

2015 Mock Meeting of the Ethics Advisory Committee

December 29, 2015



CLE Information



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The issues discussed herein are intended as illustrative of the types of issues which can arise in the course of representation and are not intended to address, nor do they address the broad range of substantive issues which could potentially arise in the scope of such representation.

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**2015 MOCK MEETING OF THE
ETHICS ADVISORY COMMITTEE
OF THE STATE BAR OF NEW MEXICO**

December 29, 2015
9:00 a.m. to 11:00 a.m.
State Bar Center
5121 Masthead NE
Albuquerque, NM 87109

RELEVANT RULES OF PROFESSIONAL CONDUCT

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 lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 16-104 NMRA 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 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 counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or misleads the tribunal. 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.

History

[As amended, effective March 15, 2001; as amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-105. Fees.

A. Determination of reasonableness. 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. Whenever a fee is charged, and except as provided in Paragraph C, 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 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 in writing.

C. Short-term limited legal services. The requirement of a writing shall not apply to legal services provided under Rule 16-605 NMRA. Where an indigent representation fee is imposed by a court, no fee agreement has been entered into between the lawyer and client, and a writing is not required.

D. 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 E 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.

E. 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.

F. 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

each lawyer assumes joint responsibility for the representation;

(2) the client 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.

[As amended by Supreme Court Order No. 08-8300-029, effective November 3, 2008; as amended by Supreme Court Order No. 15-8300-007, effective December 31, 2015.]

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 gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by Paragraph B of this rule.

B. Disclosure of information; specific circumstances. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (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;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

C. Inadvertent or unauthorized disclosure of information. A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

History

[As amended by Supreme Court Order No. 08-8300-029, effective November 3, 2008; as amended by Supreme Court Order No. 13-8300-038, effective December 31, 2013.]

16-107. Conflict of interest; current clients.

A. Representation involving concurrent conflict of interest. Except as provided in Paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) 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. Permissible representation when concurrent conflict exists. 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 that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) 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.

History

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-108. Conflict of interest; current clients; 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 in a manner that can be reasonably understood by the client;
- (2) the client is 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. 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 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 lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

- (1) the client 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 NMRA of the Rules of Professional Conduct.

G. Representation of two or more clients. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure 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 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 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.

I. Proprietary interest in cause of action. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

J. Lawyer association. While lawyers are associated in a firm, a prohibition in the foregoing Paragraphs A through I that applies to any one of them shall apply to all of them.

History

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-109. Duties to former clients.

A. Subsequent representation. A lawyer who has formerly represented a client in a matter shall not thereafter 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 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 NMRA and Paragraph C of Rule 16-109 NMRA 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.

History

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-110. 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 or 16-109 NMRA 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. 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 NMRA and Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct that is material to the matter.

C. Subsequent firm associations; screening. 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 NMRA of the Rules of Professional Conduct unless:

(1) the newly associated lawyer has no information protected by Rule 16-106 or 16-109 NMRA 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 NMRA 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 NMRA 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 NMRA of the Rules of Professional Conduct.

History

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

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 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 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.

History

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

Annotations

16-403. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. 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.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-804. Misconduct.

It is professional misconduct for a lawyer to:

- A. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;
- B. commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- C. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- D. engage in conduct that is prejudicial to the administration of justice;
- E. 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; or
- F. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

History

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]