

1 **16-108. Conflict of interest; current clients; specific rules.**

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

5 (1) the transaction and terms on which the lawyer acquires the interest are fair
6 and reasonable to the client and are fully disclosed and [~~transmitted~~] sent in writing in a manner
7 that can be reasonably understood by the client;

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

10 (3) the client gives informed consent, in a writing signed by the client, to the
11 essential terms of the transaction and the lawyer's role in the transaction, including whether the
12 lawyer is representing the client in the transaction.

13 B. **Use of information limited.** A lawyer shall not use information relating to
14 representation of a client to the disadvantage of the client unless the client gives informed consent,
15 except as permitted or required by these rules.

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

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

4 E. **Financial assistance.** A lawyer shall not provide financial assistance to a client in
5 connection with pending or contemplated litigation, [~~except that~~] but:

6 (1) a lawyer may advance court costs and expenses of litigation, the repayment
7 of which may be contingent on the outcome of the matter; [~~and~~]

8 (2) a lawyer representing an indigent client may pay court costs and expenses
9 of litigation on behalf of the client[~~;~~]; and

10 (3) a lawyer representing an indigent client pro bono, a lawyer representing an
11 indigent client pro bono through a nonprofit legal services or public interest organization, and a
12 lawyer representing an indigent client pro bono through a law school clinical or pro bono program
13 may provide modest gifts to the client for food, rent, transportation, medicine, and other basic
14 living expenses. The lawyer:

15 (a) may not promise, assure, or imply the availability of the gifts before
16 retention or as an inducement to continue the client-lawyer relationship after retention;

17 (b) may not seek or accept reimbursement for the modest gift from the
18 client, a relative of the client, or anyone affiliated with the client; and

19 (c) may not publicize or advertise a willingness to provide the gifts to
20 prospective clients.

21 Financial assistance under this rule may be provided even if the representation is eligible for fees
22 under a fee-shifting statute.

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

3 (1) the client gives informed consent;

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

6 (3) information relating to representation of a client is protected as required by
7 Rule 16-106 NMRA [~~of the Rules of Professional Conduct~~].

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

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

15 (1) make an agreement prospectively limiting the lawyer’s liability to a client
16 for malpractice unless the client is independently represented in making the agreement; or

17 (2) settle a claim or potential claim for [~~such~~] that liability with an
18 unrepresented client or former client unless that person is advised in writing of the desirability of
19 seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in
20 connection therewith.

21 I. **Proprietary interest in cause of action.** A lawyer shall not acquire a proprietary
22 interest in the cause of action or subject matter of litigation the lawyer is conducting for a client,
23 [~~except that~~] but the lawyer may:

- 1 (1) acquire a lien authorized by law to secure the lawyer’s fee or expenses; and
2 (2) contract with a client for a reasonable contingent fee in a civil case.

3 **J. Client-lawyer sexual relationships.** A lawyer shall not have sexual relations with
4 a client unless a consensual sexual relationship existed between them when the client-lawyer
5 relationship commenced.

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

8 [As amended by Supreme Court Order No. 08-8300-029, effective November 3, 2008; as amended
9 by Supreme Court Order No. 16-8300-005, effective December 31, 2016; as amended by Supreme
10 Court Order No. S-1-RCR-2023-00004, effective December 31, 2024.]

11 **Committee commentary.** —

12 **Business Transactions Between Client and Lawyer**

13 [1] A lawyer’s legal skill and training, together with the relationship of trust and confidence
14 between lawyer and client, create the possibility of overreaching when the lawyer participates in a
15 business, property, or financial transaction with a client, for example, a loan or sales transaction
16 or a lawyer investment on behalf of a client. The requirements of Paragraph A must be met even
17 when the transaction is not closely related to the subject matter of the representation, as when a
18 lawyer drafting a will for a client learns that the client needs money for unrelated expenses and
19 offers to make a loan to the client. The rule applies to lawyers engaged in the sale of goods or
20 services related to the practice of law, for example, the sale of title insurance or investment services
21 to existing clients of the lawyer’s legal practice. *See* Rule 16-507 NMRA. It also applies to lawyers
22 purchasing property from estates they represent. It does not apply to ordinary fee arrangements
23 between client and lawyer, which are governed by Rule 16-105 NMRA, although its requirements

1 must be met when the lawyer accepts an interest in the client’s business or other non-monetary
2 property as payment of all or part of a fee. In addition, the rule does not apply to standard
3 commercial transactions between the lawyer and the client for products or services that the client
4 generally markets to others, for example, banking or brokerage services, medical services,
5 products manufactured or distributed by the client, and utilities’ services. In [~~such~~] these
6 transactions, the lawyer has no advantage in dealing with the client, and the restrictions in
7 Paragraph A are unnecessary and impracticable.

8 [2] Paragraph (A)(1) requires that the transaction itself be fair to the client and that its essential
9 terms be communicated to the client, in writing, in a manner that can be reasonably understood.
10 Paragraph (A)(2) requires that the client also be advised, in writing, of the desirability of seeking
11 the advice of independent legal counsel. It also requires that the client be given a reasonable
12 opportunity to obtain [~~such~~] that advice. Paragraph (A)(3) requires that the lawyer obtain the
13 client’s informed consent, in a writing signed by the client, both to the essential terms of the
14 transaction and to the lawyer’s role. When necessary, the lawyer should discuss both the material
15 risks of the proposed transaction, including any risk presented by the lawyer’s involvement, and
16 the existence of reasonably available alternatives, and should explain why the advice of
17 independent legal counsel is desirable. *See* Rule 16-100(E) NMRA (definition of informed
18 consent).

19 [3] The risk to a client is greatest when the client expects the lawyer to represent the client in
20 the transaction itself or when the lawyer’s financial interest otherwise poses a significant risk that
21 the lawyer’s representation of the client will be materially limited by the lawyer’s financial interest
22 in the transaction. Here the lawyer’s role requires that the lawyer must comply, not only with the
23 requirements of Paragraph A, but also with the requirements of Rule 16-107 NMRA. Under that

1 rule, the lawyer must disclose the risks associated with the lawyer’s dual role as both legal adviser
2 and participant in the transaction, such as the risk that the lawyer will structure the transaction or
3 give legal advice in a way that favors the lawyer’s interests at the expense of the client. Moreover,
4 the lawyer must obtain the client’s informed consent. In some cases, the lawyer’s interest may be
5 such that Rule 16-107 [~~NMRA~~] will preclude the lawyer from seeking the client’s consent to the
6 transaction.

7 [4] If the client is independently represented in the transaction, Paragraph (A)(2) of this rule
8 is inapplicable, and the Paragraph (A)(1) requirement for full disclosure is satisfied either by a
9 written disclosure by the lawyer involved in the transaction or by the client’s independent counsel.
10 The fact that the client was independently represented in the transaction is relevant in determining
11 whether the agreement was fair and reasonable to the client as Paragraph (A)(1) further requires.

12 **Use of Information Related to Representation**

13 [5] Use of information relating to the representation to the disadvantage of the client violates
14 the lawyer’s duty of loyalty. Paragraph B applies when the information is used to benefit either
15 the lawyer or a third person, such as another client or business associate of the lawyer. For example,
16 if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer
17 may not use that information to purchase one of the parcels in competition with the client or to
18 recommend that another client make such a purchase. The rule does not prohibit uses that do not
19 disadvantage the client. For example, a lawyer who learns a government agency’s interpretation
20 of trade legislation during the representation of one client may properly use that information to
21 benefit other clients. Paragraph B prohibits disadvantageous use of client information unless the
22 client gives informed consent, except as permitted or required by these rules. *See* Rules 16-102(D),
23 16-106, 16-109(C), 16-303, 16-401(B), 16-801, and 16-803 NMRA.

1 **Gifts to Lawyers**

2 [6] A lawyer may accept a gift from a client, if the transaction meets general standards of
3 fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation
4 is permitted. If a client offers the lawyer a more substantial gift, Paragraph C does not prohibit the
5 lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of
6 undue influence, which treats client gifts as presumptively fraudulent. In any event, due to
7 concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial
8 gift be made to the lawyer or for the lawyer's benefit, except [~~where~~] when the lawyer is related
9 to the client as set forth in Paragraph C.

10 [7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or
11 conveyance the client should have the detached advice that another lawyer can provide. The sole
12 exception to this rule is [~~where~~] when the client is a relative of the donee.

13 [8] This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or
14 associate of the lawyer named as executor of the client's estate or to another potentially lucrative
15 fiduciary position. Nevertheless, [~~such~~] these appointments will be subject to the general conflict
16 of interest provision in Rule 16-107 [~~NMRA~~] when there is a significant risk that the lawyer's
17 interest in obtaining the appointment will materially limit the lawyer's independent professional
18 judgment in advising the client [~~concerning~~] about the choice of an executor or other fiduciary. In
19 obtaining the client's informed consent to the conflict, the lawyer should advise the client
20 [~~concerning~~] about the nature and extent of the lawyer's financial interest in the appointment, as
21 well as the availability of alternative candidates for the position.

22 **Literary Rights**

1 [9] An agreement by which a lawyer acquires literary or media rights [~~concerning~~] about the
2 conduct of the representation creates a conflict between the interests of the client and the personal
3 interests of the lawyer. Measures suitable in the representation of the client may detract from the
4 publication value of an account of the representation. Paragraph D does not prohibit a lawyer
5 representing a client in a transaction [~~concerning~~] about literary property from agreeing that the
6 lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to
7 Rule 16-105 [~~NMRA~~] and Paragraphs A and I of this rule.

8 **Financial Assistance**

9 [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of
10 their clients, including making or guaranteeing loans to their clients for living expenses, because
11 to do so would encourage clients to pursue lawsuits that might not otherwise be brought and
12 because [~~such~~] that assistance gives lawyers too great a financial stake in the litigation. These
13 dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation
14 expenses, including the expenses of medical examination and the costs of obtaining and presenting
15 evidence, because these advances are virtually indistinguishable from contingent fees and help
16 ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients
17 to pay court costs and litigation expenses regardless of whether these funds will be repaid is
18 warranted.

19 [11] Subparagraph (E)(3) provides another exception. A lawyer representing an indigent client
20 without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services
21 or public interest organization, and a lawyer representing an indigent client pro bono through a
22 law school clinical or pro bono program may give the client modest gifts. Gifts permitted under
23 Subparagraph (E)(3) include modest contributions as are reasonably necessary for food, rent,

1 transportation, medicine, and similar basic necessities of life. If the gift may have consequences
2 for the client, including, e.g., for receipt of government benefits, social services, or tax liability,
3 the lawyer should consult with the client about these. See Rule 16-104 NMRA.

4 [12] The Subparagraph (E)(3) exception is narrow. Modest gifts are allowed in specific
5 circumstances where it is unlikely to create conflicts of interest or invite abuse. Subparagraph
6 (E)(3) prohibits the lawyer from (i) promising, assuring, or implying the availability of financial
7 assistance before retention or as an inducement to continue the client-lawyer relationship after
8 retention; (ii) seeking or accepting reimbursement from the client, a relative of the client, or anyone
9 affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to
10 prospective clients beyond court costs and expenses of litigation in connection with contemplated
11 or pending litigation or administrative proceedings.

12 [13] Financial assistance, including modest gifts under Subparagraph (E)(3), may be provided
13 even if the representation is eligible for fees under a fee-shifting statute. However, Subparagraph
14 (E)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in
15 which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or
16 cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer
17 does not eventually receive a fee.

18 **Person Paying for a Lawyer's Services**

19 ~~[[11]]~~ [14] Lawyers are frequently asked to represent a client under circumstances in which a
20 third person will compensate the lawyer, in whole or in part. The third person might be a relative
21 or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a
22 corporation sued along with one or more of its employees). Because third-party payers frequently
23 have interests that differ from those of the client, including interests in minimizing the amount

1 spent on the representation and in learning how the representation is progressing, lawyers are
2 prohibited from accepting or continuing [~~sueh~~] these representations unless the lawyer determines
3 that there will be no interference with the lawyer’s independent professional judgment and there
4 is informed consent from the client. *See* Rule 16-504(C) NMRA (prohibiting interference with a
5 lawyer’s professional judgment by one who recommends, employs, or pays the lawyer to render
6 legal services for another).

7 [[12]] [15] Sometimes, it will be sufficient for the lawyer to obtain the client’s informed consent
8 [~~regarding~~] about the fact of the payment and the identity of the third-party payer. If, however, the
9 fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with
10 Rule 16-107 [~~NMRA~~]. The lawyer must also conform to the requirements of Rule 16-106 [~~NMRA~~
11 ~~concerning~~] about confidentiality. Under Rule 16-107(A) [~~NMRA~~], a conflict of interest exists if
12 there is significant risk that the lawyer’s representation of the client will be materially limited by
13 the lawyer’s own interest in the fee arrangement or by the lawyer’s responsibilities to the third-
14 party payer (for example, when the third-party payer is a co-client). Under Rule 16-107(B)
15 [~~NMRA~~], the lawyer may accept or continue the representation with the informed consent of each
16 affected client, unless the conflict is non-consentable under that paragraph. Under Rule 16-107(B)
17 [~~NMRA~~], the informed consent must be confirmed in writing.

18 **Aggregate Settlements**

19 [[13]] [16] Differences in willingness to make or accept an offer of settlement are among the
20 risks of common representation of multiple clients by a single lawyer. Under Rule 16-
21 107 [~~NMRA~~], this is one of the risks that should be discussed before undertaking the
22 representation, as part of the process of obtaining the clients’ informed consent. In addition,
23 Rule 16-102(A) [~~NMRA~~] protects each client’s right to have the final say in deciding whether to

1 accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere
2 plea in a criminal case. The rule stated in this paragraph is a corollary of both of those rules and
3 provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple
4 clients, the lawyer must inform each of them about all the material terms of the settlement,
5 including what the other clients will receive or pay if the settlement or plea offer is accepted. *See*
6 *also* Rule 16-100(E) [~~NMRA~~] (definition of informed consent). Lawyers representing a class of
7 plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer
8 relationship with each member of the class; nevertheless, [~~such~~] the lawyers must comply with
9 applicable rules regulating notification of class members and other procedural requirements
10 designed to ensure adequate protection of the entire class.

11 **Limiting Liability and Settling Malpractice Claims**

12 ~~[[14]]~~ [17] Agreements prospectively limiting a lawyer’s liability for malpractice are prohibited
13 unless the client is independently represented in making the agreement because they are likely to
14 undermine competent and diligent representation. Also, many clients are unable to evaluate the
15 desirability of making such an agreement before a dispute has arisen, particularly if they are then
16 represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a
17 lawyer from entering into an agreement with the client to arbitrate legal malpractice claims,
18 provided the client is fully informed of the scope and effect of the agreement and gives informed
19 consent. In this context, informed consent requires the lawyer to, at a minimum, “inform [the]
20 client that arbitration will constitute a waiver of important rights, including, the right to a jury trial,
21 potentially the right to broad discovery, and the right to an appeal on the merits.” *Castillo v.*
22 *Arrieta*, 2016-NMCA-040, ¶ 23, 368 P.3d 1249. Nor does this paragraph limit the ability of
23 lawyers to practice in the form of a limited-liability entity, [~~where~~] when permitted by law,

1 provided that each lawyer remains personally liable to the client for his or her own conduct and
2 the firm complies with any conditions required by law, such as provisions requiring client
3 notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in
4 accordance with Rule 16-102 [~~NMRA~~] that defines the scope of the representation, although a
5 definition of scope that makes the obligations of representation illusory will amount to an attempt
6 to limit liability.

7 [[15]] [18] Agreements settling a claim or a potential claim for malpractice are not prohibited
8 by this rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an
9 unrepresented client or former client, the lawyer must first advise such a person in writing of the
10 appropriateness of independent representation in connection with such a settlement. In addition,
11 the lawyer must give the client or former client a reasonable opportunity to find and consult
12 independent counsel.

13 **Acquiring Proprietary Interest in Litigation**

14 [[16]] [19] Paragraph I states the traditional general rule that lawyers are prohibited from
15 acquiring a proprietary interest in litigation. Like Paragraph E, the general rule has its basis in
16 common law champerty and maintenance and is designed to avoid giving the lawyer too great an
17 interest in the representation. In addition, when the lawyer acquires an ownership interest in the
18 subject of the representation, it will be more difficult for a client to discharge the lawyer if the
19 client so desires. The rule is subject to specific exceptions developed in decisional law and
20 continued in these rules. The exception for certain advances of the costs of litigation is set forth in
21 Paragraph E. In addition, Paragraph I sets forth exceptions for liens authorized by law to secure
22 the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each
23 jurisdiction determines which liens are authorized by law. These may include liens granted by

1 statute, liens originating in common law, and liens acquired by contract with the client. When a
2 lawyer acquires by contract a security interest in property other than that recovered through the
3 lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a
4 client and is governed by the requirements of Paragraph A. Contracts for contingent fees in civil
5 cases are governed by Rule 16-105 [NMRA].

6 **Client-Lawyer Sexual Relationships**

7 [[17]] [20] The relationship between lawyer and client is a fiduciary one in which the lawyer
8 occupies the highest position of trust and confidence. The relationship is almost always unequal;
9 thus, a sexual relationship between lawyer and client can involve unfair exploitation of the
10 lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of
11 the client to the client's disadvantage. In addition, such a relationship presents a significant danger
12 that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the
13 client without impairment of the exercise of independent professional judgment. Moreover, a
14 blurred line between the professional and personal relationships may make it difficult to predict to
15 what extent client confidences will be protected by the attorney-client evidentiary privilege, since
16 client confidences are protected by privilege only when they are imparted in the context of the
17 client-lawyer relationship. Because of the significant danger of harm to client interests and because
18 the client's own emotional involvement renders it unlikely that the client could give adequate
19 informed consent, this rule prohibits the lawyer from having sexual relations with a client
20 regardless of whether the relationship is consensual and regardless of the absence of prejudice to
21 the client.

22 [[18]] [21] Sexual relationships that predate the client-lawyer relationship are not prohibited.
23 Issues relating to the exploitation of the fiduciary relationship and client dependency are

1 diminished when the sexual relationship existed [~~prior to~~] before the commencement of the client-
2 lawyer relationship. However, before proceeding with the representation in these circumstances,
3 the lawyer should consider whether the lawyer’s ability to represent the client will be materially
4 limited by the relationship. *See* Rule 16-107(A)(2) [~~NMRA~~].

5 ~~[[19]]~~ [22] When the client is an organization, Paragraph J of this rule prohibits a lawyer for the
6 organization (whether inside counsel or outside counsel) from having a sexual relationship with a
7 constituent of the organization who supervises, directs, or regularly consults with that lawyer
8 ~~[concerning]~~ about the organization’s legal matters.

9 **Imputation of Prohibitions**

10 ~~[[20]]~~ [23] Under Paragraph K, a prohibition on conduct by an individual lawyer in Paragraphs
11 A through I also applies to all lawyers associated in a firm with the personally prohibited lawyer.
12 For example, one lawyer in a firm may not enter into a business transaction with a client of another
13 member of the firm without complying with Paragraph A, even if the first lawyer is not personally
14 involved in the representation of the client. The prohibition set forth in Paragraph J is personal and
15 is not applied to associated lawyers.

16 [Adopted by Supreme Court Order No. 08-8300-029, effective November 3, 2008; as amended by
17 Supreme Court Order No. 16-8300-005, effective December 31, 2016; as amended by Supreme
18 Court Order No. 17-8300-018, effective December 31, 2017; as amended by Supreme Court Order
19 No. S-1-RCR-2023-00004, effective December 31, 2024.]