

**PROPOSED REVISIONS TO THE RULES OF PROFESSIONAL CONDUCT
PROPOSAL 2021-006**

March 17, 2021

The Code of Professional Conduct Committee has recommended amendments to Rules 16-701, 16-702, and 16-703 NMRA, and the withdrawal of Rules 16-704 and 16-705 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 web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 16, 2021, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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

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

[As amended, effective August 1, 1992; December 1, 1992; November 1, 1993; January 1, 1999; January 1, 2000; January 20, 2005; as amended by Supreme Court Order No. 17-8300-018, effective December 31, 2017.]

[ABA COMMENT:] Committee commentary. —

[1] This rule governs all communications about a lawyer's services, including advertising[~~permitted by Rule 16-702 NMRA~~]. Whatever means are used to make known a lawyer's services, statements about them should be truthful.

[2] [~~Truthful statements that are misleading~~] Misleading truthful statements are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is [~~also~~] misleading if [~~there is~~] a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no

reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe that lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] It is misleading for a communication to provide information about a lawyer's fee without indicating the client's responsibilities for costs, if any. If the client may be responsible for costs in the absence of a recovery, a communication shall not indicate that the lawyer's fee is contingent on obtaining a recovery unless the communication also discloses that the client may be responsible for court costs and the expenses of litigation. See Rule 16-105(C) NMRA.

~~[[3]]~~ [4] ~~[An advertisement]~~ A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or a law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with ~~the services or fees~~ those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

~~[[4]]~~ [5] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 16-804(C) NMRA. See Rule 16-804(E) NMRA for the prohibition against stating or implying an ability to improperly influence ~~improperly~~ a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[6] Firm names, letterhead, and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity, or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username, or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer, or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[7] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

[8] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 16-100(C) NMRA, because to do so may be false and misleading.

[9] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

[— **Committee commentary.** —]

~~[H]~~ [10] A lawyer or nonlawyer assistant shall not make, endorse, or elicit a false or misleading statement on social media about the lawyer or the lawyer's services. Furthermore, a lawyer has a duty to remove, to the extent reasonably possible, information known to the lawyer that does not comply with the Rules of Professional Conduct.

[As amended by Supreme Court Order No. 15-8300-007, effective December 31, 2015; as amended by Supreme Court Order No. 17-8300-018, effective December 31, 2017; as amended by Supreme Court Order No. _____, effective _____.]

16-702. ~~[Advertising]~~ Communications Concerning a Lawyer's Services: Specific Rules.

A. **Permitted advertising.** ~~[Subject to the requirements of Rules 16-701 and 16-703 NMRA of the Rules of Professional Conduct, a]~~ A lawyer may ~~[advertise]~~ communicate information regarding the lawyer's services through ~~[written, recorded or electronic communication, including public]~~ any media.

B. **Payments for referrals.** A lawyer shall not compensate, give, or promise anything of value to a person who is not an employee or lawyer in the same firm for recommending the lawyer's services, except that a lawyer may[:]

(1) pay the reasonable costs of advertisements or communications permitted by this rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 16-117 NMRA~~[of the Rules of Professional Conduct]~~; ~~[and]~~

(4) refer clients to another lawyer or a non-lawyer professional ~~[pursuant to]~~ under an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement[-];

and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

C. A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless

(1) the lawyer has been certified as a specialist by the State Bar of New Mexico, an organization that has been approved by an appropriate authority of another state or the District of Columbia or a U.S. Territory, or an organization that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

~~[C-]~~ **D. Required information in communications.** Any communication made ~~[pursuant to]~~ under this rule ~~[shall]~~ must include the name and ~~[office address]~~ contact information of at least one lawyer or law firm responsible for its content.

[As amended, effective October 1, 1989; August 1, 1992; November 1, 1993; January 1, 2000; November 15, 2000; as amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. —

~~[[1]—To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public’s need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.]~~

~~[[2]] [1] This rule permits public dissemination of information concerning a lawyer’s or law firm’s name [or firm name], address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; a lawyer’s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.~~

~~[[3]—Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer or against “undignified” advertising. Television, the Internet, and other forms of electronic communications are now among the most powerful media for getting information to the public, particularly persons of low and moderate income. Prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. *But see* Rule 16-703(A) NMRA of the Rules of Professional Conduct for the prohibition against the solicitation of a prospective client through a real-time electronic exchange initiated by the lawyer.~~

~~—[[4]—Neither this rule nor Rule 16-703 NMRA of the Rules of Professional Conduct prohibits communications authorized by law, such as notice to members of a class in class action litigation.~~

~~[[5]] [2] Except as permitted under Subparagraphs (B)(1) through [(4)] (5), lawyers are not permitted to pay others for recommending the lawyer’s services[~~or for channeling professional work in a manner that violates Rule 16-703~~]. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible “recommendations.”~~

~~[3] Subparagraph (B)(1)[~~, however,~~] allows a lawyer to pay for advertising and communications permitted by this rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons, and website designers.~~

[4] Paragraph (B)(5) permits nominal gifts as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that the gift would be forthcoming or that referral would be made or encouraged in the future.

[5] ~~[Moreover, a]~~ A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with ~~[Rules]~~ Rule 16-105(E) NMRA (fee splitting) and Rule 16-504 NMRA (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 16-701 NMRA (communications concerning a lawyer's services). To comply with Rule 16-701 NMRA, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of recommendation). See also Rule 16-503 NMRA (duties of lawyers and law firms with respect to the conduct of non-lawyers); Rule 16-804(A) NMRA (duty to avoid violating the rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. ~~[Such] Qualified~~ referral services are ~~[understood by the public to be]~~ consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. *See, e.g.,* the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act ~~[(requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable, objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service)].~~

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. ~~[See Rule 16-503 NMRA of the Rules of Professional Conduct.]~~ Legal service plans and lawyer referral services may communicate with the public, but ~~[such]~~ the communication must be in conformity with these rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. ~~[Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 16-703 NMRA of the Rules of Professional Conduct.]~~

[8] A lawyer also may agree to refer clients to another lawyer or a non-lawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. ~~[Such]~~ The reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rule 16-201 NMRA and Rule 16-504(C) NMRA~~[-of the Rules of Professional Conduct]~~. Except as provided in ~~[Paragraph E of Rule 16-105]~~ Rule 16-105(E) NMRA~~[-of the Rules of Professional Conduct]~~, a lawyer who receives referrals from a lawyer or non-lawyer professional must not pay anything solely for the referral, but the lawyer does not violate Paragraph B of this rule by agreeing to refer clients to the other lawyer or non-lawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by ~~[such]~~ these types of arrangements are governed by Rule 16-107 NMRA~~[-of the Rules of Professional Conduct]~~. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these rules. This rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph A of this rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialize training or education, but those communications are subject to the “false and misleading” standard applied in Rule 16-701 NMRA to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before that Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this rule.

[11] This rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if the certification is granted by the State Bar of New Mexico; by an organization that has been approved by an appropriate authority of another state, the District of Columbia, or a U.S. Territory, or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia, or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge, and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[12] This rule requires that any communication about a lawyer or a law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address, or a physical office location. [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; as amended by Supreme Court Order No. _____, effective _____.]

16-703. Solicitation of clients.

A. **Definitions.** “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

~~[A.]~~ **B. In-person, live, or real-time contact.** A lawyer shall not solicit professional employment by live person-to-person contact ~~[by in-person, live telephone or real-time electronic contact solicit professional employment]~~ when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the ~~[person contacted]~~ contact is with a

- (1) ~~[is a]~~ lawyer; ~~[or]~~
- (2) person who has a family, close personal or prior professional relationship with the lawyer; or
- (3) person who is known by the lawyer to be experienced with the use or retention of related legal services.

~~[B.]~~ **C. Restrictions on all contacts.** A lawyer shall not solicit professional employment ~~[by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact]~~ even when not otherwise prohibited by Paragraph ~~[A]~~ B, if~~[:]~~

- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress, or harassment.

~~[C.]~~ **Notice required.** Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any written, recorded or electronic communication, unless the recipient of the communication is a person specified in Subparagraphs ~~(A)(1) or (2).~~

D. **Exceptions.** This rule does not prohibit communications authorized by law or ordered by a court or other tribunal. Notwithstanding the prohibitions in ~~[Paragraph A]~~ this rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses ~~[in-person or telephone]~~ live person-to-person contact to ~~[solicit]~~ enroll ~~[memberships]~~ members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

[Adopted, effective October 1, 1989; as amended, effective August 1, 1992; as amended 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; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. —

[1] ~~[A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a]~~ Paragraph B prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or the firm’s pecuniary gain. A lawyer’s communication [typically does] is not [constitute] a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information, or is automatically generated in response to [Internet] electronic searches.

[2] “Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection. That person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. [There is a] A potential for [abuse] overreaching exists when a [solicitation involves direct in-person, live telephone or real-time electronic contact by a] lawyer, seeking pecuniary gain, [with someone] solicits a person known to be in need of legal services. [These forms] This form of contact [subject] subjects a person to the persuasion of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult [fully] to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence [upon being retained immediately] on an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

~~[[3]—This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services and about the qualifications of available lawyers and law firms without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person’s judgment.]~~

~~[[4]—The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 16-702 NMRA of the Rules of Professional Conduct can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 16-701 NMRA of the Rules of Professional Conduct. The contents of direct in-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.]~~

~~[[5]] [3] There is far less likelihood that a lawyer would engage in [abusive practices] overreaching against a former client or a person with whom the lawyer has a close personal, [or] family, business, or professional relationship or in situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. Nor is there a serious potential for [abuse] overreaching when the person contacted is a lawyer or is a person known by the lawyer to be experienced with the use or retention of related legal services. For instance, an “experienced user” of legal services may include those who hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law, or intellectual property lawyers; insurance claims professionals who regularly engage with lawyers; small business proprietors who hire lawyers for lease or contract issues; and other people who retain lawyers for business transactions or formations. [Consequently, the general prohibition in Paragraph A of Rule 16-703 NMRA of~~

~~the Rules of Professional Conduct and the requirements of Paragraph C of that rule are not applicable in those situations. Also,] Paragraph [A] B is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.~~

~~[[6]] [4] [But even permitted forms of solicitation can be abused. Thus, any] A solicitation is prohibited: (1) that contains false or misleading information within the meaning of Rule 16-701 NMRA~~[of the Rules of Professional Conduct]~~; (2) that involves coercion, duress, or harassment within the meaning of Rule ~~[16-703(B)(2)] 16-703(C)(2)~~ NMRA~~[of the Rules of Professional Conduct]~~; or (3) that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule ~~[16-703(B)(1)] 16-703(C)(1)~~ NMRA~~[of the Rules of Professional Conduct]~~ is prohibited. ~~[Moreover, if after sending a letter or other communication permitted by Rule 16-702 NMRA of the Rules of Professional Conduct the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 16-703(B) NMRA of the Rules of Professional Conduct.]~~ Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.~~

~~[[7]] [5] This rule [is] does not ~~[intended to]~~ prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 16-702 NMRA~~[of the Rules of Professional Conduct]~~.~~

~~[[8]—The requirement of Rule 16-703(C) NMRA of the Rules of Professional Conduct that certain communications be marked “Advertising Material” does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.]~~

~~[[6] Communications authorized by law or ordered by a court or a tribunal include a notice to potential members of a class in class action litigation.~~

~~[[9]] [7] Paragraph D of this rule permits a lawyer to participate with an organization that uses personal contact to ~~[solicit]~~ enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, Paragraph D would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the ~~[in person or telephone]~~ person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The~~

communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but ~~[is to]~~ must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 16-701, 16-702, and 16-703(B) NMRA~~[-of the Rules of Professional Conduct]. [See Rule 16-804(A) 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; as amended by Supreme Court Order No. _____, effective _____.]

~~[16-704. Communication of fields of practice and specialization.~~

~~_____ A. **Communication of fields of practice.** A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.~~

~~_____ B. **Patent practice.** A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.~~

~~_____ C. **Admiralty practice.** A lawyer engaged in admiralty practice may use the designation "Admiralty", "Proctor in Admiralty" or a substantially similar designation.~~

~~_____ D. **Certification by organization.** A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless~~

~~_____ (1) the lawyer has been certified as a specialist by the State Bar of New Mexico, an organization that has been approved by an appropriate authority of another state, or by an organization that has been accredited by the American Bar Association; and~~

~~_____ (2) the name of the certifying organization is clearly identified in the communication.~~

~~[As amended, effective August 1, 1992; December 1, 1992; as amended by Supreme Court Order No. 08-8300-029, effective November 3, 2008; as amended by Supreme Court Order No. 18-8300-018, effective December 31, 2018] Withdrawn by Supreme Court Order No. _____, effective _____.]~~

~~[**Committee commentary.**—~~

~~_____ [1] Paragraph A of this rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 16-701 NMRA of the Rules of Professional Conduct to communications concerning a lawyer's services.~~

~~_____ [2] Paragraph B recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before that office. Paragraph C recognizes that designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~_____ [3] Paragraph D permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by the State Bar of New Mexico; by an organization that has been approved by an appropriate authority of another state; or by an organization that has been accredited by the American Bar Association. This may include a state bar association that~~

has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge, and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[Adopted by Supreme Court Order No. 08-8300-029, effective November 3, 2008; as amended by Supreme Court Order No. 18-8300-018, effective December 31, 2018] Withdrawn by Supreme Court Order No. _____, effective _____.]

[16-705. Firm names and letterheads.

~~_____ A. **Use of trade or firm name.** A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 16-701 NMRA of the Rules of Professional Conduct. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 16-701 NMRA of the Rules of Professional Conduct.~~

~~_____ B. **Multi-jurisdictional law firms.** A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~

~~_____ C. **Use of names of lawyers holding public office.** The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~

~~_____ D. **Statements about association.** Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.~~

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

~~[**Committee commentary.**—~~

~~_____ [1]— A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic". A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic", an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a non-lawyer.~~

~~_____ [2]— With regard to Paragraph D, lawyers sharing office facilities but who are not in fact associated with each other in a law firm may not denominate themselves as, for example, "Smith and Jones", for that title suggests that they are practicing law together in a firm.~~

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



[nmsupremecourtclerk-grp] Comments to 2021 Proposed Rule Amendments

1 message

Chief Judge Jennifer DeLaney <demdjed@nmcourts.gov>

Fri, Apr 16, 2021 at 10:04 AM

Reply-To: demdjed@nmcourts.gov

To: nmsupremecourtclerk@nmcourts.gov

Cc: "Hofacket, Jarod" <demdjkh@nmcourts.gov>, Tom Stewart <sildtfs@nmcourts.gov>, Jim Foy <sildjbf@nmcourts.gov>

Mr. Moya,

Attached are the comments from the District Judges of the Sixth Judicial District concerning the 2021 proposed rule amendments. Please let me know if I need to submit each one separately or if the attached document is sufficient to distribute to each of the rule committees. Thank you,

Chief Judge DeLaney

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Jennifer E. DeLaney

Chief Judge, Division II

Sixth Judicial District Court

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2021 Proposed Rule Amendment Comments.docx

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Code of Professional Conduct Committee

Proposal 2021-006 – Lawyer communications and solicitation of clients

[Rules 16-701, 16-702, and 16-703 NMRA; and Withdrawn Rules 16-704 and 16-705 NMRA]

The Code of Professional Conduct Committee proposes to amend Rules 16-701, 16-702, and 16-703 NMRA to incorporate certain of the 2018 amendments to the ABA Model Rules of Professional Conduct. Because the proposed amendments to Rules 16-701, 16-702, and 16-703 also incorporate some provisions and commentary from Rules 16-704 and 16-705 NMRA, the Committee proposes to withdraw Rules 16-704 and 16-705.

No issues regarding this proposed change.

Rules of Civil Procedure for State Courts Committee

Proposal 2021-007 – Production of documents and things

[Rule 1-034 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1-034 NMRA to: (1) clarify that in answering a request for production, the responding party shall permit inspection in its entirety unless the responding party files a proper objection; (2) require the responding party to state the specific reasons for an objection to a request for production; (3) require the responding party to state whether the response includes all responsive materials; and (4) if the responding party withholds any responsive materials based on an objection, the objection must clearly describe with reasonable particularity the materials withheld for each objection. The Committee also added committee commentary to further explain the amendments.

No issues regarding this proposed change.

Proposal 2021-008 – Electronic filing and service fees as recoverable costs

[Rules 1-054, 2-701, and 3-701 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rules 1-054, 2-701, and 3-701 NMRA to clarify that electronic filing and service fees are recoverable costs.

This rule change helps to clarify what is included in fees and that is helpful to the Court.

Proposal 2021-009 – Court trust account requirements

[Rule 1-102 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1-102 NMRA to clarify that district courts must deposit litigant funds within two (2) business days of receipt in a bank that is a member of the Federal Deposit Insurance Corporation and in an account that is distinct from the court's accounts for general funds. The Committee additionally proposes to amend Rule 1-102 NMRA to specify that funds deposited in a court trust fund checking account

must be invested and maintained in a financial institution located within the court's judicial district and in accordance with governing statutes and any regulation prescribed by the Director of the Administrative Office of the Courts. The Committee also replaced the references to "social security number" and "employer identification number" with the more-inclusive term "taxpayer identification number," and also cited Form W-9 (Request for Taxpayer Identification Number and Certification) by name.

No comment.

[Proposal 2021-010](#) – *Tribal court personal representative*
[Rule 1B-102 NMRA; and Forms 4B-801 and 4B-802 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1B-102 NMRA, and Forms 4B-801 and 4B-802 NMRA, to clarify that a domiciliary foreign personal representative includes a tribal court appointee designated by a tribal court or the Bureau of Indian Affairs. The Committee further proposes to amend Forms 4B-801 and 4B-802 NMRA to recognize tribal court appointments. Finally, the Committee proposes to amend Form 4B-801 NMRA to allow "equivalent indicia of authority from a tribal court or the Bureau of Indian Affairs" to serve as a substitute for Letters of Administration or Letters Testamentary, recognizing that tribal courts may title documents differently than probate courts.

No comment.

[Proposal 2021-011](#) – *Summons and order for free process*
[Rules 2-202 and 3-202 NMRA; and Forms 4-204 and 4-223 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rules 2-202 and 3-202 NMRA by replacing "incapacitated" with "incompetent" for consistency with Rules 1-004(I) and 1-017(D) NMRA applicable to the district courts.

The Committee also proposes to amend Rules 2-202 and 3-202 NMRA, as well as Form 4-204 NMRA, to permit *pro se* parties to serve a summons by mail.

Finally, the Committee proposes to amend Form 4-223 NMRA to specify the methods of service a person seeking free service of process must first attempt in the district, magistrate, and metropolitan courts.

The revisions are helpful in making the rule more clear.

[Proposal 2021-012](#) – *Title page of transcript of civil proceedings*
[Form 4-708 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Form 4-708 NMRA for consistency with the comparable criminal form, Form 9-608 NMRA, to reflect that the court clerk, rather than the judge, issues the title page of a transcript of civil proceedings.

No objections to the new forms as proposed.

Rules of Criminal Procedure for State Courts Committee

Proposal 2021-013 – Order of trial

[Rule 5-607 NMRA; and New Rules 6-603.1 and 7-603.1 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rule 5-607 NMRA to clarify and make housekeeping changes to its text and committee commentary, and to adopt new Rules 6-603.1 and 7-603.1 NMRA that import Rule 5-607's sequence of trial events into jury trial practice in the magistrate and metropolitan courts.

No objections to the new rules as proposed.

Proposal 2021-014 – Time limits for filing citations

[Rules 6-201, 7-201, and 8-201 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rules 6-201, 7-201, and 8-201 NMRA to incorporate an express time limitation for the filing of a citation and an explicit remedy—the potential dismissal of the citation with prejudice—for a late-filed citation.

This is a necessary amendment to each of the above listed rules.

Proposal 2021-015 – Interview subpoenas

[Rule 6-606 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rule 6-606 NMRA to provide that a judge-issued subpoena in magistrate court will lie “only after good faith efforts to secure an interview . . . have been unsuccessful[,]” the same criterion that governs the issuance of interview subpoenas in metropolitan court under Rule 7-606 NMRA

The changes help to clarify and will reduce the procedure where litigants come straight to the court to obtain an interview subpoena.

Proposal 2021-016 – Time limits for probation violation hearings

[Rules 6-802, 7-802, and 8-802 NMRA]

6-802 (C)(2), 7-802 (C)(2), and 8-802(C)(2) With our current use of technology, there is no reason that a hearing should take two days longer to set if the person is in custody in an out of district detention center. It should be 3 days regardless if the defendant is in detention.

8-802 (D). Municipal ordinances are generally very low-level offenses and allowing someone to remain in custody for 18 days (3 before initial hearing and 15 from that date) seems extremely severe. There should be limited reasons why this kind of case could not be adjudicated with seven days from the initial appearance. The time should be reduced.

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rules 6-802, 7-802, and 8-802 NMRA to provide explicit time limits for the holding of a probation violation hearing in the limited jurisdiction criminal courts.

[Proposal 2021-017](#) – *Waiver of counsel and other public defender forms*
[Forms 9-401, 9-403, 9-403A, and 9-403B NMRA; and Withdrawn Form 9-401A NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Forms 9-401, 9-403, 9-403A, and 9-403B NMRA, and to withdraw Form 9-401A NMRA, to adopt a single, detailed “Waiver of Counsel Advisement” for use in all courts of criminal jurisdiction, align the form provisions governing the appointment of defense counsel with the current policies of the Law Offices of the Public Defender, and clarify the form provisions governing appeals of indigency determinations.

In the Waiver of Counsel form, the language is definitely much clearer than the previous form; however, there is still a lot of legalese especially in paragraphs six and seven. Additionally, there should be added language that the prosecutor has not duty to assist a self-represented criminal defendant and has no duty of loyalty to him/her.

[Proposal 2021-018](#) – *Dismissal of criminal charges on completion of deferred sentence*
[Form 9-603A NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Form 9-603A NMRA to make clear the mandatory nature of the dismissal remedy available to a defendant upon the defendant’s completion of the terms of a deferred sentence without revocation.

No comment.

UJI-Civil Committee

[Proposal 2021-019](#) – *Insurance has no bearing*
[UJI 13-208 NMRA]

The UJI-Civil Committee proposes to amend UJI 13-208 NMRA to align the instruction with jurors’ current understanding of the role played by insurance and to provide for possible use of the instruction prior to the commencement of a trial.

The amendments appear to clarify the UJI, which is helpful.

[Proposal 2021-020](#) – *Request for admission*
[New UJI 13-215 NMRA]

The UJI-Civil Committee proposes to adopt new UJI 13-215 NMRA to address the introduction of admitted facts at trial. The proposed instruction provides jurors with the definition of a request for admission and informs them of the effect of an admitted fact at trial.

These amendments help to streamline the UJI and increase clarity.

Proposal 2021-021 – Unfair Practices Act claims

[New UJI 13-25 Introduction NMRA; New UJI 13-2501, 13-2502, 13-2503, 13-2504, 13-2505, and 13-2506 NMRA; and New UJI 13-25 Appendix NMRA]

The UJI-Civil Committee proposes to adopt a new Chapter 25 to the Civil Uniform Jury Instructions to use with Unfair Practices Act (UPA) claims. Proposed Chapter 25 includes new UJI 13-25 Introduction NMRA; new UJI 13-2501, 13-2502, 13-2503, 13-2504, 13-2505, and 13-2506 NMRA; and new UJI 13-25 Appendix NMRA. The proposed Introduction orients practitioners and judges to Chapter 25 and explains how the instructions in the chapter may be used with other UJI chapters. Proposed UJI 13-2501 sets out the elements that a plaintiff alleging a UPA violation must prove and is intended for use in all cases alleging a UPA violation. Proposed UJI 13-2502 instructs the jury on the proof required to establish that a defendant engaged in an unconscionable trade practice under the UPA. Proposed UJI 13-2503, -2504, and -2505 are definitional instructions to be used as appropriate in a given case. Proposed UJI 13-2506 provides a damages framework for UPA claims. The proposed Appendix provides a sample set of jury instructions for a hypothetical case containing UPA violations.

The new UJI will help to give the parties a better framework for proceeding in these cases and assisting jurors in their role as fact finders.

UJI-Criminal Committee

Proposal 2021-022 – Explanation of trial procedure

[UJI 14-101 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-101 NMRA to simplify instructions on outside communications and internet use and to clarify that jurors ordinarily will not receive transcripts of witness testimony.

This seems like an excellent rule change. This has always been a challenging part of the jury script.

Proposal 2021-023 – Procedure for instructing on uncharged offenses

[UJI 14-202, 14-213, 14-221A, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-360, 14-361, 14-362, 14-363, 14-378, 14-379, 14-380, 14-381, 14-382, 14-383, 14-403, 14-403A, 14-601, 14-954, and 14-971 NMRA]

The UJI-Criminal Committee proposes to amend the Use Notes to UJI 14-202, 14-213, 14-221A, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-360, 14-361, 14-362, 14-363, 14-378,

14-379, 14-380, 14-381, 14-382, 14-383, 14-403, 14-403A, 14-601, 14-954, and 14-971 NMRA to reference the procedure for instruction on uncharged offenses outlined in UJI 14-140 NMRA.

This seems like a helpful correction to make the use of 14-140 mandatory instead of referencing it. I think the old rule was adequate. This is more clear.

Proposal 2021-024 – Stalking and aggravated stalking
[UJI 14-331 and 14-333 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-331 and 14-333 NMRA to conform more closely to the language of NMSA 1978, Section 30-3A-3 (2009), defining the crime of stalking, and NMSA 1978, Section 30-3A-3.1 (1997), defining the crime of aggravated stalking.

I think this change is a reach. The statute changed in 2009. No case has interpreted the statute the way the committee is attempting to, namely that proving that the Defendant was acting without lawful authority is an element for the State to prove. I do not believe the rules committee should be making this fundamental change to the law so long after the statute they are referencing changed.

Proposal 2021-025 - Reliance in fraud
[UJI 14-1640 NMRA]

The UJI-Criminal Committee proposes to amend the committee commentary to UJI 14-1640 NMRA to reference the definition of reliance provided in *State v. Garcia*, 2016-NMSC-034, 384 P.3d 1076, and to remove outdated citations.

No problem with this change. Nice update.

Proposal 2021-026 – Securities offenses
[UJI 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320, and 14-4321 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320, and 14-4321 NMRA to update statutory references and style conventions.

No problem with this change. Nice update.

Proposal 2021-027 – Life without possibility of release or parole
[UJI 14-7010, 14-7011, 14-7012, 14-7014, 14-7015, 14-7016, 14-7017, 14-7018, 14-7019, 14-7022, 14-7023, 14-7026, 14-7027, 14-7029, 14-7030, 14-7030A, 14-7031, 14-7032, 14-7033, and 14-7034 NMRA]

Good clarity to provide the Court and practitioners guidance on these cases. No issues.

The UJI-Criminal Committee proposes to amend UJI 14-7010, 14-7011, 14-7012, 14-7014, 14-7015, 14-7016, 14-7017, 14-7018, 14-7019, 14-7022, 14-7023, 14-7026, 14-7027, 14-7029,

14-7030, 14-7030A, 14-7031, 14-7032, 14-7033, and 14-7034 NMRA to provide instructions for sentencing proceedings for life imprisonment without possibility of release or parole in response to the repeal of the death penalty and in conformity with *State v. Chadwick-McNally*, 2018-NMSC-018, 414 P.3d 326, Rule 5-705 NMRA, and proposed changes to Rule 14-101 NMRA.