

**PROPOSED REVISIONS TO THE CODE OF PROFESSIONAL CONDUCT
PROPOSAL 2026-014**

March 6, 2026

The Code of Professional Conduct Committee has recommended amendments to Rule 16-804 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's website at <https://supremecourt.nmcourts.gov/rules-forms-files/rules-forms/open-for-comment/> or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
rules.supremecourt@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 5, 2026, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

16-804. Misconduct.

It is professional misconduct for a lawyer to:

- A. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;
- B. commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- C. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- D. engage in conduct that is prejudicial to the administration of justice;
- E. state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- F. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
- G. engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, or marital status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 16-116 NMRA. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

[As amended by Supreme Court Order No. 08-8300-029, effective November 3, 2008; as amended by Supreme Court Order No. 19-8300-012, effective December 1, 2019; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. —

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph A, however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] A lawyer that creates or participates in a one-party recording does not violate Paragraph C unless the lawyer's conduct involves dishonesty, fraud, deceit, or misrepresentation. For example, it is not a violation of Paragraph C for a lawyer or a lawyer's agent to record another lawyer, or for a lawyer to advise a client that the client may make a one-party recording. Before a lawyer makes any recording of an unrepresented non-party, a lawyer acting within the scope of their profession representing a client has an ethical duty to inform an unrepresented non-party that the lawyer is a lawyer and whom the lawyer represents. Without leave of court, such recording of an unrepresented non-party or a one-party recording of a client may only be used for the lawyer's own work product or to defend the lawyer in a criminal, disciplinary or civil grievance proceeding.

[2] [3] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] [4] Discrimination and harassment by lawyers in violation of Paragraph G undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of Paragraph G.

[4] [5] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business, or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations.

~~{5}~~ [6] A lawyer does not violate Paragraph G by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules and other law. A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 16-102(B) NMRA.

~~{6}~~ [7] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 16-102(D) NMRA concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

~~{7}~~ [8] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[Adopted by Supreme Court Order No. 08-8300-029, effective November 3, 2008; as amended by Supreme Court Order No. 19-8300-012, effective December 1, 2019; as amended by Supreme Court Order No. _____, effective _____.]



New Mexico
Courts

Kateri Eisenberg <supkhe@nmcourts.gov>

[rules.supremecourt-grp] Open for Comment Form submitted on Supreme Court

Supreme Court <noreply@nmcourts.gov>

Wed, Mar 11, 2026 at 11:26 AM

Reply-To: noreply@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Name Michael

Schwarz

Phone Number 505 988 2053

Email ms@nmbarrister.com

Proposal Number 16-804

Comment This proposed rule should be in 16-403 and not 16-804. In addition, why does a lawyer need leave from court? I don't understand the basis for that. It is no different from obtaining a statement or sworn statement from a witness and we don't need leave from the court to use the statement in those circumstances. Besides, it would contrary to judicial economy, creating additional hearings and revealing work product strategy.



**New Mexico
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Wed, Mar 11, 2026 at 1:09 PM

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Name Barry

Green

**Phone
Number** 505 989-1834

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**Proposal
Number** 2026-014

Comment I have reviewed the proposed Rule change, which is actually an addition to the Committee Commentary for Rule 16-804. I urge the Court to reject this change.

The first problem is that the proposed change is not to the Rule itself, but to the Committee Commentary. That could cause many attorneys to miss the change once it is enacted. In addition, it seems like the change should be to Rule 16-403, Communications with unrepresented persons, not to Rule 16-804. It would most likely not occur to an attorney to look under Rule 16-804 when looking at the Code for communications with unrepresented persons.

The second problem is that attorneys should be allowed to communicate with unrepresented persons and be able to rely upon what the person says if there is full disclosure. So, for example, if i were to call a witness to a car crash, identify myself as an attorney and identify my client, i should be allowed to record the conversation with the person's permission and use that conversation for impeachment purposes. Of course all that information should be in the recording. I have done this many times and used the recording for impeachment in the past. If using the recording for impeachment is not allowed, then i would have to hire a private investigator at my clients' cost--which would be a totally unnecessary cost. I would also add that even the best private investigators do not ask the follow up questions i would like them to ask.

For all of these reasons, i strongly urge the Court not to adopt the provision of this amendment forbidding the use of the recording for impeachment.



New Mexico
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Thu, Mar 12, 2026 at 7:23 PM

Name Amber

Fayerberg

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Proposal Number 2026-014

Comment The portion of this proposed rule that prohibits use of any recorded conversation, even having advised the speaker of one's status as an attorney, for impeachment purposes strikes me as fundamentally unfair and creating an unnecessary and confusing conflict with existing Rules of Evidence. Any prior statement, particularly if known through lawful means, should be available for use as impeachment evidence.



New Mexico Courts

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Sun, Mar 15, 2026 at 10:33 AM

Name Damon

Hudson

Phone Number 5054164150

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Proposal Number 2026-014

Comment It is unclear why such a rule change here is necessary, and more specifically, just because it's a commentary change that can potentially catch more people off guard. It actually encourages people to get an outside investigator instead of having an attorney do it themselves, which creates more challenges for all parties involved and frankly moves away from the overall thrust of the rule.

This creates a very specific carve out of the rule that isn't necessary, especially if the attorney advises they are an attorney. It is up to the individual being spoken to whether or not they want to obtain counsel or speak without counsel. They represent their own interests. Sure, if an attorney deceives them; that is already covered by the misconduct rule, further making this commentary confusing and superfluous.



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Wed, Mar 25, 2026 at 2:46 PM

Name Michael

Stout

Phone Number 5756425205

Email michael@mlstoutlaw.com

Proposal Number 2026-014

Comment If a recording is made ethically its use in court should be governed by the already-existing Rules of Evidence, Rules of Procedure and the Constitutions. There is no justification for requiring additional "leave of court" beyond that. In fact, such a requirement is contrary to the principles of the initial ethics requirements and the Rules of Evidence and Procedure and would allow the absurd possibility of the court rejecting otherwise appropriate evidence. I urge the Court to reject the language requiring additional leave of court.



New Mexico
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Alyssa Segura <supams@nmcourts.gov>

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Wed, Mar 25, 2026 at 3:00 PM

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Name Michael

Stout

Phone Number 5756425205

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Proposal Number 2026-014

Comment [With apologies, this is to supplement my prior comment.] There is also no guidance given for when a court may refuse to give leave to use the recording. What standard would a court use to refuse to allow the use of an ethically gathered recorded statement? The proper standard would simply be the constitution and the rules of evidence. In other words, this shows again that the "leave of court" language is unnecessary. Thank you.



New Mexico Courts

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Thu, Mar 26, 2026 at 2:17 PM

Name Jonathan

Ibarra

Phone Number 505-369-3600

Email JonathanL.Ibarra@lopdm.us

Proposal Number 2026-014

Comment

I can't understand a reason why such recordings could not be used for impeachment at trial. It should not take leave of the court to do so. If people make a recorded statement to literally anyone other than a lawyer, it would be able to be used as impeachment, but not necessarily if it was made to a lawyer? That does not make sense to me.

I understand, otherwise, that identifying yourself and who you're working for are necessary. As lawyers, we should not be tricking anyone into saying something. But if they say it, and it was recorded, it should be able to be used.

I would also note that putting, essentially, a change to the rules of evidence in commentary in the rules of professional conduct is not appropriate. If we're changing the rules, then we need to actually change the rules.

Thank you for your consideration,

Jonathan L Ibarra



New Mexico Courts

Alyssa Segura <supams@nmcourts.gov>

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1 message

Supreme Court <noreply@nmcourts.gov>

Mon, Mar 30, 2026 at 2:30 PM

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Name Alex

Walker

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Proposal Number Proposal 2026-014 - Surreptitious Recording

Comment The proposed comment should be reconsidered. It normalizes the very practice New Mexico's existing ethics guidance has treated with caution in Formal Ethics Opinion 2005-03. Secret recordings can become deceit by omission when the lawyer knows the other participant believes the conversation is off the record or unrecorded. The analysis is fact-specific rather than a broad safe harbor.

Specifically as to recording other lawyers, litigation calls between counsel often involve frank and open discussions, conditional positions, and attempts to resolve disputes informally. The proposed blanket assurance invites gamesmanship and chills professional candor without any articulated benefit.

It is also poor rulemaking form to make such a consequential substantive change through commentary rather than the rule text itself, especially where the proposal is framed as an "example."



New Mexico Courts


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Thu, Apr 2, 2026 at 12:21 PM

Name	James Reist
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Proposal Number	2026-014
Comment	Please see the attached comment submitted by the Ethics Advisory Committee of the State Bar of New Mexico.
File Upload	https://supremecourt.nmcourts.gov/wp-content/uploads/sites/2/formidable/6/EAC-comment-re-Proposal-2026-014-Surreptitious-Recording-2.pdf

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Comment from the State Bar of New Mexico Ethics Advisory Committee

Regarding Proposed Revisions to the Code of Professional Conduct: Proposal 2026-014

Submitted May 31, 2026

This comment represents the consensus of the State Bar of New Mexico Ethics Advisory Committee (“EAC”) with regard to Proposal 2026-014 which proposes the insertion of a new comment 2 to Rule 16-804 NMRA.

The EAC offers the suggested revisions to the proposed committee comment number 2. The EAC believes its suggestions are more in line with the Supreme Court’s opinion expressed in *Matter of Indahl*, S-1-SC-40367, mem. op. ¶¶ 13-16 (N.M. Dec. 19, 2024) (nonprecedential), and the Opinions of the Ethics Advisory Committee cited therein. The EAC is concerned that as written, comment 2 puts a focus on how to work around the Rule as opposed to how to follow it. For these reasons, we suggest that committee comment number 2, be revised to state:

“A lawyer that creates or participates in a one-party recording that involves dishonesty, fraud, deceit, or misrepresentation violates Paragraph C. ~~Thus, if a lawyer believes through expressions of the individual being recorded that the individual would either refuse to give a recorded statement or would not give an accurate statement if the individual knew the statement was being recorded, the recording of that individual without the individual’s knowledge would involve dishonesty, fraud, deceit or misrepresentation.”~~

Proposed Revisions are Contrary to *Matter of Indahl*

In *Indahl*, the Supreme Court held that Mr. Indahl violated Rule 16-804(C) by eliciting responses from an unrepresented person concerning his clients’ potential employment claim against the unrepresented person, while knowing that the conversation was being secretly recorded by his clients. In reaching this holding, the Supreme Court explicitly states:

[A] lawyer’s surreptitious recording of a witness violates Rule 16-804(C) when, as here, “the lawyer believes, through expressions from the witness (e.g., an expression by the witness that the interview is “off the record”), that the witness would either refuse to give a recorded statement or would not give an accurate statement if the witness knew that the statement was being recorded.”

Indahl, S-1-SC-40367, mem. op. ¶ 13 (quoting State Bar of N.M. Ethics Advisory Comm., Formal Op. 2005-3, at 1, 3 (2005)). The Supreme Court clarified that mere fact that New Mexico is a one-party consent state “does not make it *ethical* for a lawyer to engage in a surreptitious recording, when it would be deceptive to do so.” *Id.* ¶ 16. The Supreme Court does not expressly limit this rationale to unrepresented persons or to potential or actual witnesses. Instead, the Supreme Court’s rationale makes it clear that the ethical responsibilities of members of the bar exceed merely abiding by state law. Instead, the Supreme Court endorses the standard that secret recording of a person is dishonest, fraudulent, deceitful, or misrepresentative, and therefore a violation of Rule

16-804(C) if the lawyer believes, through expression of the individual the lawyer seeks to record, that the individual would refuse to give a recorded statement or would not give an accurate statement if the individual knew the lawyer was recording.

We see no reason to distinguish unrepresented individuals from lawyers or represented individuals in this matter. Indeed, we believe endorsing undisclosed recording of lawyers by other lawyers or the agents of lawyers, opens the door to unscrupulous conduct and further erodes the trust between members of the bar and the public's trust in the bar. Moreover, we do not believe that a lawyer automatically converts an undisclosed recording of an unrepresented non-party from a dishonest act to an honest one by simply abiding by the requirements of Rule 16-403 and informing an unrepresented non-party that the lawyer is indeed a lawyer and whom the lawyer represents.

Rather, it is the opinion of the EAC that members of the bar have a duty to and should be encouraged to hold themselves to a higher standard of transparency than the general public. It is this obligation and drive that promotes trust in the members of the bar and the legal profession. Particularly in times of institutional skepticism and public mistrust, it is the responsibility of lawyers and the rules by which we govern our own conduct as professionals to inspire trust, or in the very least, quiet mistrust. Therefore, the EAC believes it is the responsibility of a lawyer seeking to record an individual without their knowledge to determine whether the individual would refuse to give a recorded statement or would refuse to give an accurate statement if the individual knew about the recording. The EAC therefore proposes that the proposed new committee comment number 2 should be deleted in its entirety with the exception of the first sentence, so that the comment simply reads: "A lawyer that creates or participates in a one-party recording that involves dishonesty, fraud, deceit, or misrepresentation violates Paragraph C." If it is determined that this statement needs explanation, the EAC proposes language similar to the following be included: "Thus, if a lawyer believes through expressions of the individual being recorded that the individual would either refuse to give a recorded statement or would not give an accurate statement if the individual knew the statement was being recorded, the recording of that individual without the individual's knowledge would involve dishonesty, fraud, deceit or misrepresentation." We believe this language and explanation appropriately conveys the duties a lawyer seeking to record an individual without the individual's knowledge has and follows the mandate of the Supreme Court as expressed in *Indahl*.

Additionally, there is concern over the fact that many telephone calls are interstate, or even international. As a result, when a call involves interstate or international parties, New Mexico lawyers should be mindful of the law that controls recording. While New Mexico requires consent of only one party from a legal, as distinguished from ethical, purposes, other states (such as California and Maryland) require the consent of all parties.

Conclusion

In short, the EAC does not support the proposed revisions to the committee comment number 2 of Rule 16-804 NMRA as written. We do not believe it is in line with New Mexico precedent or New Mexico public policy. Instead, it is the recommendation of the EAC that the language of committee comment number 2 be changed as described above to ensure that members

of the New Mexico bar are encouraged to conduct themselves above board and in a manner that reduces the public's growing distrust of institutions and the justice system instead of validating that skepticism by endorsing surreptitious recording as the rule and not the exception. There is also some concern that the Comment as worded might suggest that New Mexico lawyers need not consider the controlling law for interstate or international calls. Thank you for your consideration of the above comment and if there are any questions or concerns, we would be more than happy to discuss the proposal in greater detail.

Sincerely,



James T. Reist, Chair, for the
State Bar of New Mexico Ethics Advisory Committee