

# **2018 Mock Meeting of the Ethics Advisory Committee**

*Presented by the State Bar of New Mexico Ethics Advisory Committee members*

*Tuesday, December 18, 2018*



# CLE Information



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# Mock Meeting Documents

AGENDA  
ETHICS ADVISORY COMMITTEE  
STATE BAR OF NEW MEXICO  
Mock Meeting December 18, 2018  
1:00 p.m.-3:00 p.m.

CALL TO ORDER.

REVIEW OF MINUTES.

OLD BUSINESS/STATUS OF OPINIONS.

-No draft opinions require consideration.

NEW MATTERS.

- **2018-A -- Request of Jack Frost**
- **2018-B – Request of Robert Cratchet**
- **2018-C – Request of James Bowie**
- **2018-D – Request of Ima Tweety-Bird**
- **2018-E – Request of Dee Lemma**
- **2018-F – Request of Lapp S. Judgment**
- **2018-G – Request of Frosty A. Snowmann**

OTHER BUSINESS.

ADJOURN.

- **2018-A -- Request of Jack Frost**

Dear Ethics Advisory Committee:

I am representing the personal representative in a wrongful death action. The P.R. is the mother of the decedent and grandmother of the beneficiaries. Trial is set for late next month. The defendants have really started to move on settlement and are getting close to a number that I believe would be a fair settlement and would minimize the risk of going to trial.

My client is understandably very emotional over the death of her son. So much so that she refuses to acknowledge that if we go to trial, we could lose or if we win obtain a result less favorable than where settlement seems to be headed. I have explained to her that she owes duties to the beneficiaries (her grandchildren). But, she has told me that she would rather go to trial and lose than accept a settlement in the amount I have recommended. I really think that she would refuse to settle at any number.

My fee agreement permits me to withdraw due to a difference of opinion with my client, but I am obviously not going to do that at this late date. My fee agreement also requires me to advance all costs, with no obligation on the part of the client to repay if we do not settle or recover at trial.

I want to tell my client I will proceed to trial in exchange for her agreement to reimburse all my out of pocket expenses (currently about \$30,000) as well as future trial expenses (expected to be another \$40,000) if we lose. I think she just needs more skin in the game to evaluate the case appropriately. Can I amend my fee agreement with her one month before trial in an effort to get her to be more realistic?

Many thanks,

Jack Frost

- **2018-B – Request of Robert Cratchet**

Dear Ethics People:

I am a new associate at the Slick, Slack & Slock law firm. I have been assigned to a case and am kind of being supervised by Mr. Slick. We represent the plaintiff. I have been active in the case from the beginning. Mr. Slick actually let me sign the complaint! He is also letting me have a lot of contact with the client in preparation for trial.

Mr. Slick told me to meet with the client and go over the “regular stuff.” I asked what that meant and he told me that, among other things, I needed to tell the client to “‘clean up’ his Facebook because we don’t want blowups of the stuff on his Facebook at trial,” and to tell the client to delete or deactivate his account. I followed those instructions. The client deactivated the account.

In discovery, opposing counsel requested information regarding any Facebook account. I saw the answers sent out by Mr. Slick, who responded that our client had no Facebook account so just “forget about it.” A few weeks later, the client reactivated the account but only after deleting about a dozen photos that would have been helpful to the defendant in the case.

Defendant’s counsel sent me an email asking what was up with our client’s Facebook account. I showed the email to Mr. Slick who told me that he would take care of it. I’ve got to go to a depo in a few weeks and I know defendant’s counsel will ask me about the Facebook situation and the discovery responses. What should I do?

Help me!

Bob Cratchet

NOTES:



- **2018-C – Request of James Bowie**

Dear Ethics Advisory Committee:

I was recently hired to represent an individual charged with aggravated battery. The individual was initially released on bond. After a meeting with my client in my office, I noticed that there was a knife behind the toilet in the office bathroom (the alleged assault was committed with a knife). I checked with the other lawyers and staff in the office, just to make certain none of them accidentally left in there – they did not.

I tried calling my client but he is not taking my calls and his voice mail is full. His parents and girlfriend say they cannot reach him either. There is a court hearing approaching and the judge's practice is to ask attorneys about their last contact with the defendant. Am I required to answer the judge's questions if my client is a no-show? Also, what should I do with that knife?

Thanks,

Jim Bowie

NOTES:

- **2018-D – Request of Ima Tweety-Bird**

Dear Ethics Advisory Committee:

I just won a big case for my personal injury-chemical exposure client, in which a jury awarded \$15,000,000 in damages. The case involved exposure to a chemical frequently used in local industries. I love to tweet. I am considering putting out a tweet or two. Are any of these a problem?

1. “Case finally over. Unanimous verdict! Celebrating tonight!”
2. “Another great victory in court today! My client is delighted. Who wants to be next?”
3. “Won another personal injury case BIG TIME!!! Call me for a free consultation.”
4. “Just published an article on cases involving personal injuries related to chemical exposure. Let me know if you would like a copy.”

Thanks a bunch!

Ima Tweety-Bird

NOTES:

- **2018-E – Request of Dee Lemma**

Dear Ethics Advisory Committee:

I am representing a defendant in a premises liability case. I'm convinced the plaintiff is lying or at best exaggerating his back injury. Last week, I learned that he and his girlfriend were involved in a domestic violence incident in which he threatened to kill her. Yesterday, his lawyer recently told me that the girlfriend would be dropped from the witness list if I would agree not to depose her. His lawyer said that they wanted to drop her in the interest of trying to keep her safe. I think she would testify that the plaintiff is a cheating liar. If he beats her up after she testifies, that's not my problem, right?

Thanks for your assistance,

Dee Lemma

NOTES:

- **2018-F – Request of Lapp S. Judgment**

Dear Ethics Advisory Committee:

I have been a prosecuting attorney for over 20 years. I am involved in a murder case where I am convinced that the defendant murdered a teenage kid in a particularly gruesome fashion. Most of the evidence is very favorable to the prosecution. But, about two months ago, the defense came up with two female friends of the defendant who are, or at least were, going to provide an alibi for the defendant. I just couldn't let that happen, but I am may have gone overboard.

I created a false Facebook page under the name of Betty Boop. I sent two friend requests to the alibi witnesses which they both quickly accepted. I started conversations with both, eventually telling them that the defendant and I had been in a relationship, and that our baby had been born just a few weeks ago. They became irate. They told me that the defendant was a lying cheat, or words to that effect, who had tried to get them to lie for him at trial. After finding out about the "baby," both said that there was no way they would lie in court for this guy.

While I feel somewhat vindicated, I am having second thoughts about what I have done. What do I need to do?

Thanks,

Lapp S. Judgment

NOTES:

- **2018-G – Request of Frosty A. Snowmann**

Dear Ethics Peeps:

I am concerned about a little something I did the other day. I am very active on Twitter. I post so many times each day it's hard for me to keep track - random thoughts, philosophical opinions, selfies from around the world. I met another lawyer for a drink last night and he said, "I just saw some of your recent tweets and I think you need to be careful about what you're saying. Didn't you ever take the MPRE exam?" I told him I knew exactly what he meant and would take care of it. I looked over my recent tweets and I think each of them are protected by the First Amendment. Do you agree?

1. 8/15/18 Went to a hearing today. Judge Gomer "Dumber than Donuts" Pyle (18th Judicial District) is so freggin stupid that he bought opposing counsel's (Jessica Simpleton's) argument. I can't believe someone that stupid is on the bench! This whole system is corrupt!
2. 11/12/18 Jury trial started today. Am hoping to ask juror number 5 out when this thing's over. SWEET!!! Heck, why wait???
3. 11/13/18 Just friended every judge in the 18th Judicial District! Hope they keep track of my adventures!
4. 11/14/18 Friend request to Juror No.5 was accepted!!! OF COURSE! Am I lucky or what?! ?! =-)
5. 11/15/18 So, this case I have going on, there are a lot of things I can't get into evidence because of the "rules". If I could only let Judge Clueless and the numbskull jury know that there's proof that the opposing party stole money from my client, but I can't get it in. It's all so-called "hearsay" but that doesn't mean it isn't the truth!

You guys are the best!

Frosty A. Snowmann

NOTES:

SELECT RULES OF PROFESSIONAL CONDUCT (NMRA 2018)

16-100. Terminology.

For purposes of these rules

- 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. “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 this rule 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.
- C. “Firm” or “law firm” denotes a lawyer or 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.
- D. “Fraud” or “fraudulent” denotes conduct 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, a shareholder in 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. “Social media” denotes an interactive electronic or digital mechanism or application, or service that allows people or entities to share content and communications. Social media may be viewed via websites, mobile or desktop applications, or other electronic means.
- M. “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.
- N. “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.
- O. “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 electronic communications. 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.

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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.

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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.

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#### 16-103. Diligence.

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

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#### 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.

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16-304. Fairness to opposing party and counsel.

A lawyer shall not

- A. unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value nor shall a lawyer counsel or assist another person to do any such act;
- B. falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- C. knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- D. in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- E. in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

F. request a person other than a client to refrain from voluntarily giving relevant information to another party unless

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; or

G. withhold information of juror misconduct.

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16-305. Impartiality and decorum of the tribunal.

A lawyer shall not:

A. seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

B. communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

C. communicate with a juror or prospective juror after discharge of the jury if:

- (a) the communication is prohibited by law or court order;
- (b) the juror has made known to the lawyer a desire not to communicate; or
- (c) the communication involves misrepresentation, coercion, duress or harassment; or

D. engage in conduct intended to disrupt a tribunal.

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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.

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16-403. Communications with unrepresented persons.

In communicating 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.

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16-501. Responsibilities of partners, managers and supervisory lawyers.

A. **Necessary measures.** A partner in a law firm 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 all lawyers in the firm conform to the Rules of Professional Conduct.

B. **Compliance with rules.** A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

C. **Responsibility for other lawyer's violations.** A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with 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 other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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16-502. Responsibilities of a subordinate lawyer.

- 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.
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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.

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16-701. Communications concerning a lawyer's services.

A lawyer shall not make, elicit, or endorse a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law; omits a fact necessary to make the statement considered as a whole not materially misleading; or contains a testimonial about, or endorsement of, the lawyer that is misleading.

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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 New Mexico Disciplinary Board.

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 New Mexico Judicial Standards Commission.

C. **Confidential information.** This rule does not require disclosure of information otherwise protected by Rule 16-106 NMRA, or information gained by a lawyer or a judge while participating in the New Mexico Lawyers and Judges Assistance Program, unless the information pertains to those communications requiring disclosure under Paragraph E.

D. **Cooperation and assistance; required.** A lawyer shall give full cooperation and assistance to the Supreme Court and to the New Mexico Disciplinary Board, hearing committees, and disciplinary counsel in discharging the lawyer's respective functions and duties with respect to discipline and disciplinary procedures.

E. **Alcohol, drugs, addiction, or other physical or mental health-related disorders exception.** The reporting requirements of Paragraphs A and B of this rule do not apply when a lawyer believes a judge or lawyer is impaired due to alcohol or substance abuse, or for mental, emotional, or psychological reasons, if such impairment is reported to the New Mexico Lawyers and Judges Assistance Program. The exception is inapplicable to

(1) information required by law to be reported, including information that must be reported under Paragraph G of this rule;

- (2) threats of future criminal acts or violations of these rules; or
- (3) disclosures of past criminal acts or violations of these rules that are believed to have resulted in substantial harm to a client.

Such information, threats, or disclosures shall be reported to the New Mexico Disciplinary Board or the New Mexico Judicial Standards Commission, even if the impairment is also reported to the New Mexico Lawyers and Judges Assistance Program. Paragraph (E)(3) of this rule does not apply to any communication that is made to, by, or among members or representatives of the New Mexico Lawyers and Judges Assistance Program.

**F. Immunity.** The duties and responsibilities of the Program Manager of the New Mexico Lawyers and Judges Assistance Program, its members of the Board, employees, agents, designees, volunteers, or reporting parties are owed to the Supreme Court and the public in general, not to any individual lawyer or another person. Nothing in this rule is to be construed as creating a civil cause of action against the aforementioned individuals, and they are immune from liability for any omission or conduct in the course of carrying out their official duties and responsibilities or failing to fulfill their duties and responsibilities under this rule. Any person who in good faith reports information in connection with the program is immune from suit for reporting the information.

**G. Judicial misconduct involving unlawful drugs; reporting requirement.** Notwithstanding the provisions of Paragraph E, any incumbent judge who illegally sells, purchases, possesses, or uses drugs or any substance considered unlawful under the provisions of the Controlled Substances Act, shall be subject to discipline under the Code of Judicial Conduct.

Any lawyer who has specific objective and articulable facts or reasonable inferences that can be drawn from those facts, that a judge has engaged in such misconduct, shall report those facts to the New Mexico Judicial Standards Commission. Reports of such misconduct shall include the following information:

- (1) name of person filing the report;
- (2) address and telephone number where the person may be contacted;
- (3) a detailed description of the alleged misconduct;
- (4) dates of the alleged misconduct; and
- (5) any supporting evidence or material that may be available to the reporting person.

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#### 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.

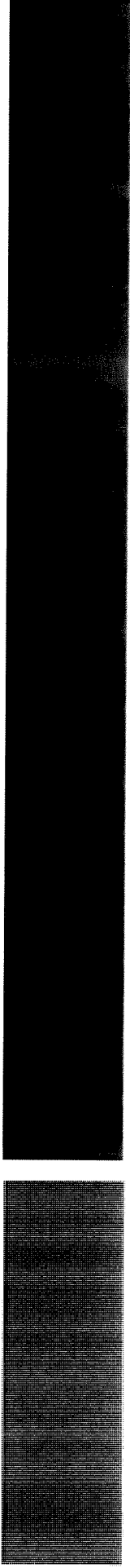
# Presentation



# MOCK MEETING ETHICS ADVISORY COMMITTEE STATE BAR OF NEW MEXICO

DECEMBER 18, 2018

Presented by  
Members of the Ethics Advisory Committee



# NM Rules – Recent Changes

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- Rule 16-100(L) defines “social media”
- L. “Social media” denotes an interactive electronic or digital mechanism or application, or service that allows people or entities to share content and communications. Social media may be viewed via websites, mobile or desktop applications, or other electronic means.

# “Social Media” Changes

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- Rule 16-101 Competence
  - ▣ Comment [5] – can include advising client on use and maintenance of social media, including privacy settings and consequences of posting and removing content
- Rule 16-106 Confidentiality
  - ▣ Comment [6] – lawyer’s use of social media must comply with 16-106

# “Social Media”

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- The rule change also impacts
- Rule 16-304 – Fairness to opposing party and counsel
- Rule 16-402 – Communications with person represented by counsel
- Rule 16-403 – Communications with unrepresented person
- Rule 16-701 – Communications concerning a lawyer’s services

# ABA Formal Opinion 484

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- Issued November 28, 2018...
- Lawyers may participate in a variety of fee financing arrangements described in Part I of that opinion provided they comply with Model Rules 1.2(c), 1.4(b), 1.5(a), 1.6, 1.7(a)(2), and 1.9(a). They may further acquire an interest in or form a finance company or brokerage and thereafter refer clients to that entity provided that they comply with Model Rule 1.8(a). Cf. NMRA 16-102, 16-104, 16-105, 16-106, 16-107 and 16-109.

# Ethics Resources for NM Lawyers

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- Office of Disciplinary Counsel
  - ▣ Part of proactive regulation initiative
  - ▣ Will advise only on prospective conduct and compliance with the Rules of Professional Conduct
- New Mexico Ethics Helpline
  - ▣ 1-800-326-8155 for assistance
  - ▣ Rules of Professional Conduct, Malpractice
- Ethics Advisory Committee
  - ▣ More deliberative assistance resulting in written opinions
  - ▣ Rules of Professional Conduct only

# ETHICS ADVISORY COMMITTEE

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- Volunteer lawyers
- Around the State
- Various practice areas
- Various practice types (government, solo, small, medium and large)
- Senior, mid and new lawyers
- Meet once a month, on a Saturday, for about 2 hours

# TRIGGERING ADVICE

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- Lawyers may submit written question(s)
  - Include as many pertinent facts as possible
- Requirements/Restrictions...
  - MUST b about the lawyer's own conduct or contemplated conduct (or that of the lawyer's firm)
    - Will not opine on conduct of another lawyer or law firm
- Seeking advice on the application of the Rules of Professional Conduct to a specific fact pattern
  - Will not advise on the application of substantive law



# Steps...

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- An initial determination of whether request meets criteria for opinion
- If yes, then distributed to members of the Committee for consideration
- Discussions ensue to determine if a consensus can be reached on the appropriate advice
- Once there is consensus, one member of the Committee assigned to draft a response, which is circulated to Committee for review/changes/approval
- Informal Opinion issued to requesting lawyer
- Not formally published, but (unless requesting lawyer objects) may be used to assist others, in CLEs, etc.

# A select few...

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- Formal Opinions
- General interest or concern
- Area of developing law
- Changes in rules, law, etc.
- Published in Bar Bulletin
- Available online --- [www.nmbar.org](http://www.nmbar.org)

# About the Opinions

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- Based upon facts presented
- Based upon the Rules in effect at the time of the request
- Represent the opinion of the Committee through consensus
- NOT BINDING!! On anyone!
- Strives to provide advice that avoids violation of the Rules

# The Meeting

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- Members appear in person or by telephone
- A meeting packet is distributed prior to the meeting
- Each request is considered through a very open discussion
- We keep working until the day's business is complete
- Here we go!

# 7 New Matters

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- **2018-A -- Request of Jack Frost**
- **2018-B – Request of Robert Cratchet**
- **2018-C – Request of James Bowie**
- **2018-D – Request of Ima Tweety-Bird**
- **2018-E – Request of Dee Lemma**
- **2018-F – Request of Lapp S. Judgment**
- **2018-G – Request of Frosty A. Snowmann**

# Request 2018-A – Jack Frost

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Dear Ethics Advisory Committee:

I am representing the personal representative in a wrongful death action. The P.R. is the mother of the decedent and grandmother of the beneficiaries. Trial is set for late next month. The defendants have really started to move on settlement and are getting close to a number that I believe would be a fair settlement and would minimize the risk of going to trial.

## 2018-A Continued

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My client is understandably very emotional over the death of her son. So much so that she refuses to acknowledge that if we go to trial, we could lose or if we win obtain a result less favorable than where settlement seems to be headed. I have explained to her that she owes duties to the beneficiaries (her grandchildren). But, she has told me that she would rather go to trial and lose than accept a settlement in the amount I have recommended. I really think that she would refuse to settle at any number.

## 2018-A Continued

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My fee agreement permits me to withdraw due to a difference of opinion with my client, but I am obviously not going to do that at this late date. My fee agreement also requires me to advance all costs, with no obligation on the part of the client to repay if we do not settle or recover at trial.



# Request 2018-A Continued

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I want to tell my client I will proceed to trail in exchange for her agreement to reimburse all my out of pocket expenses (currently about \$30,000) as well as future trial expenses (expected to be another \$40,000) if we lose. I think she just needs more skin in the game to evaluate the case appropriately. Can I amend my fee agreement with her one month before trial in an effort to get her to be more realistic?

Many thanks,

Jack Frost

## **\*\*2018-A Initial Question**

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Can Conrad seek to amend the fee agreement with his client under these circumstances?

- A. Yes, by all means!
- B. No way!
- C. Maybe, if he can obtain informed consent.
- D. Possibly, but only if \_\_\_\_\_.

# 2018-B Robert Cratchet

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Dear Ethics People:

I am a new associate at the Slick, Slack & Slock law firm. I have been assigned to a case and am kind of being supervised by Mr. Slick. We represent the plaintiff. I have been active in the case from the beginning. Mr. Slick actually let me sign the complaint! He is also letting me have a lot of contact with the client in preparation for trial.

## Request 2018-B Continued

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Mr. Slick told me to meet with the client and go over the “regular stuff.” I asked what that meant and he told me that, among other things, I needed to tell the client to “clean up” his Facebook because we don’t want blowups of the stuff on his Facebook at trial,” and to tell the client to delete or deactivate his account. I followed those instructions. The client deactivated the account.

## Request 2018-B Continued

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In discovery, opposing counsel requested information regarding any Facebook account. I saw the answers sent out by Mr. Slick, who responded that our client had no Facebook account so just “forget about it.” A few weeks later, the client reactivated the account but only after deleting about a dozen photos that would have been helpful to the defendant in the case.

# Request 2018-B Continued

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Defendant's counsel sent me an email asking what was up with our client's Facebook account. I showed the email to Mr. Slick who told me that he would take care of it. I've got to go to a depo in a few weeks and I know defendant's counsel will ask me about the Facebook situation and the discovery responses.

What should I do?

Help me!

Bob Cratchet

# **\*\*Request 2018-B Initial Question**

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What should Bob Cratchet do if asked by opposing counsel about the Facebook issue?

- A. Respond truthfully and fully without qualification
- B. Respond truthfully, but only to the extent reasonably necessary to comply with obligations under the Rules
- C. Respond by saying, "I know nothing about that."
- D. Excuse himself and leave town immediately.
- E. Something else.

# Request 2018-C James Bowie

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Dear Ethics Advisory Committee:

I was recently hired to represent an individual charged with aggravated battery. The individual was initially released on bond. After a meeting with my client in my office, I noticed that there was a knife behind the toilet in the office bathroom (the alleged assault was committed with a knife). I checked with the other lawyers and staff in the office, just to make certain none of them accidentally left in there – they did not.



# Request 2018-C Continued

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I tried calling my client but he is not taking my calls and his voice mail is full. His parents and girlfriend say they cannot reach him either. There is a court hearing approaching and the judge's practice is to ask attorneys about their last contact with the defendant. Am I required to answer the judge's questions if my client is a no-show? Also, what should I do with that knife?

Thanks,

Jim Bowie

## **\*\*Request 2018-C 1<sup>st</sup> Question**

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**Should Bowie answer the judge's questions concerning his client's whereabouts?**

- A. Yes, by all means.**
- B. Absolutely not!**
- C. It depends.**

## **\*\*Request 2018-C 2d Question**

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What should Bowie do with the knife?

- A. Toss it in the trash.
- B. Take it to Goodwill.
- C. Drop it off with the police.
- D. Something else.

# Request 2018-D Ima Twenty-Bird

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Dear Ethics Advisory Committee:

I just won a big case for my personal injury-chemical exposure client, in which a jury awarded \$15,000,000 in damages. The case involved exposure to a chemical frequently used in local industries. I love to tweet. I am considering putting out a tweet or two. Are any of these a problem?

# **\*\*Twenty-Bird's Idea #1**

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**“Case finally over. Unanimous verdict!  
Celebrating tonight!”**

- A. OK**
- B. Not OK**
- C. Maybe**

## **\*\*Tweety-Bird's Idea #2**

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**“Another great victory in court today! My client is delighted. Who wants to be next?”**

- A. OK**
- B. Not OK**
- C. Maybe**

## **\*\*Twenty-Bird's Idea #3**

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**“Won another personal injury case BLG  
TIME!!! Call me for a free consultation.”**

- A. OK**
- B. Not OK**
- C. Maybe**

## **\*\*Tweety-Bird's Idea #4**

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**“Just published an article on cases involving personal injuries related to chemical exposure. Let me know if you would like a copy.”**

- A. OK**
- B. Not OK**
- C. Maybe**



# Request 2018-E Dee Lemma

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Dear Ethics Advisory Committee:

I am representing a defendant in a premises liability case. I'm convinced the plaintiff is lying or at best exaggerating his back injury. Last week, I learned that he and his girlfriend were involved in a domestic violence incident in which he threatened to kill her. Yesterday, his lawyer recently told me that the girlfriend would be dropped from the witness list if I would agree not to depose her. His lawyer said that they wanted to drop her in the interest of trying to keep her safe. I think she would testify that the plaintiff is a cheating liar. If he beats her up after she testifies, that's not my problem, right?

Thanks for your assistance,

Dee Lemma

## **\*\*Request 2018-E Initial Question**

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**What should Dee do?**

- A. Agree not to depose the girlfriend.**
- B. Issue a subpoena to depose the girlfriend.**
- C. Withdraw.**
- D. Something else.**

# Request 2018-F Lapp S. Judgment

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Dear Ethics Advisory Committee:

I have been a prosecuting attorney for over 20 years. I am involved in a murder case where I am convinced that the defendant murdered a teenage kid in a particularly gruesome fashion. Most of the evidence is very favorable to the prosecution. But, about two months ago, the defense came up with two female friends of the defendant who are, or at least were, going to provide an alibi for the defendant. I just couldn't let that happen, but I may have gone overboard.

## Request 2018-F Continued

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I created a false Facebook page under the name of Betty Boop. I sent two friend requests to the alibi witnesses which they both quickly accepted. I started conversations with both, eventually telling them that the defendant and I had been in a relationship, and that our baby had been born just a few weeks ago. They became irate. They told me that the defendant was a lying cheat, or words to that effect, who had tried to get them to lie for him at trial. After finding out about the “baby,” both said that there was no way they would lie in court for this guy.

# Request 2018-F Continued

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While I feel somewhat vindicated, I am having second thoughts about what I have done. What do I need to do?

Thanks,

Lapp S. Judgment

# **\*\*Request 2018-F Initial Question**

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What should Lapp do?

- A. Inform his supervisor, the court, and defense counsel and self report to disciplinary authority.
- B. Contact the two alibi witnesses and tell them he really didn't have the defendant's baby.
- C. Both A and B.
- D. Something else.

# Request 2018-G Frosty A. Snowmann


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Dear Ethics Peeps:

I am concerned about a little something I did the other day. I am very active on Twitter. I post so many times each day it's hard for me to keep track - random thoughts, philosophical opinions, selfies from around the world. I met another lawyer for a drink last night and he said, "I just saw some of your recent tweets and I think you need to be careful about what you're saying. Didn't you ever take the MPRE exam?" I told him I knew exactly what he meant and would take care of it. I looked over my recent tweets and I think each of them are protected by the First Amendment. Do you agree?

1. 8/15/18 Went to a hearing today. Judge Gomer “Dumber than Donuts” Pyle (18th Judicial District) is so freggin stupid that he bought opposing counsel’s (Jessica Simpleton’s) argument. I can’t believe someone that stupid is on the bench! This whole system is corrupt!
2. 11/12/18 Jury trial started today. Am hoping to ask juror number 5 out when this thing’s over. SWEET!! Heck, why wait???
3. 11/13/18 Just friended every judge in the 18th Judicial District! Hope they keep track of my adventures!



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4. 11/14/18 Friend request to Juror No.5 was accepted!!! OF COURSE! Am I lucky or what?!?!?!! ==-)
5. 11/15/18 So, this case I have going on, there are a lot of things I can't get into evidence because of the "rules". If I could only let Judge Clueless and the numbskull jury know that there's proof that the opposing party stole money from my client, but I can't get it in. It's all so-called "hearsay" but that doesn't mean it isn't the truth!

ADJOURN!

