2016 Administrative Law Institute

Friday, Oct. 21, 2016

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Center for Legal Education
New Mexico State Bar Foundation
P.O. Box 92860
Albuquerque, NM 87199-2860
505-797-6020 or 1-800-876-6227
cleonline@nmbar.org
www.nmbar.org

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Presenter Biographies

William R. Brancard has served as general counsel of the New Mexico Energy, Minerals and Natural Resources Department since 2010. From 2003 to 2010, he served as the director of the Mining and Minerals Division in the Department. He has also worked as an assistant land commissioner and an assistant attorney general for the State of New Mexico as well as practicing law with the firm of Sutin, Thayer & Browne in Albuquerque and Santa Fe. Brancard is a graduate of Hamilton College (1979) and Harvard Law School (1987) and attended the London School of Economics. Brancard has served as chair of the New Mexico Minimum Continuing Legal Education Board and as chair of two State Bar sections: Public Law and Natural Resources, Energy and Environmental Law. He also served on the governing council of the ABA Government and Public Lawyers Division.

Robert D. Kidd is an attorney and the Compliance Officer for Bernalillo County. His areas of concentration include labor and employment law, governmental conduct, public records and regulatory compliance. Kidd received his undergraduate degree from Trinity University and his law degree from the University of New Mexico. He is a member of the state bars of New Mexico and Texas.

Scott Fuqua is a native of Portales, New Mexico and graduated from the University of Chicago Law School in 2001. He then clerked for Justice Pamela B. Minzner on the New Mexico Supreme Court after which he worked for five years in the Dallas office of Vinson & Elkins, LLP. Fuqua returned to New Mexico in 2007 to work in the litigation division of the New Mexico Attorney General's Office. He was the director of the division from 2010 to 2014 and was involved in several high-profile IPRA cases, including litigation concerning the mental health audit conducted by HSD in 2014 and *Faber v. King*, which clarified the types of damages available to different types of IPRA litigants. Fuqua opened his own firm, Fuqua Law & Policy, in January 2015.

Judge Ben Ballengee is a federal administrative law judge with the Office of Disability Adjudication and Review at the Social Security Administration in Albuquerque. Prior to coming to Albuquerque, he was assigned to the ODAR office in Middlesboro, Ky. Before appointment as an ALJ, he worked as a hearings examiner for the U.S. Department of the Interior Office of Hearings and Appeals in Oklahoma City. Before that he practiced law in Amarillo and Dallas. He is a member of the State Bar of Texas and graduated from Texas Tech University and the Texas Tech School of Law. He also holds an M.B.A. from the University of Texas at Austin and is licensed to practice as a certified public accountant in Texas.

Judge Steven Michael Trujillo is an administrative law judge with the New Mexico Department of Workforce Solutions Labor Relations Division in Santa Fe. In this position, he presides over formal hearings involving labor-related statutes and regulations, including the New Mexico Minimum Wage Act, Public Works Minimum Wage Act, New Mexico Administrative Code and other possible wage disputes between employers and employees within the State of New Mexico. He completed training at the National Judicial College on administrative law and conducting fair hearings. He is an alumnus of the University of New Mexico. His undergraduate degree was in criminology with a minor in psychology. Previously, he worked for the New Mexico Department of Corrections as a case worker. While working as a case worker for the New Mexico Department of Corrections, Trujillo managed high-risk inmates' disciplinary

sanctions, parole plans, and also tracked when inmates would be eligible for release. He has also served in the U.S. Army Reserves and the New Mexico Army National Guard. During his military service he held the position of quartermaster.

Gregory S. Shaffer, Santa Fe County attorney, is a 1997 *cum laude* graduate of the New York University School of Law, where he was a member of the editorial staff of NYU's *Law Review*. Prior to moving to Santa Fe in 2004, he practiced complex commercial litigation in New York City, primarily with the national law firm of Kirkpatrick & Lockhart LLP. He began his career in public service when he moved to Santa Fe, working as an assistant Santa Fe County attorney for approximately two years and three months before working for the State of New Mexico for approximately seven years and nine months, primarily with the New Mexico Department of Finance and Administration. From November 2010 to May 2014, he was DFA's general counsel. He became the Santa Fe County attorney in May 2014.

In more than 20 years in state government, **Carolyn Wolf** was in-house counsel for the Human Services Department, Health and Environment Department, and Taxation and Revenue Department and was counsel for other agencies, boards and commissions as an attorney in the Civil Division of the Attorney General's Office. She was general counsel for the Department of Finance and Administration and Taxation and Revenue Department. She is currently of counsel at Montgomery & Andrews PA. Wolf is a graduate of Rice University and the University of New Mexico School of Law. She is past-chair of the Public Law Section Board and serves on the Board of Bar Commissioners

Sean Cunniff is an assistant attorney general in the New Mexico Attorney General's office. He currently practices in the litigation division of the AG's office, where he serves as lead qui tam counsel and represents the state in myriad civil litigation matters before state and federal courts. He previously served in the AG's civil division, where he provided a full complement of legal services to state government clients concerning a wide range of matters, including rulemaking proceedings, administrative disciplinary proceedings, public records compliance, Open Meetings Act compliance, and procurement processes. During his tenure in the civil division, he received the New Mexico Medal of Merit for meritorious service to the Department of Military Affairs and State Armory Board. He was also selected and served as a 2014 International Fellow by the National Association of Attorneys General. Prior to his service at the AG's office, Mr. Cunniff was in private practice at the Quarles & Brady law firm in Phoenix and served as a judicial clerk to the Honorable Justice Edward L. Chavez. He is a graduate of the University of New Mexico School of Law where he served on the editorial board of the New Mexico Law Review.

Judge Timothy L. Garcia was appointed to the Court of Appeals on Nov. 12, 2008. Raised in Albuquerque, he attended the University of New Mexico where he received his bachelor's degree in business administration from the Robert O. Anderson School of Management in 1979 and his juris doctorate degree at the University of New Mexico School of Law in 1984. Prior to law school, Judge Garcia was a member of the Association of Tennis Professionals where he competed on the professional tennis tour. After law school, Judge Garcia moved to Santa Fe where he was in the private practice of law for nearly two decades. In 2002, Judge Garcia was first elected to serve as a trial judge in the First Judicial District Court that serves Santa Fe, Los Alamos and Rio Arriba Counties. While serving on the district court, he presided over the civil

and criminal dockets, primarily in Rio Arriba County. Judge Garcia presently serves as a member of the Court's Appellate Mediation Committee, oversees the Court's oral argument in the high schools program, and continues to be involved with the State Bar. He also remains actively involved with the U.S. Tennis Association and the University of New Mexico.

Judge Sarah Michael Singleton is the chief judge in the First Judicial District Court. Judge Singleton hears mostly civil cases. Prior to joining the bench Judge Singleton was a shareholder in Montgomery & Andrews, PA. in Santa Fe. She received her B.A. from Sarah Lawrence College in 1971 and her J.D. from Indiana University in Bloomington in 1974. Judge Singleton is admitted to the state bars of New Mexico and Texas. Additionally, Judge Singleton is admitted to practice before the U.S. District Court for the District of New Mexico, the 10th Circuit Court of Appeals, the U.S. Court of Federal Claims, and the United States Supreme Court. She is a member of the American Bar Association and the American Law Institute. As a lawyer, Judge Singleton was recognized by Chambers USA, Best Lawyers in America, and Southwest Super Lawyers, which listed her as one of the top 25 lawyers in New Mexico. Judge Singleton is a past president of the State Bar of New Mexico. Judge Singleton received a presidential appointment to the Board of the Legal Services Corporation. She is chair emeritus of the New Mexico Commission on Access to Justice. She served as the chair of the New Mexico Civil Legal Services Commission, and she served two terms on the ABA Standing Committee on Legal Aid and Indigent Defendants. She has received awards from the State Bar of New Mexico, the Women's Bar, and the American Bar Association, in part for her work on access to justice issues. In 2007 the State Bar honored Judge Singleton by giving her the President's Life Time Achievement Award.

New Mexico Administrative Law Update

New Mexico Administrative Law Update

William R. Brancard
General Counsel
New Mexico Energy, Minerals and Natural Resources Department
Santa Fe, NM

2016 Administrative Law Institute
October 17, 2016

The following case summaries cover some interesting administrative law decisions from the New Mexico Court of Appeals and Supreme Court that have appeared since the last administrative law update two years ago. The cases are chosen because they highlight some of the major administrative procedural issues both in the conduct of administrative proceedings and in the appeal of administrative decisions to the courts. Many decisions involving administrative agencies did not make this summary; some probably should have. I apologize for any gems left uncovered.

The topics cover many of the usual suspects: initiating an administrative hearing or an appeal; conduct of an administrative hearing; role of hearing officers; and due process. Given the number of significant rulemaking decisions in the past two years, there is a separate section on rulemaking. I refer to a number of, perhaps too many, unpublished decisions, mostly from the Court of Appeals. The value of these cases as precedent may be limited but the Courts often provide insights into administrative law issues in these cases.

Getting in the door: Timeliness

Many of the cases cited in this update focus on the role of deadlines in administrative law. For the most part, with one exception below, the appellate courts have strictly enforced deadlines both against parties seeking to appear or appeal and, sometimes, against agencies.

The Court of Appeals has stuck with its rule that only "unusual circumstances" will permit the late filing of an appeal. Trujillo v. Serrano, 1994-NMSC-024, ¶19, 117 N.M. 273 ("Only the most unusual circumstances beyond the control of the parties—such as error on the part of the court—will warrant overlooking procedural defects."). In Bassett v. New Mexico Racing Comm'n, No. 34,756, mem. op. (N.M. Ct. App. Mar. 9, 2016) (non-precedential), the appellant filed a notice of appeal in a 12-505 case which requires a petition for writ of certiorari. The Court

was not willing to consider the docketing statement as meeting the petition requirements because the statement was not filed within the 30-day period. The appellant argued excusable neglect for the failure to timely file a petition. The Court found that "excusable neglect" does not meet the "unusual circumstances" test. "Unusual circumstances that justify the untimely filing of a petition for writ of certiorari exist when '(1) there is error on the part of the court, or (2) when the filing is not very late, and there are other unusual circumstances that were not caused by the court system but that were not within the control of the party seeking appellate review'." Bassett, ¶4 (quoting Mascarenas v. City of Albuquerque, 2012-NMCA-031, ¶ 23, 274 P.3d 781).

See also Gaffney v. Robin Hood Water Users Association, Inc., No. 34,152, mem. op. (N.M. Ct. App. Jan. 27, 2016) (non-precedential), where the Court of Appeals dismissed an appeal filed one day late by a pro se appellant, and State ex rel. Human Services Dep't v. Garcia, No. 33.491, mem. op. (N.M. Ct. App. Nov. 10, 2014) (non-precedential), where the Court dismissed an appeal filed 5 days late by a pro se appellant.

In a case that goes against the trend of strictly enforcing appeal deadlines, the Court of Appeals used a statutory harmless error provision to turn around a deadline. In National Education Ass'n of New Mexico v. Santa Fe Public Schools, 2016-NMCA-009, a teacher missed the deadline to request a hearing on his proposed discharge by two days. The superintendent refused to hold a hearing and notified the teacher that his termination was final. The teacher filed a petition for writ of mandamus arguing that the school district had a non-discretionary duty to hold a hearing. The district court applied the harmless error provision in the School Personnel Act, NMSA 1978, §22-10A-28(L) (2003), which provides that "[u]nless a party can demonstrate prejudice arising from a departure from the procedures [in this Act]...such departure shall be presumed to be harmless," and issued the writ.

The Court of Appeals agreed and explicitly transferred the burden to the school district. The Court found that the harmless error statute "regards any departure from procedure that does not prejudice a party as harmless." Id. ¶9. Therefore, the burden is on the school district to demonstrate prejudice before any failure to meet the hearing request deadline can be considered a reason to deny the hearing. The Court found no merit in any of the district's claims of prejudice and concluded that the district therefore had a non-discretionary duty to hold the hearing and mandamus was proper in this case.

Standing and Showing up

In Carrasco v. City of Albuquerque, No. 33,269 mem. op. (N.M. Ct. App. Nov. 26, 2014) (non-precedential), three citizens appealed a decision by the Albuquerque-Bernalillo County Air Quality Control Board ("Board") to dismiss their requests for hearing based on a lack of standing. Two of the three had filed objections to the permit application and requested a hearing before the Albuquerque Environmental Health Department ("Agency"). The Agency denied the request for a hearing and they, along with a third citizen who had not participated before the Agency, Power, appealed to the Board arguing that the Agency should have held a hearing. The Board dismissed their appeals because all three lacked standing.

Under the Air Quality Control Act, standing to bring an appeal to the Board is limited to any person "who participated in a permitting action before the department or the local agency and who is adversely affected by such permitting action". NMSA 1978, §74-2-7(H) (2003).

For the two appellants who had participated below, the issue was whether they were adversely affected by the permitting action. The Court relied in part, on the recent standing decision of the Court of Appeals: "In order to establish that one is adversely affected, the person must show that the injury complained of is within the zone of interests sought to be protected by the statute at issue." N.M. Cattle Growers' Ass'n v. N.M. Water Quality Control Comm'n, 2013-NMCA-046, ¶ 10, 299 P.3d 436, cert. quashed 2013-NMCERT-010, 313 P.3d 251. Because the appellants were arguing that the Board erred by failing to hold a hearing, the Court found the appellants clearly were adversely affected by such failure and therefore had standing to challenge that decision.

As to the third appellant, Power claimed he had not received notice of the permitting action. The Court found that the statutory notice requirements had been fulfilled and the agency need not ensure "that every person who might be affected by the permitting action actually receive notice". Carrasco, ¶11. Because Power had not participated below, he is not permitted, under the Air Quality Control Act, to request a hearing before the Board.

In Eastwood v. New Mexico Taxation and Revenue Dep't, No. 34,948 mem. op. (N.M. Ct. App. Feb. 20, 2016) (non-precedential), the Court of Appeals dismissed an appeal of TRD decision when the appellant had not appeared at the administrative hearing below even the appellant had proper notice of the hearing. "By not appearing at the hearing for which Appellant had proper notice, he waived any arguments challenging the Department's tax assessment on appeal." Id. ¶2.

Raising and Appealing a Constitutional Claim

New Mexico Courts have reached conflicting results when considering whether an administrative agency should or must consider constitutional claims in an administrative proceeding. Recent cases include Schuster v. New Mexico Taxation & Revenue Dep't., 2012-NMSC-025, ¶ 19, 283 P.3d 288 (holding that the Motor Vehicle Division, within the course of the administrative hearing, must make a determination as to the constitutionality of the police activity leading to an arrest, as well as a determination as to the constitutionality of the arrest itself) and Victor v. New Mexico Dep't of Health, 2014-NMCA-012, ¶ 24, 316 P.3d 213 (holding that if applicable regulations do not expressly support the inference that a hearing officer can consider or rule upon the issue of the constitutionality of the process provided by the regulations, such an inquiry exceeded the hearing officer's scope of review).

In a case that is now before the New Mexico Supreme Court, a taxpayer sought a charitable property tax exemption under both the Property Tax Code, NMSA 1978, Section 7-36-7 and under Article VIII, Section 3 of the New Mexico Constitution. El Castillo Retirement

Residences v. Martinez, 2015-NMCA-041, cert. granted 2015-NMCERT-001 (No. 35,148, Apr. 13, 2015). El Castillo had appealed a denial by the County Assessor to the County Valuation Protests Board. In a decision nearly 40 years before, the Court of Appeals had determined the Protests Boards had the duty to hear any protests including claims of unconstitutional discrimination. In re Miller, 1975-NMCA-116 ¶46, 88 N.M. 492, rev'd on other grounds by 1976-NMSC-039, 89 N.M. 547.

The Court of Appeals decided to overrule the holding in Miller.

> While protests boards certainly have the professional competence to make decisions as to property valuations, classifications, or statutory exemptions, they lack the professional expertise to make legal determinations involving our state Constitution, especially where we have held that the decisions of a protests board shall have the same force and effect as a court-issued judgment. Petersen Props., 1976-NMCA-043, ¶ 18. We conclude that El Castillo's constitutional claims exceeded the Protests Board authority of review and that it was appropriate for the district court to exercise its original jurisdiction over such claims. As a result, we further conclude that Miller is overruled.

El Castillo, 2015-NMCA-041 ¶23 (citations omitted).

If an administrative agency does not rule on the constitutional issues, how then are those issues raised and how does that affect further appeals? In El Castillo, the Protests Board, in fact, only ruled on the statutory claims and did not address the constitutional claims. The taxpayer then filed an appeal of the Protests Board decision to the district court under Rule 1-074 NMRA and NMSA 1978, §39-3-1.1 (1999) and also invoked the original jurisdiction of the district court to hear the constitutional claims. The district court ruled in favor of the taxpayer on both the statutory and constitutional claims.

Now, the County Assessor sought to appeal both the statutory and constitutional issues to the Court of Appeals. The rule, as laid out in recent decisions (e.g., Victor v. New Mexico Dep't of Health, 2014-NMCA-012, 316 P.3d 213), is that to appeal a district court that has acted both its original and appellate jurisdictions, you have to appeal under both Rule 12-201 NMRA (Appeal as of right) and Rule 12-505 NMRA (Writ of certiorari for decision on review of administrative agency decisions). In this case, the County Assessor filed a notice of appeal under Rule 12-202 and later a docketing statement under Rule 12-208. But a petition for writ of certiorari was not filed under Rule 12-505.

The Court of Appeals will review a non-conforming document to see if it contains the information necessary to be accepted as a petition for writ of certiorari, Wakeland v. N.M. Dep't of Workforce Solutions, 2012-NMCA-021, ¶ 7, 274 P.3d 766, and a docketing statement will generally substantially comply with Rule 12-505. Wakeland, ¶16. However, the Court will only consider a non-conforming document if it is filed within the time deadline for the petition for writ of certiorari. In this case, the docketing statement was filed 90 days after the district court order and the Court of Appeals refused to consider it as a substitute for the petition. Thus, the

Court of Appeals only considered the constitutional claim and reversed the district court on that claim. The Supreme Court accepted certiorari and the case is ready for decision.

Hearing Officer recommendations

When a hearing officer conducts a hearing and provides a report or recommended decision to the ultimate agency decision maker, when can the agency change the proposed decision and reach a different conclusion? In a case under the Solid Waste Act, the Court of Appeals, in 1998, held that the Secretary of Environment can change the proposed decision but only if he can "provide a reasoned explanation for why he departed from the recommendations of the hearing officer who presided at the formal adjudicatory hearing and heard the testimony of the witnesses." Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶25, 125 N.M. 786. Two cases recently expanded on the Atlixco reasoning.

In a case on disability retirement benefits, Vigil v. Public Employees Retirement Bd., 2015-NMCA-079, the Public Employees Retirement Board (PERB) rejected certain recommended findings from the hearing officer and entered new, contrary findings to support a denial of benefits. The hearing officer had recommended granting benefits after a lengthy discussion of the testimony on the issue of whether a pre-existing condition was a significant contributing factor to the disability.

The Court of Appeals reversed the PERB decision, relying both on Atlixco and the PERB's own regulations. The PERB had simply replaced the hearing officer's findings with several short findings of its own. The Court found the decision to be arbitrary and capricious because the PERB had failed to meet Atlixco's requirement to provide a reasoned explanation for changing the hearing officer's recommendation. "A decision is arbitrary and capricious 'if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand.'" Vigil ¶26, quoting Atlixco ¶24.

In this case, the PERB's own regulations provided a process for changing a hearing officer's recommendation which the Court also found were violated by the PERB. The regulations require that the Board must review the record before the hearing officer and "provide a reasoned basis" for changing a recommendation. 2.80.1500.10(D)(7) NMAC. The PERB, in its decision, indicated that it had reviewed the recommendation and comments on the recommendation but did not explicitly state that it had reviewed the record. The Court assumed from this omission that the PERB had not reviewed the record or transcript below. "In summary, the Board violated its own regulations by failing to review the record before the hearing officer and by failing to provide a reasoned basis for its new findings of fact." Vigil ¶35.

In Pena-Kues v. Smith's Food & Drug Centers, Inc., No. 32,790, mem. op. (N.M. Ct. App. Nov. 26, 2014) (non-precedential), the Albuquerque-Bernalillo County Air Quality Control Board ("Board") decided to deny an application for an air quality permit modification after a hearing officer issued a report recommending that the permit modification be granted. However, the Board adopted all of the hearing officer's recommended findings and changed a few of her

proposed conclusions of law. The Court, again relying on Atlixco, found that the findings did not support the decision to deny the application. The Board had concluded that quality of life issues related to air quality led to the decision to deny the application, but the Court found no findings on these quality of life concerns. "Our review of the findings of fact reveals no instance where the Board identified the "quality of life" concerns it was taking into account." Id. ¶10. And the Court refused to "search the record to supply evidence to support the Board's decision where the Board made no such express findings. See Atlixco, 1998-NMCA-134, ¶ 21 (stating that an agency's decision 'cannot be sustained on a ground appearing in the record to which the [agency] made no reference; to the contrary, the [agency]'s decision stands or falls on its express findings and reasoning')." Pena-Kues, ¶12.

Timeliness and Hearing Officers

What happens when a hearing officer misses a time deadline? The New Mexico Racing Commission adopted regulations to provide for the conduct of its hearing and included a deadline for the submission of a report from a hearing officer: "Where a hearing officer conducts a hearing, the hearing officer shall, within 30 days of the hearing prepare a report containing his or her findings of fact, conclusions of law and recommendations for commission action." 15.1.9.C(15)(a) NMAC. In Stinebaugh v. New Mexico Racing Comm'n, No. 32,840, mem. op. (N.M. Ct. App. July 9, 2015) (non-precedential), a case was brought against a trainer after his horse failed a drug test. The Commission appointed a hearing officer to conduct a hearing. The Commission adopted the hearing officer's recommendations even though the hearing officer submitted her report 91 days after the hearing.

The Court of Appeals had little tolerance for the time violation. "[A]n agency's failure to comply with its own regulations in rendering a decision is a basis for voiding that decision." Stinebaugh, ¶12. The Court refused to consider arguments that no one was prejudiced by the delay or that the Commission attempted to mitigate the delay by reducing the penalty. The Court reversed the decision and ordered the Commission to dismiss the proceedings against Stinebaugh.

Hearing Requirements.

Along with time deadlines, the Courts in recent cases have been willing to hold agencies to the statutory requirements for hearings. In Tri-State Generation & Transmission Ass'n, Inc. v. New Mexico Public Regulation Comm'n, 2015-NMSC-013, the Supreme Court grappled with orders and hearings under the laws governing electric cooperatives. Tri-State filed an "Advice Notice" for its 2013 rate design with the Public Regulation Commission (PRC) and three utilities protested. The PRC suspended the rates and set a hearing on the Advice Notice under NMSA 1978, §62-6-4(D) (2003), which requires a hearing if 3 or more utilities file protests and the PRC determines there is "just cause" for reviewing the rates.

Tri-State then filed 3 more Advice Notices and the same 3 utilities protested each. The PRC then rejected the 3 new Notices without a hearing because of the pending proceeding and alleged

discrimination against other utilities. After a lengthy review of the statutes and rules that govern PRC proceedings involving coops, the Supreme Court concluded that the PRC had no authority to reject the Notices without a hearing. Once the PRC determined there was just cause to review the Notices, Section 62-6-4(D) required a hearing.

In Freed v. City of Albuquerque (In re Hearing on Air Quality Permit No. 3135), 2016-NMCA-___, No. 34,285 (Sept. 9, 2016), the issue became whether the hearing that was held met the requirements for public involvement under the statute. In yet another case under the Air Quality Control Act involving the Albuquerque-Bernalillo County Air Quality Control Board (Board), three citizens appealed a permitting decision to the Board. The Air Quality Control Act requires the Board to hold a hearing within 60 days after receipt of a petition and if the Board determines that the permitting action substantially affects the public interest:

> [The B]oard shall ensure that the public receives notice of the date, time and place of the hearing. The public in such circumstances shall also be given a reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any person submitting data, views or arguments orally or in writing shall be subject to examination at the hearing.

NMSA 1978, § 74-2-7(I).

The Board provided notice of the public hearing in November 2014 but also noted that the Board may hear motions at a Board meeting in October 2014. A motion for summary judgment was filed and the Board granted the motion after oral arguments at its October 2014 meeting and then vacated the hearing for November. The citizens appealed to the Court of Appeals arguing that the Board either could not decide a case without the full public hearing required by the Act, or that the summary procedure used in this case failed to provide the public with sufficient notice of its right to participate.

The Court of Appeals chose the second argument and concluded that the notice for the motion hearing failed to inform the public of its statutory right to participate in the hearing, and the motion hearing did not provide the public with the opportunity to provide input on the permit and the petition as required by NMSA 1978, Section 74-2-7(I).

Due Process.

There have been a series of decisions concerning unemployment compensation and the process to challenge benefit decisions over the past three years. The cases revolve around the Department of Workforce Solutions process to recoup benefits initially grated to an applicant and later determined to be improperly granted. In one case, the Court of Appeals upheld the Department's obligation to recoup overpayments and rejected equitable estoppel claims. Millar v. New Mexico Dep't of Workforce Solutions, 2013-NMCA-055, 304 P.3d 427. In Narvaez v. New Mexico Dep't of Workforce Solutions, 2013-NMCA-079, 306 P.3d 513, the Court reversed a denial of benefits which was initiated more than a year after benefits began. The Court found the Department had violated the time limits within its own rules.

The Garduño case resulted in due process analyses of the unemployment compensation process by both the Court of Appeals and the Supreme Court. Garduño filed for unemployment benefits and, after a preliminary fact finding, the Department issued a notice of claim determination awarding benefits. The employer is given a right to appeal and did so. However, Garduño did not receive a copy of the appeal. Garduño was notified of the appeal 130 days later when notified of a hearing to be held two weeks later. After the hearing, in which Garduño participated, the Department determined Garduño was disqualified from collecting benefits and then sought to recover the benefits paid to Garduño.

The Court of Appeals found that the delay in notice that the benefits had been appealed was a violation of due process. "The risk of erroneously depriving claimants of a prompt notice and a hearing at a meaningful time is significantly high when DWS fails to send notice of the employer's appeal for several months. In this case, by failing to timely inform Garduño that Employer had appealed, DWS essentially saddled her with a substantial potential debt without meaningful notice." New Mexico Dep't of Workforce Solutions v. Garduño, 2014-NMCA-050, ¶ 21.

The Supreme Court reversed in New Mexico Dep't of Workforce Solutions v. Garduño, 2016-NMSC-002. The Court analyzed the due process issue by applying the Matthews v. Eldridge test:

> The Mathews test evaluates the following factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. ¶11. (quoting Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

The Supreme Court does agree with the Court of Appeals that Garduño has a property right in receiving unemployment benefits. Id. ¶19. However, the issue for the Supreme Court was whether the late notice deprived her of the ability to participate in the hearing. "In New Mexico, the distinguishing factor used to determine whether there was or was not a violation of due process rights depends on whether the defective notice deprived the claimant of the ability to participate in the proceeding." Id. ¶27. The Court finds that the Department all the required procedures in conducting the hearing and Garduño was able to participate in the hearing and was not deprived of any hearing rights. "Even though Garduño did not receive notice of her employer's appeal for 130 days, we cannot conclude that the risk of erroneous deprivation of unemployment benefits is unnecessarily high as a consequence of the procedures utilized by the Department." Id. ¶28. The Court also posits that additional notice would not have changed anything: "Garduño was discharged from employment for her own misconduct, and no amount of time would have permitted her to show otherwise." Id. ¶35. The Supreme Court also chides the

Court of Appeals for not looking at the entire process and all the procedures and appeals available to Garduño. Id. ¶36.

Ripeness.

A broader due process challenge was brought in a labor relations case which the Supreme Court transformed into a ripeness decision. The union filed a declaratory judgment action claiming that the structure for adjudicating labor disputes for Bernalillo County violated the employees' due process rights to a fair and impartial tribunal. A hearing on a potential practice violation is held before the County Labor Management Relations Board but the ultimate decision is made by the County Commission. The plaintiffs alleged that the County Commission, which appoints and works with the County Manager, is aligned with management and cannot be fair to employees.

The Court of Appeals, in AFSCME v. Board of County Commissioners of Bernalillo County, 2015-NMCA-070, analyzed the argument as a bias claim. In looking at prior bias cases, the Court found that a personal interest was needed to show impartiality. The Court did not find an interest sufficient to presume bias in the County Commission's supervision of the County Manager. The Court held that the plaintiffs had not met their burden of presenting evidence to document bias on behalf of the County Commission. Id. ¶14.

The Supreme Court in a 3 to 2 opinion ignored the merits of the case and instead focused on whether the plaintiffs satisfied the requirements of the Declaratory Judgment Act. AFSCME v. Board of County Commissioners of Bernalillo County, 2016-NMSC-017. The Court found that AFSCME's claims were not fit for review and therefore not ripe. The majority also found that AFSCME only asserted the possibility of a hypothetical injury and therefore did not establish an injury-in-fact. Id. ¶33. The dissent concurred on the ripeness decision; AFSCME did not file a complaint with the County Labor Board. The dissent did see a potential due process injury when the County Commission reviews a Board decision since the Commission is a party to the collective bargaining agreement.

Rulemaking

Several major rulemaking decisions appeared in the last two years with the Supreme Court perhaps more willing than the Court of Appeals to take a harder look at agency actions. Several of these cases focused on what is substantial evidence in the record to support the agency decision. In New Mexico Exchange Carrier Group v. New Mexico Public Regulation Comm'n, 2016-NMSC-015, the Supreme Court reviewed a related rate case and a rulemaking action from the PRC and found both lacking. The cases involved the Rural Universal Service Fund and the surcharge which is the funding source for the Fund. In September 2014, the PRC adopted a surcharge rate of 3% for 2015, and then, in November 2014, the PRC adopted rule changes which included a permanent cap of 3% for the surcharge. The Court found that the rate action was arbitrary, not supported by substantial evidence and, perhaps most important, conflicted with the statutory requirement that "the surcharge be large enough to allow for a prudent Fund balance". 2016-NMSC-015, ¶18.

In the rulemaking case, the appellants charged that the PRC had prejudged the outcome by its actions in the rate case. The Court was clearly troubled by comments made by the Commissioners during the rate case including that the rate case was "just laying some ground work" for the rule. Id. ¶20. "If in fact the Surcharge Order, which was issued ten weeks prior to the Rule Order, preordained the results of the Rule Order, the Rule Order should be set aside. An agency that is considering rule changes must maintain an "open-minded attitude" until the rule is adopted so that interested parties can offer the benefit of their expertise to the agency through commentary." Id. (citations omitted). However, the Court reviewed the lengthy history of the rulemaking and found that the PRC did not prejudge the rule changes. Id. ¶23.

The appellants also argued that the rule decision was not supported by substantial evidence because the majority of those commenting on the rulemaking opposed the 3% cap. The Court laid out the standard for a substantial evidence review:

> We are required to review the whole record, including the evidence both in favor of and contrary to the PRC's decision, when determining whether its decision is supported by substantial evidence, while looking at the evidence in the light most favorable to the PRC decision. PNM Gas Servs. v. New Mexico Pub. Util. Comm'n, 2000-NMSC-012, ¶ 4. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Rinker v. State Corp. Comm'n, 1973-NMSC-021, ¶5.

Id. ¶28.

The Court acknowledged that most commenters opposed the 3% cap, but held that substantial evidence review goes beyond simply adding up the number of pro and con comments. "Our review is not as simple as comparing the number of entities in favor of the 3% cap with those who either oppose the 3% cap or take no position on the cap. Our review requires us to look at the whole record and determine whether there is evidence to support the PRC's decision." Id. ¶30. However, in its review of the record, the Court could not find substantial evidence in the record to show that setting the cap at 3% would meet the statutory requirements. The Court reversed the rule order and remanded it to the PRC. Id. ¶32.

In a case that was recently argued before the Supreme Court, the Court of Appeals took a tougher stance on substantial evidence challenges and placed a greater burden on the appellants to document the lack of substantial evidence. The "copper rule" case, Gila Resources Information Project v. New Mexico Water Quality Control Comm'n, 2015-NMCA-076, cert. granted 2015-NMCERT-007 (Nos. 35,279. 35,289, 35,290 July 15, 2015), focuses heavily on whether the rules adopted by the Water Quality Control Commission (WQCC) conflict with the Water Quality Act which requires the adoption of the rules. In addition to the statutory conflict issues, the appellants also raise issues of substantial evidence. The Court of Appeals responds by making it clear that it is the appellants' responsibility to provide all the evidence on an issue: "On appeal, the party challenging the sufficiency of the evidence supporting an administrative agency's action 'must set forth the substance of all evidence bearing upon the proposition' in the light most favorable to the agency's decision and 'then demonstrate why, on balance, the evidence fails to support the

finding made.' Martinez v. SW. Landfills, Inc., 1993-NMCA-020, ¶¶ 8-11". 2015-NMCA-076, ¶55.

The Court admonishes the appellants for their failure to provide citations to the record and to describe all the evidence on an issue. "[I]t is Appellants' burden in challenging the sufficiency of the evidence to set out all of the evidence bearing on a proposition and to specifically attack contested findings. Martinez, 1993-NMCA-020, ¶ 9; see Rule 12-213(A)(3), (4). Even when undertaking a whole-record review, it is not the duty of this Court to search through the record seeking the bases for reversal or to re-weigh the evidence". Id. ¶58. The Court finds that the appellants' failure to document the substantial evidence claims leaves it to the Court to dig through the "voluminous record". "This we will not do". Id. ¶56.

The copper rule case is also one of several rulemaking decisions where appellants have sought to limit or prohibit an agency's rulemaking authority because of prior court decisions or pending cases. The appellants argued that collateral estoppel precluded the WQCC from re-litigating certain facts or issues that were addressed by the WQCC in a prior permitting order which pertains to one copper mine. That order flowed from a Court of Appeals decision which remanded the permitting case back to the WQCC. Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n, 2006-NMCA-115, 140 N.M. 464. The Court of Appeals first finds the principle of collateral estoppel has no bearing on the WQCC's rulemaking. 2015-NMCA-076, ¶45. The Court further notes that the rulemaking was required by the Legislature and intended to apply to all future permit applications by copper mines. Id. ¶46.

In a case that bounced back and forth between the agency and the Court of Appeals and resulted in two unpublished decisions, the Court of Appeals addressed both the appellants' obligation to document their substantial evidence claims and the agency's obligation to explain their decision. In the first appeal of a Construction Industries Commission's (CIC) action to revise its building codes, the Court of Appeals remanded the case to the CIC because the CIC failed to state any reason for the adoption of the rule changes and therefore did not provide a record sufficient for appellate review. Southwest Energy Efficiency Project v. New Mexico Construction Industries Comm'n, No. 31,383, mem. op. (N.M. Ct. App. Apr. 4, 2013) (non-precedential). The CIC issued no written decision on the rule changes and the Court found the sole statement of one Commissioner to be too broad ("An assertion that the Commission was doing what was "best for New Mexico, for the industry, [and] for the public at large" is far too broad to be a sufficient statement of reasons to permit review of the Commission's decision on appeal.") mem. op. ¶11. The Court remanded the rule changes to the CIC "for reconsideration, a new vote, and a statement of reasons for the vote, preferably in written form." Id. ¶14.

On remand, the CIC voted to re-adopt the rule changes and provided a statement of reasons for the changes. Appellants challenged the statement of reasons as insufficient and the rule changes were not supported by substantial evidence. The Court of Appeals upheld the rule changes and found the statement of reasons to be "legally sufficient". Southwest Energy Efficiency Project v. New Mexico Construction Industries Comm'n, No. 32,939, mem. op. (N.M. Ct. App. Sept. 25, 2014) (non-precedential). As with the later copper rule case, the Court attacked the appellants

for failing to summarize all the evidence and failing to cite to the record ("We decline to construct Petitioners' arguments for them, and will not review these arguments further.") Id. ¶8.

The appellants also raised a jurisdiction argument that will be developed further in the pit rule case below. In this case, there was a pending motion for rehearing on the first CIC case pending before the Court of Appeals when the CIC acted to re-adopt the rules. The Court found that the appellants provided no authority for the claim that an appeal divests an administrative agency of its rule-making authority. Id. ¶14.

Another major rulemaking decision centered on the "pit rule" for oil and gas operations and involved a number of novel challenges to a rulemaking. In Earthworks' Oil & Gas Accountability Project v. New Mexico Oil Conservation Comm'n, 2016-NMCA-055, cert. denied No. S-1-SC-35824 (Apr. 15, 2016)1, the Court of Appeals grappled with the third revision to the pit rule in six years. The prior two rulemakings, in 2008 and 2009, had been appealed to the district court but no decision had been issued on them. The appellants began with the argument offered in the CIC case above: the pending appeals of the pit rule deprived the Oil Conservation Commission (OCC) of jurisdiction to further amend the pit rule. The Court first clarifies that this is a rulemaking, not an adjudication, by the OCC. Then the Court applies the separation of powers doctrine set forth by the Supreme Court in New Energy Economy, Inc. v. Shoobridge, 2010-NMSC-049, 149 N.M. 42.

> When the Legislature lawfully delegates authority to a state agency to promulgate rules and regulations, may a court intervene to halt proceedings before the agency adopts such rules or regulations?...We hold that a court may not intervene in administrative rule-making proceedings before the adoption of a rule or regulation[.]...[T]he separation of powers doctrine forbids a court from prematurely interfering with the administrative processes created by the Legislature." 2010-NMSC-049, ¶1.

Another novel argument offered in the Earthworks case focused in whether there should be a higher burden for an agency amending an existing rule compared to when an agency enacts a new rule. Appellants argued that the rule adopted in 2013 was a radical departure from those adopted in 2008 and 2009 event though, as the appellants claimed, the record in each proceeding was similar. To prove their point, the appellants requested that the Court take judicial notice of the records in the 2008 and 2009 rulemakings even the OCC had declined to take administrative notice of these records (which were over 10,000 pages). The Court refused and stated that it would only review the rulemaking based on the record that was before the OCC. 2016-NMCA-055, ¶16. "It is not the function of a court acting in an appellate capacity to admit new evidence or substitute its judgment for that of the administrative agency. Id. ¶15.

Appellants argued repeatedly that the OCC failed to justify its departure from the 2008 rule or why the OCC failed to consider the facts that supported the 2008 rule. The Court refused to

1 The author served as counsel to the Oil Conservation Commission in this case.

apply this standard to the revised rule. "[T]he Commission is not required to 'justify its departure' from the 2008 Rule; it is only required to explain its reasoning for adopting the 2013 Rule and how the 2013 Rule accomplishes the Commission's statutory duties." Id. ¶23.

Appellants also challenged the adequacy of the public notice provided by the OCC. The OCC listed 15 categories of rule changes in its notice and the appellants claimed one of these was misleading. Shortly before this case was briefed, the Supreme Court conducted a lengthy analysis of agency notice in Rayellen Resources, Inc. v. New Mexico Cultural Properties Review Comm., 2014-NMSC-006, 319 P.3d 639. In Rayellen, the Supreme Court determined that the cultural property listing proceeding at issue was more akin to a rulemaking but at the same time the Court applied a due process analysis to the adequacy of the public notice. However, in Earthworks, the Court of Appeals made no mention of Rayellen or due process in its analysis of notice. Instead, the Court relied on the old standard set forth in Livingston v. Ewing, 1982-NMSC-110, that the right to receive notice of a rulemaking hearing is solely a statutory right. The Court of Appeals compared the public notice in this case to the notice requirements in the OCC's rules and found that the notice "satisfied the statutory and regulatory requirements". Id. ¶39.

Recent New Mexico Appellate Opinions Discussed in 2016 Administrative Law Update

AFSCME v. Board of County Commissioners of Bernalillo County, 2015-NMCA-070

AFSCME v. Board of County Commissioners of Bernalillo County, 2016-NMSC-017

Bassett v. New Mexico Racing Comm'n, No. 34,756, mem. op. (N.M. Ct. App. March 9, 2016) (non-precedential)

Carrasco v. City of Albuquerque, No. 33,269 mem. op. (N.M. Ct. App. Nov. 26, 2014) (non-precedential)

Earthworks' Oil & Gas Accountability Project v. New Mexico Oil Conservation Comm'n, 2016-NMCA-055, cert. denied No. S-1-SC-35824 (Apr. 15, 2016)

Eastwood v. New Mexico Taxation and Revenue Dep't, No. 34,948 mem. op. (N.M. Ct. App. Feb. 20, 2016) (non-precedential)

El Castillo Retirement Residences v. Martinez, 2015-NMCA-041, cert. granted 2015-NMCERT-001 (No. 35,148, Apr. 13, 2015)

Freed v. City of Albuquerque (In re Hearing on Air Quality Permit No. 3135), 2016-NMCA-___, (No. 34,285, Sept. 9, 2016)

Gaffney v. Robin Hood Water Users Association, Inc., No. 34,152, mem. op. (N.M. Ct. App. Jan. 27, 2016) (non-precedential)

Gila Resources Information Project v. New Mexico Water Quality Control Comm'n, 2015-NMCA-076, cert. granted 2015-NMCERT-007 (Nos. 35,279. 35,289, 35,290 July 15, 2015)

National Education Ass'n of New Mexico v. Santa Fe Public Schools, 2016-NMCA-009

New Mexico Dep't of Workforce Solutions v. Garduno, 2016-NMSC-002

New Mexico Exchange Carrier Group v. New Mexico Public Regulation Comm'n, 2016-NMSC-015

Pena-Kues v. Smith's Food & Drug Centers, Inc., No. 32,790, mem. op. (N.M. Ct. App. Nov.26, 2014) (non-precedential)

Southwest Energy Efficiency Project v. New Mexico Construction Industries Comm'n, No. 31,383, mem. op. (N.M. Ct. App. Apr. 4, 2013) (non-precedential)

Southwest Energy Efficiency Project v. New Mexico Construction Industries Comm'n, No. 32,939, mem. op. (N.M. Ct. App. Sept. 25, 2014) (non-precedential)

State ex rel. Human Services Dep't v. Garcia, No. 33.491, mem. op. (N.M. Ct. App. Nov. 10, 2014) (non-precedential)

Stinebaugh v. New Mexico Racing Comm'n, No. 32,840, mem. op. (N.M. Ct. App. July 9, 2015) (non-precedential)

Tri-State Generation & Transmission Ass'n, Inc. v. New Mexico Public Regulation Comm'n, 2015-NMSC-013

Vigil v. Public Employees Retirement Bd., 2015-NMCA-079

NOTES

IPRA/OMA: Electronic Records and Damages

DEALING WITH ELECTRONIC RECORDS IN THE IPRA PROCESS

Robert D. Kidd,
Compliance Officer

EXAMPLE OF TYPICAL REQUEST

- I am requesting the investigation in it's entirety on the last two harassment, retaliation of sexual harassment concerning "employee."
- 1. I want the full audit of all parties that were spoken to by the external investigation group.
- 2. I want all the typed transcript of the interviews.
- 3. I want any write ups "employee" has received in the last 45 days, up until September 29, 2016.
- 4. I want any notices "employee" received putting him on notice that he was a target of this investigation concerning the employees who came forward.
- 5. I need a copy of the original complaint the employees filed with the HR department or the County "Department."
- 6. I need all emails to and from "employee(s)" from June 1, 2016 until today September 29, 2016, including attachments, not just pertaining to these events I want ALL for the time period requested.
- 7. All text messages from "employee" to all others who were part of this investigation.

REACH OUT TO THE REQUESTER

- Don't be afraid to clarify the Request
- Prioritize
- Explain if it is broad and burdensome and the process it will take to obtain the records in their original format
- Respond to Duplicate Requests by providing details of specific details (e.g. "Numbers 1-5 are duplicate Requests of Work Order #249959, and such responsive records were picked up on "date," therefore, that portion of this Work Order #249960 has been completed and closed)
- If responsive records are not available due to technology available, tell the Requester exactly what the limitations are and provide what is obtainable
- Retention Schedules

BREAK DOWN THE REQUEST SO IT IS MANAGEABLE

- Prioritize the multiple requests within each Request based on availability, capability and time required
- Break the requests down into installments
- Make available the first installment available for inspection and then proceed to the second installment
- Be diligent in communicating with the Requester

NOTES

NOTES

Technology in Administrative Hearings: Cautionary Tales and Practical Considerations

Technology in Administrative Hearings:

Cautionary Tales and Practical Considerations

2016 Administrative Law Institute
State Bar of New Mexico
October 21, 2016

Presented by

Steven M. Trujillo
Labor Law Administrator
New Mexico Department of Workforce Solutions

Ben Ballengee
Administrative Law Judge
Social Security Administration

Disclaimer: The views expressed are the personal opinions of the authors and do not represent the official views of their respective agencies or offices.

Technology in Administrative Proceedings

Cautionary Tales and Practical Considerations

Steven M. Trujillo
Ben Ballengee

Overview

- Telephonic Hearings
  - Advantages
  - Disadvantages
- Interpreter Services
- Admitting Electronic Evidence
- Video Hearings

Telephonic Hearings

- Advantages
  - Increased flexibility and availability for hearing officer
  - Reduced intensity of emotions
  - Increased availability of witnesses
  - Less hardship on those with physical disabilities
  - Increased safety for all parties involved

Telephonic Hearings

- Disadvantages
  - Non-verbal cues can play no role in hearing
  - Late submission of evidence
  - Technical difficulties
  - Distractions
  - Those that are hearing impaired

Interpreter Services

- Advantages
  - Aids in due process
  - Allows for testimony from those who would have been inaccessible otherwise
  - Easily accessible
- Disadvantages
  - Increases length of hearing significantly
  - Costly

Electronic Evidence

- Evidence stored or transmitted in digital format
  - Digital photographs
  - Bank records
  - Word processing files
  - Spreadsheet files
  - Emails
  - Website postings

Video Hearings

a.k.a.

Video Teleconferencing (VTC)

Videoconferencing

A Quick Poll

Who is our audience?

The 10/20/30 Rule

Aspirational but not mandatory

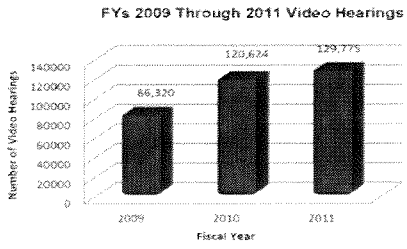
What We Won't Cover

- Video conferencing under Fed. R. Civ. P. 43(a)
- Problems with the Confrontation Clause in criminal proceedings
- Constitutional issues of any kind
- Use in civil or criminal trials
- Use in adversarial proceedings of any kind
- Submission of evidence at hearing

Benefits

Everybody loves a chart

(most recent data available):



But wait, there's more ...

- Cost savings to representatives, clients, and agency
- Time savings through less travel
- Better security (at least on my end!)
  - Reduced exposure to potentially violent persons
  - Reduced exposure to communicable diseases
- Reduced waiting time (although evidence is anecdotal)

Problems

- Minor sound delay
- Lack of available technical support
- Lack of user permissions necessary to fix problems due to network security concerns
- Poor quality equipment in some remote locations
- Lack of a video transcript; sound recording only plus reporter's notes

Practical Concerns

- Who can see what?
- How do I communicate confidentially with my client?
- Is the judge able to assess witness demeanor and physical expression (body language)? (Hint: It is not hard on a 60" high definition monitor.)

War Stories

- When your video hearing becomes a train wreck
- Telephone testimony inside a video hearing
- Problems with interpreters
- The George Zimmerman Trial *or* Why We Don't Use Skype for Video Hearings

Wrap-Up

- Use of video hearings is growing in all forums
- No longer esoteric or "high tech"
- Know your forum; spend some time researching a new video forum the same way you would research a new courtroom
- Q&A: What do you *really* want to know?

Video Hearings

I. How Judges Use Video Hearings

a. Basics
   i. "Almost as good as being there" provided you have good equipment
   ii. Many major industrial countries aside from the United States already use video hearings extensively; however, they are not subject to any Constitutional constraints

b. Criminal and Civil Cases
   i. Criminal trial proceedings
      1. Confrontation Clause issues
      2. Protecting witnesses in certain types of cases from emotional distress
   ii. Criminal non-trial proceedings
      1. Federal requirement of presence of defendant at arraignments and sentencing, but defendant can consent to video hearing
      2. Possible to use video for parole and probation revocation
   iii. Civil cases
      1. Used more in civil cases than criminal cases because of fewer constitutional concerns
      2. Federal Rule of Civil Procedure 43(a) allows testimony through videoconference – "In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location."

c. Appellate use
   i. Varies between courts

a. Other types of use
   a. Immigration removal proceedings
   b. Mediation/alternative dispute resolution
   c. High-volume entitlement proceedings

II. The Pros and Cons

a. Issues with attorney-client communication during proceeding
b. Cost savings
   i. Reduces costs billed to clients
   ii. Reduces costs for governments by reducing costs for parties, attorneys and judges
c. Distance problems
   i. Video conferencing shrinks the world
   ii. Physical distance can be a problem for a large and rural state like New Mexico

d. Security
    i. Sometimes safer to not have the parties around each other or the judge
e. Administrative ease
    i. Reduces administrative burden on the court
    ii. Less travel means more time for cases
f. Technology breakdowns
    i. Need good hardware on both ends
        1. Quality of reception and sound
    ii. Technology is getting better so fewer breakdowns, but the technology might not be intuitive and user-friendly
    iii. Must have technology support because breakdowns still happen
    iv. Problems with security of the transmission
g. Access to the Courts
    i. Can increase level of access to courts for some marginalized individuals, but it might be difficult to use for individuals who do not speak clearly or who learned English as a second language
    ii. Loss of face-to-face interactions
    iii. Greater access for individuals with disabilities

III. The Future of Video Hearings

a. Likely increase in video hearings as technology gets better, attorneys and judges get more comfortable with it and as litigation costs continue to increase
b. Need training to become more comfortable with technology
c. Acknowledging and understanding changes in the demographics and changes in ideas concerning communication

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NOTES

Ethics—The Age-Old Question Persists: Who Is Your Client?

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 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.

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. "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 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.

[Adopted 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.]

Annotations

Committee commentary. —

[1] The Terminology section was previously placed with the Preamble and Scope but has been moved here as Rule 16-100 NMRA to make it more accessible and convenient for the user.

Confirmed in Writing

[2] 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

[3] 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.

[4] 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.

[5] 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

[6] 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

[7] 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 NMRA, Paragraph A of Rule 16-106 NMRA and Paragraph B of Rule 16-107 NMRA 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.

[8] 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 NMRA and Paragraph A of Rule 16-109 NMRA 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 NMRA of the Rules of Professional Conduct.

Screened

[9] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 16-110, 16-111, 16-112 or 16-118 NMRA of the Rules of Professional Conduct.

[10] 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 information, including information in electronic form, 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 information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[11] 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.

[Adopted 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.

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

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

Committee Commentary. —

General Principles

[1] 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 NMRA of the Rules of Professional Conduct. For former client conflicts of interest, *see* Rule 16-109 NMRA of the Rules of Professional Conduct. For conflicts of interest involving prospective clients, *see* Rule 16-118 NMRA 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.

[2] 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 consentable; 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.

[3] 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 NMRA 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 NMRA and Scope of the Rules of Professional Conduct.

[4] 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 NMRA 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 NMRA of the Rules of Professional Conduct.

[5] 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 NMRA 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 NMRA of the Rules of Professional Conduct.

Identifying Conflicts of Interest: Directly Adverse

[6] 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 clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering

alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 16-109 NMRA 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

[10] 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 NMRA 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 NMRA of the Rules of Professional Conduct (personal interest conflicts under Rule 16-107 NMRA of the Rules of Professional Conduct ordinarily are not imputed to other lawyers in a law firm).

[11] 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 NMRA of the Rules of Professional Conduct.

[12] 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.

Interest of Person Paying for a Lawyer's Service

[13] 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 NMRA 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

[14] 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.

[15] 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 NMRA (Competence) and Rule 16-103 NMRA (Diligence) of the Rules of Professional Conduct.

[16] 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.

[17] 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

[18] 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* 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.

[19] 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

[20] 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

[21] 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

[22] 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

[23] 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.

[24] 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.

[25] 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

[26] 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.*

[27] 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.

[28] 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

[29] 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.

[30] 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.

[31] 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 NMRA 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.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship 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 NMRA of the Rules of Professional Conduct.

[33] 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 NMRA 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 NMRA of the Rules of Professional Conduct.

Organizational Clients

[34] 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 NMRA 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.

[35] 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.

[Adopted 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.

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

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

Committee Commentary. —

[1] 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 NMRA of the Rules of Professional Conduct.

[2] 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.

[3] 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 rezoning 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

[4] 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.

[5] Paragraph B operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rule 16-106 NMRA and Paragraph C of Rule 16-109 NMRA 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 NMRA of the Rules of Professional Conduct for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of Paragraph B of this rule depends on a situation's particular facts, aided by inferences, deductions or working presumptions 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.

[7] 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 NMRA and Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct.

[8] 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.

[9] 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 NMRA 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 NMRA of the Rules of Professional Conduct.

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

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 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.

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. "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 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.

[Adopted 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.]

Annotations

Committee commentary. —

[1] The Terminology section was previously placed with the Preamble and Scope but has been moved here as Rule 16-100 NMRA to make it more accessible and convenient for the user.

Confirmed in Writing

[2] 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

[3] 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.

[4] 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.

[5] 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

[6] 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

[7] 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 NMRA, Paragraph A of Rule 16-106 NMRA and Paragraph B of Rule 16-107 NMRA 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.

[8] 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 NMRA and Paragraph A of Rule 16-109 NMRA 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 NMRA of the Rules of Professional Conduct.

Screened

[9] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 16-110, 16-111, 16-112 or 16-118 NMRA of the Rules of Professional Conduct.

[10] 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 information, including information in electronic form, 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 information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[11] 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.

[Adopted 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.]

16-102. 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.

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

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

Committee commentary. —
Allocation of Authority between Client and Lawyer

[1] 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* Rule 16-104(A)(1) NMRA 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 Rule 16-104(A)(2) NMRA of the Rules of Professional Conduct and may take such action as is impliedly authorized to carry out the representation.

[2] 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* Rule 16-116(B)(4) NMRA of the Rules of Professional Conduct. Conversely, the client may resolve the disagreement by discharging the lawyer. *See* Rule 16-116(A)(3) NMRA.

[3] 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 NMRA 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.

[4] 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 NMRA of the Rules of Professional Conduct.

Independence from Client's Views or Activities

[5] 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

[6] 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.

[7] 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 NMRA of the Rules of Professional Conduct.

[8] With regard to Paragraph C, 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. *See* Rule 16-303 NMRA.

[9] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. *See, e.g.*, Rules 16-101, 16-108 and 16-506 NMRA of the Rules of Professional Conduct.

[10] A lawyer providing limited-scope representation shall explain that other lawyers may communicate directly with the client, without the permission of the lawyer and outside the presence of the lawyer. The lawyer shall explain that the client may limit or halt communications with the other lawyer with notice, preferably in writing. The lawyer should explain the risks of communicating with another lawyer. The lawyer is not required to participate in communications outside the scope of the limited representation, even if the client requests such participation.

Criminal, Fraudulent and Prohibited Transactions

[11] 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.

[12] 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* Rule 16-116(A) NMRA 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 NMRA of the Rules of Professional Conduct.

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

[14] 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.

[15] 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* Rule 16-104(A)(5) NMRA of the Rules of Professional Conduct.

[Adopted 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.]

COMPILER'S ANNOTATIONS

The 2001 amendment, effective March 15, 2001, rewrote Paragraph C which read "A lawyer may limit the objectives of the representation if the client consents after consultation".

The 2005 amendment of the Code of Professional Conduct Comment, effective January 20, 2005, added the comment to Paragraph E.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, added "and allocation of authority between client and lawyer" in the title; in Paragraph A, added "Subject to Paragraphs C and D of this rule", added the reference to Rule 16-104 NMRA, and added the second sentence; in Paragraph D, changed "A lawyer shall not engage or counsel" to "A lawyer shall not counsel"; and deleted former Paragraph E which concerned consultation on limitations of assistance when the client expects assistance not permitted by the Rules of Professional Conduct.

The 2015 amendment, approved by Supreme Court Order No. 15-8300-007, effective December 31, 2015, revised the committee commentary to provide for additional duties for lawyers providing limited-scope representation, and to make technical changes to rule citations; and in the committee commentary, added Paragraph 10 and redesignated the subsequent paragraphs accordingly.

Unreasonable limitation on the scope of representation. — Where respondent agreed to represent a criminal defendant for the limited purpose of negotiating a plea agreement for a flat fee; respondent conducted no discovery or witness interviews; defendant rejected the state's plea offer; six weeks before trial, respondent sought to withdraw from the representation without discussing the matter with defendant; respondent cited a breakdown of the attorney-client relationship as the reason for the withdrawal, when in fact respondent wanted to withdraw because respondent had accepted a flat fee for negotiating a plea agreement; and after the court denied the motion, respondent told the prosecutor that respondent would not prepare for trial in order to set up a claim for ineffective assistance of counsel, respondent's conduct warranted suspension. *In re Chavez*, 2013-NMSC-008, 299 P.3d 403.

Duty to take essential steps and consult with client. — When one contracts with an attorney for legal services, it is not the client's responsibility to initiate all inquiries to the attorney to insure that essential steps are being taken. Furthermore, it is within the scope of an attorney's obligations to a client to provide the information, advice, and reassurances necessary to allay unnecessary concerns that the client may have. Where attorney does none of these things, he violates this and other rules. *In re Carrasco*, 1987-NMSC-089, 106 N.M. 294, 742 P.2d 506.

Attorney's failure to consult with his clients concerning the objectives of the representation and the means by which the objectives were to be pursued violated Paragraph A of this rule. *In re Houston*, 1999-NMSC-032, 127 N.M. 582, 985 P.2d 752.

Dual role of guardian ad litem. — The dual role of a guardian ad litem to represent the best interests of a child while also presenting the child's wishes to the court even if they conflict with the position of the guardian ad litem conforms to the requirements of the Rules of Professional Conduct. *State ex rel. Children, Youth & Families Dep't v. Esperanza M.*, 1998-NMCA-039, 124 N.M. 735, 955 P.2d 204.

Lawyers are officers of court and are always under obligation to be truthful to the court. *Woodson v. Phillips Petroleum Co.*, 1985-NMSC-018, 102 N.M. 333, 695 P.2d 483.

Public defenders are not excused from compliance with the Code of Professional Responsibility (now the Rules of Professional Conduct) even though they are paid with public funds. *State v. Martinez*, 1982-NMCA-020, 97 N.M. 540, 641 P.2d 1087.

Attorney's duty upon appeal. — An attorney representing a client on appeal should first seek to convince the client of the wisdom of the attorney's professional judgment, but, failing such persuasion, the client's contention should be presented. The manner of such presentation is solely for the attorney, subject, however, to Rule 7-102(A) NMRA (now Rules 16-102, 16-303 and 16-304 NMRA) which prohibits an attorney from knowingly advancing unwarranted claims and from knowingly making false statements of law or fact. *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1.

Abandonment of issues on appeal. — The strict language of this rule and Rule 7-102 NMRA (now Rules 16-102, 16-303 and 16-304 NMRA) allows attorneys to abandon frivolous issues, or even non-frivolous issues, once the attorney has found one non-frivolous issue to argue with vigor on appeal. *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1.

Abandonment of client warrants suspension. — Where an attorney abandons his client and the client's case, despite his having been paid a substantial fee, he violates this rule and the violation warrants suspension. *In re Chowning*, 1983-NMSC-085, 100 N.M. 375, 671 P.2d 36.

Six-month suspension and other penalties were warranted since attorney accepted one-half of the fee and failed to represent the client, allowing default to be entered against the client. *In re Trujillo*, 1990-NMSC-062, 110 N.M. 180, 793 P.2d 862.

Suspension warranted where conflicting interests impair independent judgment. — If a lawyer allows his independent professional judgment on his client's behalf to be impaired by his representation of conflicting interests and, through negligence and acceptance of undue influence and instructions from others, he unintentionally aids an embezzlement scheme in which his client is the victim, such conduct warrants suspension from practice of law for a 30-day period and thereafter until reinstated as provided by the rules of the supreme court. *In re Dilts*, 1979-NMSC-055, 93 N.M. 131, 597 P.2d 316.

Censure and fine for false and misleading brief. — An attorney was publicly censured and fined $1,000 for knowingly making false, misleading and inaccurate statements in a brief to the court of appeals in violation of this rule (former Rule 7-102 NMRA). *In re Chakeres*, 1984-NMSC-088, 101 N.M. 684, 687 P.2d 741.

Restitution made only under pressure is entitled to no weight as a mitigating factor. *In re Stewart*, 1986-NMSC-043, 104 N.M. 337, 721 P.2d 405.

Misappropriation of funds. — Attorney's conversion to his own use of money received from a client to have a liquor license transferred to her name violated Rules 1-102, 6-101, 7-101 and 9-102 NMRA of the Code of Professional Responsibility (now Rules 16-102, 16-104, 16-115 and 16-804 NMRA of the Rules of Professional Conduct). *In re Gallegos*, 1986-NMSC-058, 104 N.M. 496, 723 P.2d 967.

One-year suspension warranted. — Attorney's actions warranted a one-year suspension since he made misrepresentations to a court, failed to return unearned fees, failed to render an accounting to a client and acted otherwise to prejudice the administration of justice. *In re Arrieta*, 1986-NMSC-045, 104 N.M. 389, 722 P.2d 640.

Indefinite suspension warranted. — Sixteen violations of nine rules governing professional responsibility, involving misrepresentation, neglect, improper fee-splitting, disrespect to various tribunals, and other conduct prejudicial to the administration of justice resulted in defendant's being suspended

indefinitely from the practice of law. *In re Quintana*, 1986-NMSC-057, 104 N.M. 511, 724 P.2d 220.

Indefinite suspension was warranted because an attorney violated Paragraph A by failing to abide by a client's decisions concerning the objectives of the representation. The attorney also violated Rule 16-101 NMRA, by failing to provide competent representation; Rule 16-103 NMRA, by failing to act with reasonable diligence and promptness in representing a client; Rule 16-104(A) NMRA, by failing to keep a client reasonably informed about the status of a matter and by failing to promptly comply with reasonable requests for information; Rule 16-116(D) NMRA, by failing to timely surrender papers and property to which a client was entitled and by failing to timely refund any advance payment of fee that had not been earned; Rule 16-804(D) and (H) NMRA, by engaging in conduct that is prejudicial to the administration of justice and conduct that adversely reflects on his fitness to practice law; Rule 16-801(B) NMRA, by failing to respond to lawful requests for information from the office of disciplinary counsel; and Rule 16-803(D) NMRA, by failing to cooperate with disciplinary counsel in the course of the investigation. *In re Carlton*, 2000-NMSC-001, 128 N.M. 419, 993 P.2d 736.

An attorney's apparent failure to complete several cases, to take steps to insure that the interests of her clients were protected upon her withdrawal from their cases, and to promptly refund any unearned portions of fees paid in advance, as well as her lack of cooperation with the disciplinary counsel, constitute conduct violative of the professional rules warranting an indefinite suspension from the practice of law. *In re Roth*, 1987-NMSC-004, 105 N.M. 255, 731 P.2d 951.

Disbarment warranted. — Disbarment was justified because of the inadequacy of an attorney's representation of clients in violation of Paragraph A of this rule and Rules 16-101, 16-103 and 16-104(A) NMRA, by his adverse business transaction with a client and misappropriation of trust account funds in violation of Rules 16-108, 16-115 and 16-116(D) NMRA, and violation of Rule 16-801 NMRA and other rules relating to disciplinary proceedings. *In re Darnell*, 1997-NMSC-025, 123 N.M. 323, 940 P.2d 171.

Rule violated. *In re Cutter*, 1994-NMSC-086, 118 N.M. 152, 879 P.2d 784; *In re Chavez*, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417.

Misleading the court. — In a personal injury action for damages resulting from a pharmacist filling a child's prescription for Ritalin with methadone, where attorney, who had prior knowledge that her client's records indicated that the prescription at issue had been mis-filled, who recommended that the client admit liability, who relied on representations from the pharmacist, pharmacy manager and out-of-state counsel for the pharmacy that the missing drugs could be accounted for and followed their advise to investigate other possible sources for the methadone that injured the plaintiff rather than using the attorney's independent judgment, and who proceeded to defend the case that was contrary to the evidence the attorney had found and that the attorney had not provided in discovery, the attorney misled the court. *In re Estrada*, 2006-NMSC-047, 140 N.M. 492, 143 P.3d 731.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 67 to 73.

Legal malpractice in settling or failing to settle client's case, 87 A.L.R.3d 168.

Method employed in collecting debt due client as ground for disciplinary action against attorney, 93 A.L.R.3d 880.

What statute of limitations governs damage action against attorney for malpractice, 2 A.L.R.4th 284.

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies, 13 A.L.R.4th 533.

Adequacy of defense counsel's representation of criminal client regarding appellate and

postconviction remedies, 15 A.L.R.4th 582.

Attorney's delay in handling decedent's estate as ground for disciplinary action, 21 A.L.R.4th 75.

Disciplinary action against attorney based on communications to judge respecting merits of cause, 22 A.L.R.4th 917.

Legal malpractice liability for advising client to commit crime or unlawful act, 51 A.L.R.4th 1227.

Ratification of attorney's unauthorized compromise of action, 5 A.L.R.5th 56.

Admissibility, in prosecution of attorney for collaborating with client in criminal activities, of evidence as to attorney's duties under Code of Professional Responsibility, 111 A.L.R. Fed. 403.

16-111. Special conflicts of interest for former and current government officers and employees.

A. **Subsequent representation.** Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Paragraph C of Rule 16-109 NMRA 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. **Imputation of conflict to firm; screening.** 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.

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 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. 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.

D. **Subsequent government employment.** Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 16-107 and 16-109 NMRA 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 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 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 NMRA of the Rules of Professional Conduct and subject to the conditions stated in Paragraph B of Rule 16-112 NMRA.

E. **"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.

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

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

Committee Commentary. —

[1] 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 NMRA 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".

[2] 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 NMRA 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.

[3] 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 pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, 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 NMRA of the Rules of Professional Conduct is not applicable to the conflicts of interest addressed by these paragraphs.

[4] 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 in which 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.

[5] 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 NMRA of the Rules of Professional Conduct.

[6] 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.

[7] 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.

[8] 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.

[9] 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 NMRA of the Rules of Professional Conduct and is not otherwise prohibited by law.

[10] 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.

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

COMPILER'S ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, changed the title from "Successive government and private employment" to the current title; in Paragraph A, deleted the provision which prohibited a lawyer from representing a private client in a matter in which the lawyer participated as a public officer or employee unless the government agency consented and added Subparagraphs (1) and (2); in Paragraph B, added the paragraph letter and title; added the introductory provision which applies Paragraph B to situations in which a lawyer is disqualified under Paragraph A; relettered former Paragraph B as Paragraph C; in Paragraph C, added the second sentence which defines "confidential government information"; relettered Paragraph C as Paragraph D; in Paragraph D, added Subparagraph (1); in Item (i) of Subparagraph (2) of Paragraph D, deleted the language which created an exception when under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter and added the exception when the government agency gives its informed consent in writing; in Item (ii) of Subparagraph (2) of Paragraph D, added the exception for a lawyer serving as a law clerk; relettered Paragraph D as Paragraph E; and deleted former Paragraph E which defined "confidential government information", Paragraph F which defined "screened", and Paragraph G which prohibited a lawyer in private practice from advocating before a governmental body at a time the lawyer is representing the governmental body.

Subsequent government employment. *State v. Chambers*, 1974-NMCA-058, 86 N.M. 383, 524 P.2d 999), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974) is expressly overruled to the extent that it can be read as always requiring disqualification of an entire district attorney's office from prosecuting a defendant solely on the ground that one employee of the office had worked for defendant on the same matter. When the disqualified employee is effectively screened from any participation in the prosecution of the defendant, the district attorney's office may, in general, proceed with the prosecution. *State v. Pennington*, 1993-NMCA-037, 115 N.M. 372, 851 P.2d 494.

Application to prosecution of former criminal client. — This rule does not apply to a prosecutor prosecuting a defendant whom she previously defended while in private practice, unless the subject of the prosecution is the same matter for which she previously defended the defendant; instead, Rule 16-109 NMRA applies to such a situation. *State v. Barnett*, 1998-NMCA-105, 125 N.M. 739, 965 P.2d 323.

Construction with 10-16-8 NMSA 1978. — This rule and Subsection C of 10-18-8 NMSA 1978, prohibiting an attorney, for a period of one year, from representing a client for pay in any matter in which the attorney appears before the attorney's former government agency employer, prohibit different types of conduct and are not in conflict. *Ortiz v. Taxation & Revenue Dep't*, 1998-NMCA-027, 124 N.M. 677, 954 P.2d 109.

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 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.

C. **Authority to reveal information.** Except as provided in Paragraph D of this rule, if:

(1) despite the lawyer's efforts in accordance with Paragraph B the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law; and

(2) 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 NMRA 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.

F. **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 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.

G. **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 NMRA of the Rules of Professional Conduct. If the organization's consent to the dual representation is required by Rule 16-107 NMRA 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.

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

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

Committee Commentary. —

The Entity as the Client

[1] 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.

[2] 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 NMRA of the Rules of Professional Conduct. Thus, by way of 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 NMRA 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 NMRA of the Rules of Professional Conduct.

[3] 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.

[4] 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 NMRA 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.

[5] 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

[6] 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 NMRA of the Rules of Professional Conduct. Paragraph C of this rule supplements Paragraph B of Rule 16-106 NMRA 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 NMRA 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 NMRA of the Rules of Professional Conduct may permit the lawyer to disclose confidential information. In such circumstances Paragraph D of Rule 16-102 NMRA 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 NMRA of the Rules of Professional Conduct may be required.

[7] 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.

[8] 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

[9] 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 prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This rule does not limit that authority. *See* Scope of the Rules of Professional Conduct.

Clarifying the Lawyer's Role

[10] 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.

[11] 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

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

Derivative Actions

[13] 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.

[14] 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 NMRA of the Rules of Professional Conduct governs who should represent the directors and the organization.

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

COMPILER'S ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph B, added the last sentence which requires a lawyer for an organization to report matters that are not in the best interest of the organization to the highest authority who can act on behalf of the organization; and deleted the former list of factors which the lawyer should consider in determining how to proceed and measures to be taken to minimize disruption of the organization and the risk of revealing information to persons outside the organization; deleted former Paragraph C which permitted the lawyer to resign from an organization when the highest authority in the organization insists on an act or refusal to act that is in violation of law and that is likely to injure the organization; added new Paragraphs C, D and E; relettered former Paragraph D as Paragraph F; in Paragraph F, changed "it is apparent" to "the lawyer knows or reasonably should know"; and relettered former Paragraph E as Paragraph G.

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 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.

C. **Authority to reveal information.** Except as provided in Paragraph D of this rule, if:

(1) despite the lawyer's efforts in accordance with Paragraph B the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law; and

(2) 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 NMRA 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.

F. **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 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.

G. **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 NMRA of the Rules of Professional Conduct. If the organization's consent to the dual representation is required by Rule 16-107 NMRA 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.

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

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

Committee Commentary. —

The Entity as the Client

[1] 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.

[2] 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 NMRA of the Rules of Professional Conduct. Thus, by way of 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 NMRA 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 NMRA of the Rules of Professional Conduct.

[3] 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.

[4] 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 NMRA 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.

[5] 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

[6] 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 NMRA of the Rules of Professional Conduct. Paragraph C of this rule supplements Paragraph B of Rule 16-106 NMRA 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 NMRA 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 NMRA of the Rules of Professional Conduct may permit the lawyer to disclose confidential information. In such circumstances Paragraph D of Rule 16-102 NMRA 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 NMRA of the Rules of Professional Conduct may be required.

[7] 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.

[8] 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

[9] 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 prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This rule does not limit that authority. *See* Scope of the Rules of Professional Conduct.

Clarifying the Lawyer's Role

[10] 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.

[11] 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

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

Derivative Actions

[13] 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.

[14] 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 NMRA of the Rules of Professional Conduct governs who should represent the directors and the organization.

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

COMPILER'S ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-29, effective November 3, 2008, in Paragraph B, added the last sentence which requires a lawyer for an organization to report matters that are not in the best interest of the organization to the highest authority who can act on behalf of the organization; and deleted the former list of factors which the lawyer should consider in determining how to proceed and measures to be taken to minimize disruption of the organization and the risk of revealing information to persons outside the organization; deleted former Paragraph C which permitted the lawyer to resign from an organization when the highest authority in the organization insists on an act or refusal to act that is in violation of law and that is likely to injure the organization; added new Paragraphs C, D and E; relettered former Paragraph D as Paragraph F; in Paragraph F, changed "it is apparent" to "the lawyer knows or reasonably should know"; and relettered former Paragraph E as Paragraph G.

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