or associated with the prosecutor in a 
criminal case from making an extrajudicial statement that the 
prosecutor would be prohibited from making under Rule 16-306 
of the Rules of Professional Conduct.  

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED  
[The committee proposes to delete the current ABA Com-
mentary, which can be found in the 2007 New Mexico Rules 
Annotated, and replace it with the following new Committee 
Commentary.]  

COMMITTEE COMMENTARY  
A prosecutor has the responsibility of a minister of justice 
and not simply that of an advocate. This responsibility carries 
with it specific obligations to see that the defendant is accorded 
procedural justice and that guilt is decided upon the basis of suf-
cient evidence. Precisely how far the prosecutor is required to 
go in this direction is a matter of debate and varies in different 
jurisdictions. Many jurisdictions have adopted the ABA Standards 
of Criminal Justice Relating to the Prosecution Function, which 
in turn are the product of prolonged and careful deliberation by 
lawyers experienced in both criminal prosecution and defense. 
Applicable law may require other measures by the prosecutor and 
knowing disregard of those obligations or a systematic abuse of 
prosecutorial discretion could constitute a violation of Rule 16-
804 of the Rules of Professional Conduct.  

In some jurisdictions, a defendant may waive a preliminary 
hearing and thereby lose a valuable opportunity to challenge 
probable cause. Accordingly, prosecutors should not seek to ob-
tain waivers of preliminary hearings or other important pretrial 
rights from unrepresented accused persons. Paragraph C does 
not apply, however, to an accused appearing pro se with the ap-
proval of the tribunal. Nor does it forbid the lawful questioning 
of an uncharged suspect who has knowingly waived the rights to 
counsel and silence.  

The exception in Paragraph D recognizes that a prosecutor may 
seek an appropriate protective order from the tribunal if disclosure 
of information to the defense could result in substantial harm to 
an individual or to the public interest.  

Paragraph E is intended to limit the issuance of lawyer subpoe-

nats in grand jury and other criminal proceedings to those situations 
in which there is a genuine need to intrude into the client-lawyer 
relationship.  

Paragraph F supplements Rule 16-306 of the Rules of Profes-
sional Conduct, which prohibits extrajudicial statements that have 
a substantial likelihood of prejudicing an adjudicatory proceeding. 
In the context of a criminal prosecution, a prosecutor’s extraju-
dicial statement can create the additional problem of increasing 
public condemnation of the accused. Although the announcement 
of an indictment, for example, will necessarily have severe con-
sequences for the accused, a prosecutor can, and should, avoid 
comments that have no legitimate law enforcement purpose and 
have a substantial likelihood of increasing public opprobrium of 
the accused. Nothing in this commentary is intended to restrict the 
statements that a prosecutor may make that comply with Paragraph 
B or C of Rule 16-306 of the Rules of Professional Conduct.  

Like other lawyers, prosecutors are subject to Rules 16-501 
and 16-503 of the Rules of Professional Conduct, which relate to 
responsibilities regarding lawyers and non-lawyers who work for 
or are associated with the lawyer’s office. Paragraph F reminds 
the prosecutor of the importance of these obligations in connection 
with the unique dangers of improper extrajudicial statements in 
a criminal case. In addition, Paragraph F requires a prosecutor to 
exercise reasonable care to prevent persons assisting or associated 
with the prosecutor from making improper extrajudicial state-
ments, even when such persons are not under the direct supervi-
sion of the prosecutor. Ordinarily, the reasonable care standard 
will be satisfied if the prosecutor issues the appropriate cautions 
to law-enforcement personnel and other relevant individuals. 

16-309. Advocate in non-adjudicative proceedings.  
A lawyer representing a client before a legislative [or ad-
ministrative tribunal] body or administrative agency in a non-
adjudicative proceeding shall disclose that the appearance is in 
a representative capacity and shall conform to the provisions of 
Paragraphs A through C of Rule[s] 16-303. [and] Paragraphs A 
through C of Rule 16-304 and [with] Rule 16-305 of the Rules 
of Professional Conduct.  
[Amended, effective ________________.]  

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED  
[The committee proposes to delete the current ABA Com-
mentary, which can be found in the 2007 New Mexico Rules 
Annotated, and replace it with the following new Committee 
Commentary.]  

COMMITTEE COMMENTARY  
In representation before bodies such as legislatures, municipal 
councils and executive and administrative agencies acting in a 
rule-making or policy-making capacity, lawyers present facts, 
formulate issues and advance argument in the matters under con-
sideration. The decision-making body, like a court, should be able 
to rely on the integrity of the submissions made to it. A lawyer 
appearing before such a body must deal with it honestly and in 
conformity with applicable rules of procedure. See Paragraphs A 
through C of Rule 16-303, Paragraphs A through C of Rule 

Lawyers have no exclusive right to appear before non-adjudi-
cative bodies, as they do before a court. The requirements of this 
rule may therefore subject lawyers to regulations inapplicable 
to advocates who are not lawyers. However, legislatures and 
administrative agencies have a right to expect lawyers to deal
16-401. Truthfulness in statements to others.
In the course of representing a client a lawyer shall not knowingly:
A. make a false statement of material fact or law to a third person; or
B. fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 16-106 of the Rules of Professional Conduct.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.

COMMITTEE COMMENTARY
Misrepresentation
A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are 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.

Statements of Fact
This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, as is the existence of an undiscovered principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client
Under Paragraph D of Rule 16-102 of the Rules of Professional Conduct, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph B of this rule states a specific application of the principle set forth in Paragraph D of Rule 16-102 of the Rules of Professional Conduct and addresses the situation where a client’s crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client’s crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud. If the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information, then under Paragraph B the lawyer is required to do so, unless the disclosure is prohibited by Rule 16-106 of the Rules of Professional Conduct.

16-402. Communications with person represented by counsel.
In representing a client, a lawyer shall not communicate about the subject of the representation with a [party] person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so by law or a court order. [Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity about the subject matter of the representation even though the corporation, partnership or entity itself is represented by counsel.] [Amended, effective _____________.]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.

COMMITTEE COMMENTARY
This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the un-counseled disclosure of information relating to the representation. This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See Paragraph A of Rule 16-102.
16-804 of the Rules of Professional Conduct. Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.

A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare Paragraph F of Rule 16-304 of the Rules of Professional Conduct. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 16-404 of the Rules of Professional Conduct.

The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but such actual knowledge may be inferred from the circumstances. See Paragraph F of Terminology of the Rules of Professional Conduct. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer’s communications are subject to Rule 16-403 of the Rules of Professional Conduct.

16-403. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the represented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. [Amended, effective ________________ .]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Paragraph F of Rule 16-113 of the Rules of Professional Conduct.

The rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer’s client and those in which the person’s interests are not in conflict with those of the client. In the former situation, the possibility that the lawyer will compromise the unrepresented person’s interests is so great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer’s client will enter into an agreement or settle a matter, prepare documents that require the person’s signature and explain the lawyer’s own view of the meaning of the document or the lawyer’s view of the underlying legal obligations.


A. Prohibited actions. In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

B. Inadvertently sent documents. A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. [Amended, effective ________________ .]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]
Paragraph A applies to lawyers who have managerial authority over the professional work of a firm. See Paragraph C of Terminology of the Rules of Professional Conduct. This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, members of other associations authorized to practice law and lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency, and lawyers who have intermediate managerial responsibilities in a firm. Paragraph B applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

Paragraph A requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

Other measures that may be required to fulfill the responsibility prescribed in Paragraph A can depend on the firm’s structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 16-502 of the Rules of Professional Conduct. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the rules.

Paragraph C expresses a general principle of personal responsibility for acts of another. See also Paragraph A of Rule 16-804 of the Rules of Professional Conduct.

Subparagraph (2) of Paragraph C defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as the supervisory authority over the performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer’s involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of Paragraph B on the part of the supervisory lawyer even though it does not entail a violation of Paragraph C because there was no direction, ratification or knowledge of the violation.
Apart from this rule and Paragraph A of Rule 16-804 of the Rules of Professional Conduct, a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer’s conduct is a question of law beyond the scope of these rules.

The duties imposed by this rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Paragraph A of Rule 16-502 of the Rules of Professional Conduct.


A. Responsibility for own actions. A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

B. Arguable question of duty. A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document’s frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 16-107 of the Rules of Professional Conduct, the supervisor’s reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

16-503. Responsibilities regarding nonlawyer assistants.

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

A. a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

B. a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

C. a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[Amended, effective ________________ .]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Paragraph A requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that non-lawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Committee Commentary to Rule 16-501 of the Rules of Professional Conduct. Paragraph B applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph C specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

16-504. Professional independence of a lawyer.

A. Fee sharing. A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer’s firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 16-117 of the Rules of Professional Conduct, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled or disappeared lawyer may pay to the estate or other representative of the deceased, disabled
or disappeared lawyer that proportion of the total compensation which that fairly represents the services rendered by the deceased, disabled or disappeared lawyer; and

B. Partnerships with nonlawyers. A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

C. Influence by nonclient. A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.

D. Professional corporations and associations. A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

1. a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
2. a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
3. a nonlawyer has the right to direct or control the professional judgment of a lawyer.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

The provisions of this rule express traditional limitations on the sharing of fees. These limitations are to protect the lawyer’s professional independence of judgment. Where someone other than the client pays the lawyer’s fee or salary or recommends employment of the lawyer, that arrangement does not modify the lawyer’s obligation to the client. As stated in Paragraph C, such arrangements should not interfere with the lawyer’s professional judgment.

This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer’s professional judgment in rendering legal services to another. See also Paragraph K of Rule 16-108 of the Rules of Professional Conduct (lawyer may accept compensation from a third party as long as there is no interference with the lawyer’s independent professional judgment and the client gives informed consent).

16-506. Restrictions on right to practice.

A. a partnership, [or employment] shareholders, operating employment or other similar type of agreement that restricts the right(s) of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

B. an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy [between private parties].

[Amended, effective _________________.]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph A prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

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

This rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 16-117 of the Rules of Professional Conduct.

16-507. Responsibilities regarding law-related services.

A. Application of rule. A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in Paragraph B of this rule, if the law-related services are provided:

1. by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or
2. in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

B. Definition of term “law-related services.” The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

[Approved, effective _________________.]

COMMITTEE COMMENTARY

When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

Rule 16-507 of the Rules of Professional Conduct applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply generally to lawyer
conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 16-804 of the Rules of Professional Conduct.

When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer’s provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Subparagraph (1) of Paragraph A of this rule. Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in Subparagraph (2) of Paragraph A of this rule unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity’s operations, the rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer’s control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Paragraph A of Rule 16-108 of the Rules of Professional Conduct.

In taking the reasonable measures referred to in Subparagraph (2) of Paragraph A to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services and preferably should be in writing.

The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by Subparagraph (2) of Paragraph A of the rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer’s conduct and, to the extent required by Rule 16-503 of the Rules of Professional Conduct, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

A broad range of economic and other interests of clients may be served by lawyers engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation and patent, medical or environmental consulting.

When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the rules addressing conflict of interest, see Rules 16-107 through 16-111, especially Subparagraph (2) of Paragraph A of Rule 16-107 and Paragraphs A, B and F of Rule 16-108, of the Rules of Professional Conduct, and to scrupulously adhere to the requirements of Rule 16-106 of the Rules of Professional Conduct relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 16-701 through 16-703 of the Rules of Professional Conduct, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction’s decisional law.

When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the rules, for example the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 16-804 of the Rules of Professional Conduct (Misconduct).


The legal profession has a responsibility to provide legal services to those unable to pay. [A lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year.] In fulfilling this [inspiration] responsibility, the [a lawyer] may should:

A. provide [a substantial majority of the fifty (50) hours of] legal services without fee or expectation of fee to:
   (1) persons of limited means; or
   (2) charitable, religious, civic, community, governmental and educational organizations in matters [which that] are designed primarily to address the needs of persons of limited means; [and] or
B. [provide any additional] deliver legal services [through at]:
   (1) [delivery of legal services at no fee or] a substantially reduced fee to persons of limited means; or [individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of the standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate.]
   (2) [delivery of legal services at no fee or a substantially reduced fee to persons of limited means] individuals, groups or
organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; or

C. [participant] in activities for improving the law, the legal system or the legal profession; or

C. alternatively, fulfill this aspiration by contributing financial support to organizations that provide legal services to persons of limited means, in the amount of three hundred fifty dollars ($350) per year.

D. contribute financial support to organizations that provide legal services to persons of limited means or promote improvement of the law, the legal system or the legal profession.

[As amended, effective January 1, 1997; amended, effective _______.]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

Every lawyer, regardless of professional prominence or professional work load, should aspire to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.

Subparagraphs (1) and (2) of Paragraph A recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Such services consist of the full range of legal activities, including individual and class representation, legislative lobbying, administrative rule making and the provision of free training or mentioning to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

Eligible persons are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but who, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations, such as, homeless shelters, battered women’s centers and food pantries that serve those of limited means. The term “governmental organizations” includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

Because service should be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of Subparagraphs (1) and (2) of Paragraph A. Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys’ fees in a case originally accepted as pro bono would not disqualify such services. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

The aspirational standard of Rule 16-601 of the Rules of Professional Conduct can be met in a variety of other ways as set forth in Paragraphs B, C and D of the rule.

Subparagraph (1) of Paragraph B covers instances in which the lawyer agrees to and receives a modest fee for furnishing legal services to persons of limited means. Participation in judicial programs and acceptance of court appointments in which the fee is substantially below a lawyer’s usual rate are examples.

Subparagraph (2) of Paragraph B includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this subparagraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

Paragraph C recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are examples of the many activities that fall within this paragraph.

There may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations without the contemplation of Rule 16-601 of the Rules of Professional Conduct. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm’s aggregate pro bono activities.

Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by Rule 16-601 of the Rules of Professional Conduct.

The responsibility set forth in Rule 16-601 of the Rules of Professional Conduct is not intended to be enforced through disciplinary process.

16-602. Accepting appointments.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

A. representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

B. representing the client is likely to result in an unreasonable financial burden on the lawyer; or

C. the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.
ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY
A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer’s freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 16-601 of the Rules of Professional Conduct. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel
For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently. See Rule 16-101 of the Rules of Professional Conduct, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example when it would impose a financial sacrifice so great as to be unjust.

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules.

16-603. Membership in legal services organization.
A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:
A. if participating in the decision or action would be incompatible with the lawyer’s obligations to a client under Rule 16-107 of the Rules of Professional Conduct; or
B. where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY
Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer’s clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession’s involvement in such organizations would be severely curtailed.

It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established written policies in this respect can enhance the credibility of such assurances.

16-604. Law reform activities affecting client interests.
A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY
Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Paragraph B of Rule 16-102 of the Rules of Professional Conduct. For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 16-107 of the Rules of Professional Conduct. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

16-702. Advertising [and solicitation].
A. Public media advertising. Subject to the requirements of these rules, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor billboards or signs, radio or television, internet or through other written or electronic communication.
B. Record keeping requirements. The lawyer shall keep a copy or recording of any advertisement or solicitation disseminated to any member of the public, as permitted by these rules, subject to the exemptions stated in Paragraph C of Rule 16-707, together with a written record of each and every dissemination, publication, or broadcast in the lawyer’s records for five (5) years following the date of the last publication, broadcast or dissemination.
C. Payment for referrals. A lawyer shall not give anything of value or otherwise provide a benefit to a person for recommending
the lawyer’s services, except that a lawyer may pay the reasonable cost of the advertising or the reasonable cost of preparing the communication which is permitted by this rule and may pay the usual charges for a not-for-profit lawyer referral service or other legal service organization.

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

1. name, including name of law firm and names of professional associates; addresses and telephone numbers;
2. one or more fields of law in which the lawyer or law firm practices, using commonly accepted and understood definitions and designations, so long as such statements do not improperly suggest specialization or certification except as otherwise provided by these rules;
3. a claim of certification if the requirements in Paragraph D of Rule 16-704 are met;
4. date and place of birth;
5. date and place of admission to bar of state and federal courts;
6. schools attended, with date of graduation, degrees, and other scholastic distinctions;
7. public or quasi-public offices;
8. military service;
9. legal authorships;
10. legal teaching positions;
11. offices and committee assignments in bar associations and court appointed offices and committee assignments;
12. technical and professional licenses;
13. foreign language ability;
14. names and addresses of bank references;
15. prepaid or group legal services programs in which the lawyer participates;
16. whether credit cards or other credit arrangements are accepted;
17. office and telephone answering service hours.

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

1. fee for an initial consultation;
2. availability upon request of a written schedule of fees or an estimate of fees to be charged for specific services;
3. contingent fee rates, or a statement to the effect that the charging of a fee is contingent on outcome or that the fee will be a percentage of recovery, provided that the statement discloses (a) whether percentages are computed before or after deduction of costs, and (b) specifically states that the client will bear the expenses incurred in the client’s case regardless of outcome;
4. range of fees for services, provided that the statement discloses that (a) the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and (b) the client is entitled without obligation to an estimate of the fee within the range likely to be charged;
5. hourly rate, provided that the statement discloses that (a) the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client, and (b) the client is entitled without obligation to an estimate of the fee likely to be charged;
6. fixed fees for specific legal services, provided that the statement discloses that the quoted fee will be available only to a client seeking the specific services described;
7. the disclosures required by Paragraph E of this rule relating to fees or rates shall be located with an in print size at least equivalent to that used in describing the fee or rate for which the disclosure is required. In a radio or television advertisement, the disclosures shall be presented immediately following the information regarding the fee or rate, shall be in the same form, either spoken or written, as the information regarding the fee or rate and shall be prominent and conspicuous.

A. Permitted advertising. Subject to the requirements of Rules 16-701 and 16-703 of the Rules of Professional Conduct, a lawyer may advertise services through written, recorded or electronic communication, including public media.

B. Payments for referrals. A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may:

1. pay the reasonable costs of advertisements or communications permitted by this rule;
2. pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
3. pay for a law practice in accordance with Rule 16-117 of the Rules of Professional Conduct;
4. refer clients to another lawyer or a non-lawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if
   i. the reciprocal referral agreement is not exclusive, and
   ii. the client is informed of the existence and nature of the agreement.

C. Required information in communications. Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

[As amended, effective October 1, 1989; August 1, 1992; November 1, 1993; January 1, 2000; November 15, 2000: ________]

ABA COMMENT TO MODEL RULES

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public’s need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

This rule permits public dissemination of information concerning a lawyer’s name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; a lawyer’s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer or against “undignified” advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income. Prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the infor-
A lawyer shall not solicit a non-lawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rule 16-201 and Paragraph C of Rule 16-504 of the Rules of Professional Conduct. Except as provided in Paragraph E of Rule 16-105 of the Rules of Professional Conduct, a lawyer who receives referrals from a lawyer or non-lawyer professional must not pay anything solely for the referral, but the lawyer does not violate Paragraph B of this rule by agreeing to refer clients to the other lawyer or non-lawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 16-107 of the Rules of Professional Conduct. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these rules. This rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

16-703. Direct [in-person or telephone] contact with prospective clients.

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

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

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

A. In-person, live or real-time contact. A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted:

   (1) is a lawyer; or
   (2) has a family, close personal or prior professional relationship with the lawyer.

B. Restrictions on all contacts. A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by Paragraph A, if:

   (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;
   (2) the written communication or other solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident involving the person to whom the communication is addressed or a relative of that person, unless the accident occurred more than thirty (30) days prior to the mailing or other communication or the communication or solicitation is permitted by this rule; or
   (3) the solicitation involves coercion, duress or harassment.

C. Notice required. Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in Subparagraphs (1) or (2) of Paragraph A.

D. Exceptions. Notwithstanding the prohibitions in Paragraph
A, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY
There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation and overreaching.

This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 16-702 of the Rules of Professional Conduct offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications that may be mailed or auto-dialed make it possible for a prospective client to be informed about the need for legal services and about the qualifications of available lawyers and law firms without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client’s judgment.

The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 16-702 of the Rules of Professional Conduct can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 16-701 of the Rules of Professional Conduct. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

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 constititionally 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.

But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 16-701 of the Rules of Professional Conduct, that involves coercion, duress or harassment within the meaning of Subparagraph (2) of Paragraph B of Rule 16-703 of the Rules of Professional Conduct or that involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Subparagraph (1) of Paragraph B of Rule 16-703 of the Rules of Professional Conduct is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 16-702 of the Rules of Professional Conduct the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Paragraph B of Rule 16-703 of the Rules of Professional Conduct.

This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or lawyer’s firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 16-702 of the Rules of Professional Conduct.

The requirement in Paragraph C of Rule 16-703 of the Rules of Professional Conduct that certain communications be marked “Advertising Material” does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.

Paragraph D of this rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, Paragraph D would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rule 16-701, Rule 702 and Paragraph B of Rule 703 of the Rules of Professional Conduct. See Paragraph A of Rule 16-804 of the Rules of Professional Conduct.

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


[B]. Admiralty practice. A lawyer engaged in admiralty practice may use the designation “Admiralty”, “Proctor in Admiralty” or a substantially similar designation[1].

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

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

A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

1. the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

2. the name of the certifying organization is clearly identified in the communication.

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

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

Paragraph A of this rule permits a lawyer to indicate areas of practice in communications about the lawyer’s services. If a lawyer practices only in certain fields or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a “specialist”, practices a “specialty” or “specializes in” particular fields, but such communications are subject to the “false and misleading” standard applied in Rule 16-701 of the Rules of Professional Conduct to communications concerning a lawyer’s services.

Paragraph B recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before that office. Paragraph C recognizes that designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

Paragraph D permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

16-705. Firm names and letterheads.

A. Use of trade or firm name. A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 16-701 of the Rules of Professional Conduct. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 16-701 of the Rules of Professional Conduct.

B. Multi-jurisdictional law firms. A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

C. Use of names of lawyers holding public office. The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

D. Statements about association. Lawyers may not state or imply that they practice in a partnership or other organization unless only when that is the fact.

[Amended, effective _________________.]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm’s identity or by a trade name such as the “ABC Legal Clinic”. A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic”, an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a non-lawyer.

With regard to Paragraph D, lawyers sharing office facilities but who are not in fact associated with each other in a law firm may not denominate themselves as, for example, “Smith and Jones”, for that title suggests that they are practicing law together in a firm.
16-801. Bar admission and disciplinary matters.
An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
A. knowingly make a false statement of material fact; or
B. fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 16-106 of the Rules of Professional Conduct.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.

COMMITTEE COMMENTARY
The duty imposed by this rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted and, in any event, may be relevant in a subsequent admission application. The duty imposed by this rule applies to a lawyer's own admission or discipline as well as to that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph B of this rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

This rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this rule.

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

16-802. Judicial and legal officials.
A. Defamation. A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
B. Judicial candidates; Code of Judicial Conduct. A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.

COMMITTEE COMMENTARY
Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

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

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

16-803. Reporting professional misconduct.
A. Misconduct of other lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.
B. Misconduct of judges. A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.
C. Confidential information. This rule does not require disclosure of information otherwise protected by Rule 16-106 of the Rules of Professional Conduct.
D. Cooperation and assistance; required. A lawyer shall give full cooperation and assistance to the highest court of the state and to the disciplinary board, hearing committees and disciplinary counsel in discharging their respective functions and duties with respect to discipline and disciplinary procedures.
E. Alcohol and substance abuse exception. The reporting requirements set forth in Paragraphs A and B of this rule do not apply to any communication concerning alcohol or substance abuse by a judge or attorney that is:

[(1) intended to be confidential;]
[(2) made to the highest court of the state or to the disciplinary board, hearing committees and disciplinary counsel for the purpose of reporting substance abuse or recommending, seeking or furthering the diagnosis, counseling or treatment of a judge or an attorney for alcohol or substance abuse; and]
[(3) made to, by or among members or representatives of a support group recognized by the Judicial Standards Commission or the Disciplinary Board, the Lawyer’s Assistance Committee of the State Bar, Alcoholics Anonymous, Narcotics Anonymous or other support group recognized by the Judicial Standards Commission or the Disciplinary Board;]

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

[As amended, effective April 1, 1991; amended, effective ____________________ .]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED
The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.
COMMITTEE COMMENTARY

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

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

If a lawyer were obliged to report every violation of the Rules of Professional Conduct, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this rule. The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer privilege.

Information about a lawyer’s or judge’s misconduct or fitness may be received by a lawyer in the course of that lawyer’s participation in an approved support group. A lawyer may also receive such information in the context of the lawyer who has a problem with alcohol or substance abuse reporting the problem in order to seek help, or another person reporting the problem or making a recommendation in order to seek help for the affected lawyer. In those circumstances, providing for an exception to the reporting requirements of Paragraphs A and B of this rule encourages lawyers and judges to seek treatment through such programs or by reporting such problems to their colleagues in an effort to seek help, and encourages lawyers to report alcohol or substance abuse by other lawyers in order to get counseling or treatment for them. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs or to report alcohol or substance abuse problems of other lawyers, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program. Such an obligation, however, may be imposed by the rules of the program or other law.

16-804. Misconduct.

It is professional misconduct for a lawyer to:
A. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or to do so through the acts of another;
B. commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
C. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
D. engage in conduct that is prejudicial to the administration of justice;
E. willfully violate the Supreme Court Rules on Minimum Continuing Legal Education or the New Mexico Plan of Specialization, or the board regulations promulgated under the authority of the rules or the plan;
F. state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
G. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
H. engage in any conduct that adversely reflects on his fitness to practice law;

[Amended, effective _________________.]

ABA COMMENT TO MODEL RULES AS PROPOSED TO BE MODIFIED

[The committee proposes to delete the current ABA Commentary, which can be found in the 2007 New Mexico Rules Annotated, and replace it with the following new Committee Commentary.]

COMMITTEE COMMENTARY

Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf. Paragraph A, however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving “moral turpitude”. That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates Paragraph D when such actions are prejudicial to the administration of justice.Legitimate advocacy respecting the foregoing factors does not violate Paragraph D. A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Paragraph D of Rule 16-102 of the Rules of Professional Conduct concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.
REGISTER YOUR ATTENDANCE:

Name ___________________________________________________________________________ NM Bar No. _________________
Name for Badge (if different than above) __________________________________________
Address ____________________________________________________________________________________________________
City _______________________________________________________________ State _______________ Zip _________________
Phone _______________________________ Fax _____________________________ Email _________________________________
Guest 1 ______________________________ Guest 2 ____________________________ Guest 3 ____________________________  

Name badge required to attend all functions. Additional security measures in effect. No exceptions.

REGISTRATION FEES

<table>
<thead>
<tr>
<th>Description</th>
<th>Price</th>
<th>Qty.</th>
<th>Subtotal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standard Fee</td>
<td>$395</td>
<td></td>
<td></td>
</tr>
<tr>
<td>YLD, Paralegal, Government &amp; Legal Services Attorney</td>
<td>$275</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guest (includes name badge, continental breakfasts, breaks, silent auction and receptions)</td>
<td>$65</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Conference Materials - I would like :

☐ CD Version ☐ Printed Version
☐ Both CD and Printed Version Both Versions Add $50

SEPARATELY TICKETED EVENTS

☐ Luncheon, Friday, July 13
☐ Spencer Theater, Saturday, July 14 (After June 11, limited tickets may still be available on a first come first served basis.)
☐ Golf Tournament (18-hole) (You must pre-purchase by June 29—tickets will not be available for sale after that date.)

☐ I will set up my own team and the players are: __________________   __________________   __________________
☐ I would like to be placed on a team    (Handicap/Average Golf Score ________)

☐ Friday, July 13, Kids’ Event (6-9 pm) Ages: ______  ______  ______  $10
☐ Saturday, July 14, Kids’ Event (5:30-10:30 pm) Ages: ______  ______  ______  $10

☐ Total __________________

PAYMENT OPTIONS

☐ Enclosed is my check in the amount of $ __________(Make Checks Payable to: State Bar of NM)
☐ VISA ☐ Master Card ☐ American Express ☐ Discover ☐ Purchase Order (Must be attached to be registered)

Credit Card Acct. No. _______________________________________________________________ Exp. Date __________
Signature ______________________________________________________________________________

Register by mail, phone or fax.
Mail: SBNM, P.O. Box 92860, Albuquerque, NM 87199-2860
Phone: (505) 797-6020; Monday - Friday, 9 a.m. - 4 p.m. Fax: (505) 797-6071; Open 24 Hours
(Please have credit card information ready).

Cancellations & Refunds: If you find that you must cancel your registration, send a written notice of cancellation via fax by 5 p.m., one week prior to the program of interest. A refund, less a $50 processing charge will be issued. Registrants who fail to notify CLE by the date and time indicated will receive a set of course materials via mail following the program.

MCLE Credit Information: Courses have been approved by the New Mexico MCLE Board. CLE will provide attorneys with necessary forms to file for MCLE credit in other states. A separate MCLE filing fee may be required.