

like to comment on the proposed revisions and new form, send your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848.

Comments must be received by July 4, 1997.

For your reference, the above mentioned revisions were published in full in the *Bar Bulletin* dated June 12, 1997 (Vol. 36, No. 24, pp. 13-23).

Proposed Revision of Rules 1-005 and 1-100 of the Rules of Civil Procedure for the District Courts

The Supreme Court is considering revisions to Rules 1-005 and 1-100 of the Rules of Civil Procedure for the District Courts. If you would like to comment on the proposed revisions, send your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848.

Comments must be received by July 4, 1997.

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Disciplinary Board

DISCIPLINARY NOTE

Several recent complaints have revealed that there continues to be a lack of understanding about the correct handling of flat fees and retainers. In one complaint, which is fairly typical, the attorney agreed to represent an individual on criminal charges for a flat fee. The fee was paid at the beginning of the representation. Upon receipt, the fee was deposited into the attorney's regular business account and promptly spent. Before the representation had gone very far, the attorney was discharged and a refund was requested. The attorney agreed to refund the unused portion of the fee, while not conceding an obligation to make the refund. Because the fee had already been spent, the attorney was unable to make a timely refund of the unearned portion of the fee.

The starting point concerning the fee issue is that there is no such thing as a *nonrefundable unearned fee*. *Matter of Eaby*, 28 State Bar Bulletin 27 (July 6,

1989) stands for this proposition. The money at issue in *Eaby* was a retainer to be applied against accrued fees, not a flat fee. The retainer, however, was designated "non-refundable" in the fee agreement. There is no appreciable difference between a "non-refundable retainer" and a "flat fee," where the issue of refunding unearned portions to the client upon discharge is concerned. Indeed, in *Eaby*, the Disciplinary Board mentioned both "non-refundable retainers" and "flat fees" in making the point that a lawyer working under either arrangement, who is discharged before the agreed-upon services are provided, may be guilty of violating Rule 16-105 by charging an unreasonable fee, if the amount in excess of what would have been earned at the lawyer's regular hourly rate is not refunded to the client. The Disciplinary Board stated quite clearly that the form of the fee arrangement was not determinative:

Clients may discharge their attorneys at any time with or without cause and are always entitled to a refund of money paid in advance which has not been earned, *regardless of the language contained in the fee agreement.*

Even more seriously, handling a flat fee or retainer improperly can result in violations of Rule 16-115 (safeguarding client funds). Violations of Rule 16-115 are viewed most seriously by the New Mexico Supreme Court. (*Matter of Turpen*, 119 N.M. 227, 889 P.2d 835 (1995), *Matter of Reid*, N.M., 927 P.2d 1055 (1996), *Matter of Cannain*, N.M., 930 P.2d 1162 (1997) Because there is no such thing as a nonrefundable unearned fee, it stands to reason that *the unearned portion* of any fee paid in advance by the client remains the property of the client. Rule 16-115(A) requires such funds to be held in trust until earned. By holding these funds in trust, the attorney is able to timely refund the unearned portion if discharged.

This does not mean that no portion of a retainer or flat fee can be accessed by an attorney prior to completing the rep-
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resentation. At any point in time, the attorney may properly disburse that portion of the flat fee or retainer which has been earned. Many times, the entire amount of the flat fee will be earned prior to completion of the representation. If that occurs, the attorney may properly pay himself or herself the entire fee or retainer.

In order to know what portion of a flat fee or retainer may properly be withdrawn from trust, the attorney should maintain records showing the ongoing status of the fee, even when the fee arrangement is for a flat fee. Often, because attorneys apparently do not understand that a flat fee is NOT non-refundable, no such records are kept. These records must be kept in order for the attorney to withdraw only that portion of the fee which has been earned, and in order to promptly provide an accounting, if discharged prior to earning the entire fee. They should also be kept because the attorney bears the burden of proving the value of the services provided to a client. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 N.M. 119, 452 P.2d 188 (1969).

Because lawyers bear the burden of proof in fee disputes, and to avoid unnecessary disputes, it is always advisable to have a written fee agreement. If the fee arrangement involves a retainer or a flat fee, it is equally advisable for the fee agreement to reflect the basis upon which the amount of fee earned will be computed and that the client has been informed that he or she is entitled to a refund of any unearned portion of the retainer or flat fee.

N.M. COURT OF APPEALS
Albuquerque Satellite Filings

The Court of Appeals in changing the days that filings of pleadings will be accepted at its Albuquerque satellite office at 1117 Stanford NE. Such filings are accepted only on Mondays, Tuesdays, Wednesdays and Fridays from 8 a.m. to noon and 1 p.m. to 5 p.m.

The court will accept only the following items for filings:

- a. Docketing Statement.
- b. Notice of Appeal.
- c. Filing fees may be paid by money order, certified check, or attorney firm checks. Filing fees paid by personal check or in cash will not be accepted.
- d. Motions.
- e. Briefs. (The person filing a pleading must have the correct number of copies for filing. See SCRA 12-306 (D).)
- f. Memoranda in opposition/support.

Fax filings will only be accepted at the Santa Fe office at 827-6642.

FIRST JUDICIAL DISTRICT
Judicial Nominees

The First Judicial District Nominating Commission convened June 11 in Santa Fe and completed its evaluation of the 15 applicants for the position in the First Judicial District. The commission recommends the following five applicants (in alphabetical order) to Gov. Gary E. Johnson.

- T. Glenn Ellington
- Asenath M. Kepler
- Francis J. Mathew
- Daniel A. Sanchez
- Carol J. Vigil

BERNALILLO COUNTY
METROPOLITAN COURT
Nominating Commission Meeting

Seventeen applications have been received in the Judicial Selection Office for the judicial vacancy in the Bernalillo County Metropolitan Court created by the resignation of Judge Mark H. Shapiro.

The Bernalillo County Metropolitan Court Nominating Commission will meet June 19 at 8:30 a.m. at the Bernalillo County Metropolitan Court in Albuquerque to evaluate the applicants for the positions. The commission meeting is open to the public.

The names of the applicants in alphabetical order are as follows:

- Roberto Albertorio
- Richard L. Blumenfeld
- James A. Chavez
- Sandra J. Clinton
- Michael D. Cox
- Peter Paul Decker
- Mark L. Drebing
- Kevin Leo Fitzwater
- Kenneth E. Fladager
- Chris Elias Garcia
- Gregory D. Griego
- James F. Law
- Lawrence O. Maxwell
- Ceceila Niemczyk
- Rondolyn R. O'Brien
- E. Justin Pennington
- Vera Verhoeven

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COMING UP

- JUNE 26**
Board of Bar Commissioners meeting, 10 a.m., Elephant Butte Inn
- JULY 4**
Holiday, State Bar Center Closed
- JULY 10**
Membership Services Committee, noon, Bar Center
- JULY 11**
Task Force on Minorities in the Profession, 9 a.m., Bar Center
- JULY 11**
Committee on Legal Services and Programs, 2 p.m., Bar Center
- JULY 25**
Commission on Professionalism, 1:30 p.m., Bar Center

Changes or cancellations in the published meeting schedule may occur.