In for a Pound: Ethical Issues Associated with Co-Counsel Arrangements

State Bar of New Mexico's
Lawyer Professional Liability and Insurance Committee

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I. Introductory Comments

The State Bar's Ethics Advisory Committee's (EAC) *Formal Opinion 2020-01* is big. It is a game-changer. If we don't scare you in this CLE, then something is wrong. Even scarier, we are going to raise a lot of questions and offer very few answers, and the answers aren't that good. If you have been the sponsor (the New Mexico licensed lawyer) in a *pro hac vice* relationship or been part of a co-counsel arrangement, odds are you have not done it correctly. At least as gauged by *Formal Opinion 2020-01.* The opinion is attached.

The foregoing may be more *doomsday* than it needs to be – but we do hope we are getting your attention. If that is the *bad news*, there is a *good news* side to *Formal Opinion 2020-01.*

There is a certain sweet irony here. Some complain about the invasion of lawyers from outside the state. If a lawyer from outside the borders has been admitted on reciprocity, that lawyer is "one of us" even though they are often clueless about New Mexico law and procedure. But, for those outsiders who are not *one of us* and *pro hac vice* is that lawyer's passport to practicing in this state, the days of the New Mexico *sponsoring lawyer* **casually** taking on that responsibility evaporated with *Formal Opinion 2020-01*. Being perhaps too facetious but to make a point, the days of giving directions to the courthouse, tips about good places to eat and explaining red and green chile and recommending they ask for "Christmas" are gone. That is being too facetious, but the guess on the part of these CLE presenters is that most lawyers' (including themselves) sponsoring of *pro hac vice* out-of-state lawyers would not pass muster under the EAC's *Formal Opinion 2020-01*.

At the outset, it is important to strongly emphasize that the intent of this CLE is not to attack or be critical of *Formal Opinion 2020-01*. It is well reasoned, it is clear, and it is probably *spot-on* in terms of the law and what should happen. But is it too *spot*-on? Does it embrace the realities of the practice of law and client's desires in terms of who they want to represent them in legal matters? Should consideration be given to submitting additional facts to the EAC to consider? This CLE does not address those questions. Instead, we focus on highlighting the problems, the risks and how to move forward.

There is disagreement among this CLE's presenters. One believes the only way around the advisory opinion is what the opinion itself points to – NMRA 16-102 (C) and 1-089.1 (A) – and drafting agreements where the clients are provided informed consent as to the division of labor between a client's lawyers. But even assuming you can successfully draft an agreement, does that relieve the local New Mexico lawyer from responsibility? The advisory opinion is directed at the *pro hac vice* relationship, but what about Rules 16-102 and 1-089.1 in the context of a co-counsel agreement?

II. Definitions

For purposes of discussion, defining terms helps. The following are not perfect definitions, but they will work for our purposes.

Pro Hac Vice – Counsel licensed in another state and in good standing in that state who seek to represent clients in New Mexico (not just litigation, but to do anything which would constitute the practice of law in New Mexico), and which is governed by NMRA 1-089.1 (A) requiring a sponsoring New Mexico licensed lawyer.

Local Counsel – Certainly includes the New Mexico lawyer sponsoring an out-of-state non-licensed lawyer *pro hac vice*, but also an out-of-state lawyer who is New Mexico licensed, perhaps through reciprocity, but who is not comfortable with

New Mexico law, procedure, customs, and practice and wants a local New Mexico lawyer to assist.

Fee Splitting – As defined in NMRA 16-105 (F) is where the lawyers split fees based on proportion of work performed or where the lawyers assume joint responsibility and where the agreement as to fees is in writing and approved by the client. It is worth noting, and being attached to the materials, is the State Bar's Ethics Advisory Opinion 2021-001 addressing "fee splitting when one lawyer provides no services."

Referral Fee – Generally prohibited in New Mexico by NMRA 16-702. *See Formal Opinion 2021-001* just referred to and attached. The Advisory Opinion observes that a lawyer cannot do an end-run on the prohibition on referral fees by simply saying, "I'm co-counsel on the case."

III. Can there be created divisions of *lawyering* based on areas of expertise in certain areas of law? Can lawyers sponsoring *pro hac vice* or serving as local co-counsel in such "specialty" situations limit their involvement by agreement under Rule 16-102 (C)?

Toxic tort (asbestos as an example), medical device litigation, medical malpractice, regulatory matters, public regulation, banking law, trucking accidents, consumer law and others could be included "specialty" areas where lawyers from outside New Mexico who are not licensed in New Mexico (sometimes because of experience and training, or sometimes because clients outside of New Mexico have developed relationships with lawyers not licensed in New Mexico) have

understandable reasons for handling legal matters in this state and they require a licensed New Mexico lawyer to sponsor them *pro hac vice* or to serve as local counsel. But what if the subject of the legal matter (whether it be litigation or transactional) is truly sophisticated and beyond a New Mexico lawyer's training and experience, does *Formal Opinion 2020-01* preclude the New Mexico lawyer from agreeing to sponsor *pro hac vice* or to agree to be local counsel to a non-New Mexico licensed lawyer? Or can the lawyers, with a client's informed consent, limit representation of the New Mexico sponsoring lawyer or New Mexico licensed co-counsel under Rule 16-102 (C)? The Formal Opinion *gives a tip of the hat* to this possibility, but then goes on to state, "that such limitation would have to be entered into by the client with all counsel; local counsel cannot limit their representation to be more restrictive than *pro hac vice* counsel with whom they are associating." Not encouraging. Perhaps more than "not encouraging", that may be the answer: a lawyer sponsoring a *pro hac vice* may be in the case with both feet.

In the opinion, the EAC discusses both the Utah and Wyoming Rules of Professional Conduct seeming to suggest that the sponsoring lawyer's or licensed co-counsel's professional responsibility might be limited to providing guidance on that state's law, statutes, cases, rules, procedures and customs, including that state's Rules of Professional Conduct and provided that local counsel is responsible for the conduct of the court proceedings and is also responsible to advise client if and/or the

court or tribunal if local counsel determines *pro hac vice* counsel is engaging in conduct likely to serious prejudice client or impair the administration of justice. But that may be reading too much into that portion of the ethical opinion.

In agreeing to sponsor a non-New Mexico licensed *pro hac vice* or entering into a co-counsel agreement, there are going to be risks. Some of those risks are outlined below.

IV. Co-Counsel Arrangements

In many ways, the *pro hac vice* arrangement and two lawyers serving as co-counsel are the same; with *pro hac vice*, one of the lawyers is not licensed in New Mexico. It is fair to say that the requirements of *Formal Opinion 2020*-01also apply to two or more lawyers joining forces on a case; a situation which is becoming more prevalent in New Mexico.

Again, the circumstances leading up to lawyers joining forces can vary. Lawyer advertising is a fact of legal life in our state, and it is not uncommon for a lawyer or law firm to attract a case which is beyond its experience and skill, and when that happens, reaching out to a more experienced lawyer often occurs. It is also not uncommon for a lawyer to believe at the outset of the attorney-client relationship they can handle the case only to have it morph into something much bigger. NMRA 16-101 and our Rules of Professional Conduct dictate that a lawyer has a duty to be

competent. If a lawyer finds her/himself suddenly in deep water, getting co-counsel is the **right thing** to do.

There needs to be a written agreement though which is approved by the client with informed consent[1]. Can the lawyers (and client) by agreement limit their responsibilities in the representation that will effectively protect them and be binding on the client? Can that be accomplished in the shadow of *Formal Opinion 2020-01*? It is not clear; but it is clear that *pro hac vice* and lawyers co-counseling relationships are going to continue, and lawyers need to do their best to address the divisions of labor or limitations of representation in an agreement.

It has probably already been stated, but perhaps not directly enough. A lawyer cannot limit what might be called a lawyer's "basic" duties which come with any attorney-client relationship – the duties spelled out in the Rules of Professional Conduct by any agreement. The question not answered in this paper or CLE is if a representation presents a subject matter which is so specialized by its very nature requiring what we will call "specialized lawyering", can the lawyers limit their involvement, and can clients be sufficiently informed of this to accomplish *informed consent* under our Rules of Professional Conduct?

We do not have the answer to that question, and it may be the lawyer is "in for a penny, in for a pound", but if lawyers are going join forces via *pro hac vice* or

[1] How and what is "informed consent" is not being addressed in this paper.

as co-counsels, it should be addressed in a written agreement, and the more thoughtful and nuanced, the better.

Provided with this paper is a basic template. While it is tempting to go beyond the template, the concern is that adding detail might be misleading as to "all that has to be done."

V. Potential Risks

A. What do you know about the legal matter?

B. What do you know about the lawyer you are agreeing to sponsor *pro hac vice* or co-counsel with?

C. How much due diligence have you done on either A or B; or should do?

D. What do you know about the client you will be representing?

E. What risks (professional risks to you) are involved with the legal matter?

F. Related to E, what professional liability insurance does your *pro hac vice* lawyer or co-counsel maintain – limits of coverage.

G. Also related to E, do you maintain professional liability limits which will address the risks presented by the legal matter.

H. Does your professional liability policy address *pro hac vice* or co-counsel agreements?

I. If the lawyer is mindful of the responsibilities set out in *Formal Opinion 2020-01*, your legal fees and costs will be substantial, and does the client understand that and will you get paid? And, if you aren't being paid, can you withdraw?

J. What if your *pro hac vice* lawyer or co-counsel is terminated by the client or withdraws? Are you taking over?

VI. Concluding thoughts

We do not believe *Formal Opinion 2020-01* will stop New Mexico lawyers from sponsoring lawyers *pro hac vice* or co-counseling with New Mexico licensed and non-licensed lawyers, but we have a new measuring stick for what those relationships require.

Co-Counsel Agreement
[Would this work for Pro Hac Vice???]

This Co-Counsel Agreement [Pro Hac Vice Agreement] is between [firm name] and [firm name]. The two law firms are referred to as "The Firms."

I. Purpose
II. Respective Obligations
III. Attorney Fees and Expenses
IV. Additional Counsel
V. Resignation and Termination
VI. Client Consent

[Client name] hereby acknowledge that have been fully informed of the terms of this Co-Counsel Agreement prior to its execution by The Firms and consent to the division of responsibility and fees described herein.

By: _____ Date: _____
[client name]

[Firm name]

By:

[Firm name] Date:

Formal Advisory Opinion

2020-01

Ethics Advisory Opinion

From the State Bar of New Mexico's Ethics Advisory Committee

Formal Opinion: 2020-01

Topic: Lawyer's Responsibility When Acting As Local Counsel For A Client In Association With Pro Hac Vice Counsel

Rules Implicated: The Entirety Of Rules 16-100 Et Seq. Nmra (2020); With Special Emphasis On Article 1: Lawyer-Client Relationship Rules

Disclaimer: The Ethics Advisory Committee of the State Bar of New Mexico ("Committee") is constituted for the purpose of advising lawyers on the application of the New Mexico Rules of Professional Conduct in effect at the time the opinion is issued ("Rules"). One way in which the Committee attempts to advise lawyers is through "formal opinions," which are published. In issuing formal opinions, the conclusions are based upon any facts that are referenced in the opinion. Lawyers are cautioned that should the Rules subsequently be revised, or different facts be presented, a different conclusion may be appropriate. The Committee does not opine on matters of substantive law although concerns regarding substantive law are sometimes raised in the opinions. The Committee's opinions are advisory only, and are not binding on the inquiring lawyer, the disciplinary board, or any tribunal. The statements expressed in this opinion are the consensus of the Committee members who considered the question presented.

Question Presented:
What are a lawyer's duties to the client under the Rules of Professional Conduct when they are acting in the capacity as local counsel for that client in association with a pro hac vice lawyer?

Summary Answer:
A lawyer who enters an appearance in a matter as local counsel in association with another lawyer who is admitted pro hac vice has the same duties under the Rules as in every matter in which the attorney appears.

Analysis:

Under a straightforward reading of the Rules of Professional Conduct, there is no differentiation between representing a client through a pro hac vice arrangement or through direct engagement.

The pro hac vice arrangement is a creation of the Rules of Procedure, which make it clear that local counsel is considered to have entered an appearance in the matter as an attorney of record along with the out-of-state attorney, who is only permitted to practice in association with this local counsel – a member in good standing with the bar.

Specifically, Under Rule 24-106 NMRA an attorney not admitted in New Mexico may practice law after complying with required conditions and only "in association with an active member in good standing as a member of the State Bar of New Mexico." Pursuant to Rule 1-089.1 NMRA. , the local counsel must be present at every hearing "unless excused by the court," and is considered to have signed every pleading and is subject to Rul 1-011 for everything submitted to the court . Therefore, a lawye acting as local counsel implicitly certifies to the court that the "ha[ve] read the pleading, motion, or other paper; that to th best of the [their] knowledge, information, and belief there i good ground to support it; and that it is not interposed for delay Rule 1-011(A) NMRA.

Nothing in the Rules of Procedure differentiate between th level of participation or professionalism expected from loca counsel and that of other counsel involved in a matter. To th contrary, they express the clear expectation that once counse has entered their appearance, they are guided by universall applicable principles.

Although unpublished and therefore not authoritative, Khals v. Puri provides the example of how the expectations for "loca counsel" are no different than for "counsel." In that case, th defendant had filed for a writ of certiorari with the New Mexic Supreme Court, which it granted. No. S-1-SC-36192 (Nov. 27 2017); 2017 WL 9833745 (unpublished). The court set ora arguments for September 26, 2017 but canceled them when local counsel did not appear with pro vac vice counsel, in violation of Rule 12-302(E). Id. While the New Mexico Supreme Court ultimately decided to quash the order to show cause, it did award attorney's fees to opposing counsel as compensation and for the Rule 12-302(E) violation of local counsel. Id.

While it does not appear to be a case involving a pro hac vice arrangement, In Re Estrada provides an example where a less-experienced subordinate attorney was held accountable under the Rules of Professional Conduct, even though directed in her conduct by out-of-state counsel controlling the litigation. 2006-NMSC-047; 140 N.M. 492. At the client and out-of-state counsel's urging, the lawyer allowed a forged prescription to be submitted, violating her duties to the judiciary and the administration of justice. Specifically, the court found that she had repeatedly violated " Rules 16–102(D) and 16–301 by pursuing a meritless defense and assisting her client in conduct that misled the court." Id. ¶27, 140 N.M. at 502. The court did not find the subordinate role compelling, noting that "under Rule 16–502(A) NMRA, '[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.'" Id. ¶26, 140 N.M. at 502. Finally, the Supreme Court admonished that: "It should be clear to Members of the New Mexico Bar and those who provide or offer to provide legal services here, that such conduct will not be tolerated." Id. ¶27, 140 N.M. at 502.

From the Rules of Procedure and these two cases, we are brought squarely back to the Rules of Professional Conduct. Those rules start by directing that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 16-101 NMRA. Beginning with that rule, and going forward, a New Mexico lawyer who enters his or her appearance on behalf of a client – as sole

or local counsel – is thereafter bound by the identical duties to the client, the courts, and the administration of justice.

The Fifth Circuit, applying the Louisiana Rules of Professional Conduct and discussing the "duty of care," provides an on-point example in Curb Records v. Adam and Reese L.L.P., 203 F.3d 828, 1999 WL 1240800 (5th Cir. 1999)(unpublished). In that case, a California firm hired local counsel and stated that his sole function was to "file[] and forward pleadings, discovery and orders" and that he was not to have any contact with the client. Id. at *1. With this understanding of his role, local counsel did not inform the client of a series of discovery defaults by the California firm, which resulted in sanctions and ultimately an unfavorable settlement. The district court, relying solely on contract principles, did not find that local counsel committed malpractice. Id. at *3. However, the Fifth Circuit, after a thorough analysis of lawyers' duties under their Rules of Professional conduct concluded:

> [I]n a situation in which it is clear to a reasonable attorney that substantial prejudice will occur to the client as a result of lead counsel's malfeasance or misfeasance, we think that the duty of care under Louisiana law requires local counsel to notify the client of lead counsel's actions or inaction, irrespective of instructions, excuses, or strategies of lead counsel."

Id. at *6 (emphasis added). In other words, no pro hac vice agreement between attorneys can serve to alter local counsel's duties imposed by the Rules of Professional Conduct.

Other ethics advisory committees, including Utah's, have looked at this precise question. In its Opinion 17-04 (Sept. 26, 2017), Utah did not mince words, clearly concluding after a similar analysis that:

> Acting as local counsel for a pro hac vice attorney is not a minor or perfunctory undertaking. Local counsel violates the Utah Rules of Professional Conduct when local counsel acts as nothing more than a mail drop or messenger for the pro hac vice attorney. All attorneys admitted to the Utah State Bar are required to comply with all of the Utah Rules of Professional Conduct, including when they are acting as local counsel. Under Rule 5.1 of the Utah Rules of Professional Conduct, local counsel has a general duty to adequately supervise pro hac vice counsel and to provide expertise regarding Utah law, statutes, cases, rules, procedures, and customs in Utah. Local counsel is responsible to the client and responsible for the conduct of the Utah court proceedings.....[I]f local counsel determines that the pro hac vice attorney is engaging in conduct that is likely to seriously prejudice the client's interests, or the administration of justice, local counsel must communicate local counsel's independent judgment to the client, and, if necessary, to the court or tribunal.

Emphasizing this point even further, Wyoming recently added the following language to their rule governing pro hac vice admissions: "Local counsel shall be deemed to have ratified all conduct of pro hac vice counsel and shall be responsible for pro hac vice counsel's violation of the Rules of Professional Conduct." Rules Governing the Wyoming State Bar and the Authorized Practice of Law, Rule 8(3)(e) (effective December 1, 2019).

Finally, while our Rules allow for limited entries of appearance, Rule 16-102(C) NMRA and Rule 1-089(A) NMRA, it is the opinion of the Committee, in light of the foregoing discussion, that such limitation would have to be entered into by the client with all counsel; local counsel cannot limit their representation to be more restrictive than pro hac vice counsel with whom they are associating.

Conclusion:
For the reasons set forth above, the Committee concludes that a lawyer who enters an appearance in a matter as local counsel in association with another lawyer who is admitted pro hac vice, has the identical duties under the Rules of Professional Conduct to the client and to any court that exist in every matter in which the lawyer appears.

Endnotes

1 Rule 1-089.1(A) NMRA Nonadmitted counsel.
Except as otherwise provided in Paragraph C of this rule, counsel not admitted to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or country, may upon compliance with Rule 24-106 NMRA, participate in proceedings before New Mexico courts only in association with counsel licensed to practice law in good standing in New Mexico, who, unless excused by the court, must be present in person in all proceedings before the court. Nonadmitted counsel shall state by affidavit that they are admitted to practice law and are in good standing to practice law in another state or country and that they have complied with Rule 24-106 NMRA. The affidavit shall be filed with the first paper filed in the court, or as soon as practicable after a party decides on representation by nonadmitted counsel. Upon filing of the affidavit, nonadmitted counsel shall be deemed admitted subject to the other terms and conditions of this paragraph. A separate motion and order are not required for the participation of nonadmitted counsel. New Mexico counsel must sign the first motion or pleading and New Mexico counsel's name and address must appear on all subsequent papers or pleadings. New Mexico counsel shall be deemed to have signed every subsequent pleading and shall therefore be subject to the provisions of Rule 1-011 NMRA. For noncompliance with Rule 24-106 NMRA or this rule, or for other good cause shown, the court may issue an appropriate sanction including termination of the attorney's appearance in any proceeding.

2 Similarly, in appellate court, "[a]n attorney or firm shown as participating in the filing of any brief, motion, or other paper shall, unless otherwise indicated, be deemed to have appeared in the cause." Rule 12-302(B) NMRA.

3 Although New Mexico has not incorporated pro hac vice language into its Rule 16-501 NMRA, the rationale of the Utah Rule is persuasive.

Formal advisory opinion

2021-001

STATE BAR OF NEW MEXICO
ETHICS ADVISORY COMMITTEE
FORMAL ETHICS ADVISORY OPINION

FORMAL OPINION: 2021- 001

TOPIC: Fee Splitting when one lawyer provides no services

RULES IMPLICATED: Rules 16-100, 16-101, 16-103, 16-104, 16-105 and 16-702 NMRA (2021).

DATE ISSUED: November 15, 2021

DISCLAIMER FOR FORMAL OPINIONS: The Ethics Advisory Committee of the State Bar of New Mexico ("Committee") is constituted for the purpose of advising lawyers on the application of the New Mexico Rules of Professional Conduct in effect at the time the opinion is issued ("Rules"). One way in which the Committee attempts to advise lawyers is through "formal opinions," which are published. In issuing formal opinions, the conclusions are based upon any facts that are referenced in the opinion. Lawyers are cautioned that should the Rules subsequently be revised, or different facts be presented, a different conclusion may be appropriate. The Committee does not opine on matters of substantive law although concerns regarding substantive law are sometimes raised in the opinions. The Committee's opinions are advisory only, and are not binding on the inquiring lawyer, the disciplinary board, or any tribunal. The statements expressed in this opinion are the consensus of the Committee members who considered the question presented, based upon the Rules in effect on the date issued.

QUESTIONS PRESENTED:

1. May a lawyer split a fee with counsel who, other than signing up the client, does no work in and assumes no responsibility for the matter?

2. Under what circumstances may lawyers who are not in the same firm split a fee?

SUMMARY ANSWERS:

1. No.

2. A fee may only be split between lawyers not in the same firm if each of the conditions of Rule 16-105(F) are met.

ANALYSIS:

1. Referral Fees Generally Prohibited.

In New Mexico, the Rules generally prohibit a lawyer from making the payment of a fee or "anything of value" to a person who has recommended the lawyer's services. Rule 16-702(B) NMRA (2021). There are only four enumerated and specific exceptions to this prohibition:

> (1) A lawyer may pay the reasonable costs of advertisements or communications through written, recorded or electronic communication, including public media;
> (2) A lawyer may pay the usual charges of a legal service plan[1] or not-for profit or qualified lawyer referral service[2];
> (3) A lawyer may purchase a law practice in accordance with Rule 16-117 NMRA (2021); and
> (4) A lawyer may refer clients to another lawyer or non-lawyer professional pursuant to a reciprocal referral agreement so long as the agreement is not exclusive and the client is informed of the nature and existence of the agreement.

Id. Any payment for referral (i.e., referral fee) that does not squarely fall within one of these exceptions is an impermissible referral fee prohibited by the Rules. For purposes of this opinion, the Committee assumes that the lawyer who signed up the client does not fall within any of the four exceptions, and therefore no referral fee or payment for referral is permissible.

2. Fee Splitting Permitted Under Certain Conditions.

The Rules do allow fee splitting, or a division of a fee, between lawyers who do not practice in the same firm but only under certain circumstances. The primary Rule applicable to this issue is Rule 16-105(F), which provides:

> (F) Fee Splitting. A division of a fee between lawyers who are not in the same firm may be made *only* if:
> (1) the division is in proportion to the services performed by each lawyer *or* each lawyer assumes joint responsibility for the representation;
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
> (3) the total fee is reasonable.

(Emphasis added).

The [Code of Professional Conduct] Committee Commentary ("Commentary") to this Rule recognizes that "A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well." Rule 16-105 NMRA (2021), cmt. [8]. In this Committee's view, such an arrangement could be appropriate based upon combined ability to timely and competently represent the client.

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[1] A "legal service plan" is a "prepaid or group legal service plant or a similar delivery system that assists people who seek to secure legal representation." Rule 16-702 NMRA (2021), cmt. [6].

[2] A "qualified lawyer referral service" is defined as a lawyer referral service that has been approved by an appropriate regulatory authority. Rule 16-702(B)(2).

A. Proportion of Services or Joint Responsibility.

The first prong of Rule 16-105(F), *i.e.*, a division of fees may be permitted "in proportion to the services performed by each lawyer" or "each lawyer assumes joint responsibility for the representation." A division "in proportion to the services performed" is not further explained in the rule or the commentary. In the Committee's view, such a division might be based upon the respective time spent on the matter by each attorney, or the application of both time and value provided by each lawyer. By example, if one lawyer is providing very generalized legal service while another is providing very specialized legal service, a reasonable adjustment by which the lawyer providing very specialized legal service is compensated more than the lawyer providing more generalized service is likely not prohibited by the Rule.

Lawyers may also split a fee, not based upon the proportion of services provided, so long as each lawyer assumes joint responsibility for representation. While the Rules do not define "joint responsibility," the Commentary advises that "joint responsibility ... entails financial and ethical responsibility for the representation *as if the lawyers were associated in a partnership*." (Emphasis added). Rule 16-106 NMRA (2021), cmt. [8]. Existing New Mexico case law does not expound on the meaning of the term as used in this Commentary. However, New Mexico partnership statutes provide: "Except as otherwise provided in Subsections (b) and (c) of this section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." §54-1A-306 NMSA 1978. Some other ethics committees have opined that "joint responsibility" under similarly worded rules would include joint responsibility for legal malpractice. *See, e.g., New York State Bar Ass'n Ethics Op. 1201* (2020). The Committee does not opine on substantive law issues. However, lawyers utilizing the "joint responsibility" option would be wise to consider the substantive law issues surrounding such a relationship, including partnership law and resulting liabilities. Certainly, at a minimum, a lawyer contemplating a relationship that would be allowed under Rule 16-105(F) should consider the competency of the other lawyer in regard to the representation at hand. *See*, Rule 16-101 NMRA (2021).

Regardless of whether a matter involves proportionate splitting of a fee or a split based on joint responsibility, in any joint representation matter, it is important for all lawyers involved to recognize that the duties to a client as set forth generally in the Rules, as well as in substantive law, apply to each lawyer. By example, responsibilities related to competence, allocation of authority between lawyer and client, diligence, communication, fees, confidentiality, etc., apply to each lawyer engaged in a joint representation. *See, e.g.*, Rules 16-101 through 16-106. This includes certain specific obligations, such as the disclosure of professional liability insurance requirement of Rule 16-104(C), which applies to each lawyer, and each lawyer must make the disclosure and obtain an acknowledgement from the client if the requisite level of professional liability insurance coverage is not held by the lawyer.

B. Client Agreement.

Any fee splitting arrangement requires that the "client agrees to the arrangement, including the share each lawyer will receive." Rule 16-105(F)(2) NMRA (2021). The client's agreement must

be confirmed in writing. Lawyers are obligated to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 16-104(B) NMRA (2021). Either or both lawyers involved should encourage the client to ask any and all questions the client may have regarding the arrangement and then provide the client with candid responses. In the Committee's view, this requires the arrangement to be set forth in writing for the client's review and, at the very least, the writing must confirm the client's agreement.

C. Fee Must be Reasonable.

Lastly, the final requirement of Rule 16-105(F) is the total fee charged to the client be reasonable. This triggers consideration of Rule 16-105(A) which prohibits a lawyer from "mak[ing] an arrangement for, charg[ing] or collect[ing] an unreasonable fee or an unreasonable amount for expenses." The Commentary states that the fees must be "reasonable under the circumstances." Cmt. [1]. A non-exclusive list of considerations is provided in Rule 16-105(A):

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

These factors "are not exclusive … nor will each factor be relevant in each instance." Cmt. [1]. Thus, the reasonableness of a fee in cases involving fee splitting will be based upon the facts and circumstances of the specific representation, as is true for all cases.

CONCLUSION:

Fee splitting where one of the lawyers brings the client to the matter but neither provides any service to the client nor assumes joint responsibility for the representation is prohibited under New Mexico's Rules. Such an arrangement would amount to an impermissible referral fee.

Any matter in which a fee is split between lawyers not in the same firm must satisfy three requirements:

1. Either:
    a. The division is in proportion to the services performed by each lawyer; or
    b. Each lawyer assumes joint responsibility (ethical and financial) for the representation as if the lawyers were in a partnership regarding the matter;
2. The client must agree to the arrangement, including the share each lawyer will receive, with the client's agreement confirmed in writing; and
3. The total fee must be reasonable.