

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

**Proposed Amendment of Rule 11-801 of the Rules of Evidence**

The Supreme Court is considering revising Rule 11-801 of the Rules of Evidence. If you would like to comment on the proposed amendment to this rule, please send your 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 11, 1997.

For your reference, the above mentioned revisions were published in full in the *Bar Bulletin* dated June 19, 1997 (Vol. 36, No. 25, p. 13).

**Amendment to Disciplinary Note**

In Vol. 36 *Bar Bulletin* No. 25 (June 19, 1997), a Disciplinary Note concerning the treatment of flat fees and retainers was published. Concerning flat fees, the note discussed two critical points: that the unearned portion of any flat fee must be returned to the client if the representation is terminated prior to completion, and that, therefore, the unearned portion of all flat fees should be held in trust. These statements reflect the view of the Disciplinary Board.

Unfortunately, in the second paragraph of the note, the statement is made that the amount to be refunded to the client is determined by "what would have been earned at the lawyer's regular hourly rate...." This statement is not correct. The Disciplinary Board recognizes that there are several different ways to measure the amount of a flat fee that has been earned at the point in time the representation is terminated. One method could be the hourly rate of the lawyer; another could be the percentage of the representation completed at the time of discharge. The factors set forth

in Rule 16-105(A) for determining the reasonableness of a fee may also be important. What should be recognized is that the lawyer is only entitled to be paid that portion of a fee which has been earned at any point in time.

If a dispute arises between the lawyer and client about what part of the fee has been earned, it should be resolved as all other such fee disputes are resolved. First, pursuant to Rule 16-115(C), the lawyer must continue to hold the funds in dispute separate from the lawyer's property, until the dispute is resolved. The lawyer and the client may then be able to negotiate an agreed resolution. Or, the lawyer and client may agree to submit the matter for fee arbitration. If all else fails, the matter can be brought before the appropriate court for resolution by way of interpleader.

The lawyer should bear in mind that an attorney has the burden of proving the reasonable value of the legal services provided for which payment is claimed. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 P.2d 119, 452 P.2d 188 (1969). Whatever the measure of the amount earned, therefore, the amount claimed must be defensible, under the facts of the particular case.

**N.M. COURT OF APPEALS  
Albuquerque Satellite Filings**

The Court of Appeals is 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.

**SECOND JUDICIAL DISTRICT  
Judicial Nominees**

The Second Judicial District Nominating Commission convened June 17 in Albuquerque and completed its evaluation of the 30 applicants for the two positions in the Second Judicial District. The commission recommends the following six applicants (in alphabetical order) to Gov. Gary E. Johnson:

- Theodore C. Baca
- Barbara V. Johnson
- James J. Loughren
- Thomas C. Montoya
- Geraldine E. Rivera
- Deborah Davis Walker

**ELEVENTH JUDICIAL DISTRICT  
Judicial Vacancy**

A vacancy in the Eleventh Judicial District will exist on August 1 due to the resignation of Judge Benjamin S. Eastburn.

The chair of the Eleventh Judicial District Nominating Commission solicits nominations and applications for this position from lawyers who meet the constitutional qualifications in Article VI, Section 14, of the New Mexico Constitution. Applications may be obtained from the UNM School of Law, 1117 Stanford NE, or mailed to you by calling Margaret Banek at 277-4700. The deadline for applications/nominations is July 10 at 5 p.m.

The Eleventh Judicial District Nominating Commission will meet August 1 in Farmington to evaluate the applicants for the position.

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