

**PROPOSED REVISIONS TO THE RULES OF PROFESSIONAL CONDUCT  
PROPOSAL 2018-012**

The Code of Professional Conduct Committee has recommended adoption of new Rule 16-119 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](mailto:nmsupremecourtclerk@nmcourts.gov)  
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 11, 2018, 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.

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**[New Material]**

**16-119. Lawyer succession planning.**

**A. Written succession plan.**

(1) **Solo practitioners.** Except as otherwise provided in this rule, every lawyer practicing law as a solo practitioner or in a single lawyer law firm must prepare a written succession plan specifying the steps to be taken in the event of the lawyer's extended incapacity from practicing law, disability, or death. As part of the succession plan the lawyer shall arrange for one or more lawyers or law firms ("the transition lawyer") to take steps to promptly distribute the lawyer's client matters to other lawyers chosen by the clients, or, with the clients' consent, to assume responsibility for the interests of the lawyer's clients, subject to the right of the lawyer's clients to retain a different lawyer or law firm other than the transition lawyer. Attorneys' fees paid or to be paid to the transition lawyer shall be in accordance with Rules 16-105, 16-115, and 16-504 NMRA. Any transition lawyer must be notified of and consent to the designation as a transition lawyer in a writing signed by both the lawyer making the designation and the transition lawyer or law firm. Regardless of the form, clients must be informed of a lawyer's succession plan and client consent must be obtained such that any transition lawyer can appropriately access confidential client information and conduct conflict checks when necessary.

(2) **Law firms.** Except as otherwise provided in this rule, every law firm employing more than one lawyer, regardless of its business organizational structure, shall develop a written succession plan specifying the steps to be taken by other members of the firm in the event of the extended incapacity from practicing law, disability, or death of a member of the firm, including the person or persons responsible for and the methods to be used to accomplish the

following:

- (a) notify clients of the lawyer's inability to continue work on the clients' matters;
- (b) determine the status of matters on which the lawyer was working, including any applicable deadlines or urgent matters needing immediate attention;
- (c) determine whether the firm will continue representation of clients for whom the lawyer was providing services, subject to client approval; and
- (d) determine whether any clients for whom the lawyer was providing services have funds held in trust.

**B. Certificate of compliance.** On forms provided by the State Bar of New Mexico and approved by the Supreme Court, every lawyer shall annually certify to the state bar, with the registration statement filed pursuant to Rule 17-202 NMRA, that the lawyer, or the law firm that the lawyer is employed by, is either in compliance with this rule or claiming an exemption from this rule pursuant to Paragraph C. Solo practitioner or single lawyer law firms shall include on the form the name or names of the lawyer or law firm designated by the lawyer as the transition lawyer to assume responsibility for the interests of the lawyer's clients in the event of extended incapacity from practicing law, disability, or death of the lawyer. Law firms employing more than one lawyer shall identify on the form the person or persons responsible for the law firm's succession plan. The state bar shall retain the original of each form and shall provide to the Disciplinary Board a copy of any form requested. When the state bar certifies to the Supreme Court that any member of the state bar has failed or refused to comply with the provisions of this paragraph, the clerk of the Supreme Court shall issue a citation to such member requiring the member to show cause before the Court, within fifteen (15) days after service of such citation, why the member should not be suspended from the right to practice law in the courts of this state. Service of the citation may be by personal service or by first class mail postage prepaid. The member's compliance with the provisions of this paragraph on or before the return day of such citation shall be deemed sufficient showing of cause and shall serve to discharge the citation.

**C. Applicability.** This rule shall not apply to any lawyer whose entire compensation derived from the practice of law during the year preceding the filing of any registration statement was received in the lawyer's capacity as an employee of a corporation handling legal matters for that corporation, an employee of a tribal government, or an employee of an agency of the federal, state, or local government. Any lawyer claiming an exemption from this rule must do so on the certificate of compliance set forth in Paragraph B. A lawyer who is exempted from the terms of this rule shall, within six months of any change in circumstance that results in this rule becoming applicable to that lawyer, fully comply with the terms of this rule by preparing a written succession plan as set forth in Paragraph A and filing a certificate of compliance with the lawyer's next annual registration statement.

**Committee commentary. —**

[1] When a lawyer is unexpectedly unable to practice for an extended period of time, the lawyer's clients, staff, and practice are at risk of significant harm. By taking proactive steps to plan for an unexpected interruption in practice, including implementation of a succession plan, a lawyer can avert or mitigate such harm.

[2] The level of sophistication of a succession plan should be determined by each lawyer's or law firm's circumstance. Something as simple as providing a list of clients and cases, computer passwords, and information on and access to, via a power of attorney or otherwise, the

lawyer's trust and operating accounts and corresponding records, along with instructions to close the practice and distribute client files and unearned funds, may be sufficient in some circumstances. Alternatively, a lawyer might draft a simple document naming a willing transition lawyer and provide that lawyer with a list of and access to clients and cases, information concerning client trust funds and billings, and a springing power of attorney or some other method by which trust and operating funds can be accessed. With some lawyers, a more sophisticated succession plan that includes a detailed notice of office procedures, multiple powers of attorneys, contractual agreements with transition lawyers, and so forth, may be appropriate. These examples are not meant to be exhaustive.

[3] Numerous resources are available to assist a lawyer in engaging in effective succession planning and lawyers are encouraged to avail themselves of the materials available through the State Bar of New Mexico to formulate an appropriate succession plan.

[4] Multiple lawyer law firms likewise need to develop a formal plan for dealing with the unexpected inability of a lawyer in the firm to practice for an extended period of time. The appropriate notice to clients, an assessment of the status of the matters on which the lawyer was working and any trust funds held by the firm related to the lawyer's work, and the question of whether the law firm can continue the representation, must all be addressed. If the lawyer who is unable to practice is the sole, beneficial owner of the law firm, thought should be given to the manner in which the lawyer's ownership interest in the firm will be handled consistent with the business needs of the law firm and the Rules of Professional Conduct.

[As adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]



**FitzPatrick Law, LLC.**



11005 Spain NE, Suite 17  
Albuquerque, NM 87111  
Phone: (505)-400-0420  
Fax: (505) 214-5486

Email: [sfitzpatrick@fitzpatricklawllc.com](mailto:sfitzpatrick@fitzpatricklawllc.com)

March 30, 2018

Joey D. Moya, Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504

SUPREME COURT OF NEW MEXICO  
FILED

MAR 30 2018

**Via website submission: <https://supremecourt.nmcourts.gov/open-for-comment.aspx>**

Re: Succession planning required for practicing lawyers- Proposed Rule 16-119 NMRA

Rule 17-213 already provides a mechanism for appointing an attorney in event of incapacitation or death.

It seems odd that New Mexico doesn't require malpractice insurance, but is now going to require mandatory succession planning. I would venture to guess that there are more malpractice cases than those cases where a client is abandoned through an unforeseen accident or extended disability. An appropriate rule might be that an attorney has to disclose to clients that they do not have a succession plan rather than require attorneys to make one, just like with malpractice. Assuming there is no going back, and some form of mandatory succession planning is inevitably required these changes should be made.

**1. Requiring an attorney to be the transition point of contact is short sighted.**

Theoretically, clients can be notified of an attorney's incapacitation either by a non-attorney staff member, or even through automated services such as email notification. Automation is rapidly encroaching on all professions and the legal field is no exception. Why create a rule that is not at least future resistant if not future proof.

The time may (probably will) come where a cloud based practice management software becomes aware of death or incapacitation of an attorney. It can then send out the pre-approved notices as part of the succession plan. The notice can include the clients options as well as attorneys the client can contact to explore those options.

**2. The requirement that an attorney's succession plan has to be consented to by the client unnecessarily limits the attorney's right to practice law.**

At the point of transition the client can either retain an attorney designated in the transition plan, or can seek other counsel. Having them consent to the transition plan is superfluous and just another barrier to retaining clients if for some reason they disagree with the attorney's succession plan. The client is responsible for ultimate decisions in a case, but practice management? Should a client be able to decide what type of router a firm uses? Or their passwords for file encryption? Arguably, law firms using 12345 as a password to protect files

poses a much greater risk to a client than a sudden unexpected death of a lawyer. An attorney should maybe inform a client they have a succession plan, but requiring the client to consent to it seems overbroad.

**3. Extended incapacity needs a defined time.**

If the intent of the rule is to clarify what happens and when, leaving extended incapacity open to interpretation defeats the purpose.

**Your Name**  
Barry Green

**Phone Number**  
5059891834

**Email**  
name@host.com

**Proposal Number**  
16-119

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APR - 2 2018

A handwritten signature in black ink, appearing to be the initials 'BG' followed by a flourish.

**Comment**

I am 60 years old and have been a solo practitioner for 26+ years. I am very concerned that this rule does not define extended incapacity because I had a situation 3 years ago where I was ill for 10 months due to a surgical infection. If that would have been considered an extended incapacity, my practice would have ended and that would have had a disastrous impact on my life, my children in college and private school, etc. Of course my clients were all kept informed of my illness and progress towards returning to work, yet all of them chose to wait for my return rather than change counsel. Thus the apparent mandatory requirement of this proposed Rule would have had a severe negative impact on my life and would have been contrary to the wishes of my clients. I therefore suggest that the designated succession attorney have the discretion to distribute cases in consultation with the incapacitated attorney and their clients.

Thank you for your consideration.



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## [nmsupremecourtclerk-grp] Succession Planning proposed rule

1 message

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**Mary Leslie** <leslielawtaos@icloud.com>  
Reply-To: leslielawtaos@icloud.com  
To: nmsupremecourtclerk@nmcourts.gov

Sun, Apr 1, 2018 at 1:05 PM

Here are my comments:

As a solo practitioner in Taos, I have been seeking a successor to my practice for some years. I began this even before I took the course detailing how to do this and how important it is. Taos has a huge number for its size of lawyers 60+ and 70+. By contrast the few lawyers under 50 are mostly government employed with no desire to take on a probate and Estate Planning practice. I don't know the feasibility of trying to make a succession plan with a Santa Fe or Albuquerque solo or firm. How does the S. Ct plan to handle non compliance when genuine efforts are made but without success. My practice is limited and it is a county where the average annual income per the US Census for a family of four is \$30K. It is very difficult to be financially attractive to a successor in this market.

Help. Thank you.

Mary Lane Leslie  
State Bar #4759

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Mary Leslie  
leslielawtaos@icloud.com

**Your Name**  
**Charles Gurd**

**Phone Number**  
**5059180960**

**Email**  
**Charles@GurdLaw.com**

**Proposal Number**  
**2018-012**

**Comment**

Comment Attached (in a PDF File)

Upload  
Gurd's Comments Regarding Proposal 2018-012.Proposed Rule 16-119.pdf

**SUPREME COURT OF NEW MEXICO**  
**FILED**

**APR - 4 2018**

A handwritten signature in black ink, appearing to be 'C. Gurd', written over the date stamp.

APR - 4 2018

**CHARLES GURD'S RESPONSE TO PROPOSAL 2018-012  
PROPOSED RULE 16-119**



My name is Charles Gurd. I am a solo attorney who has been practicing law for 25 years. I have practiced in Federal Court, before federal administrative agencies, such as the Social Security Administration, and before State Agencies, such as the New Mexico Board of Nursing and before the New Mexico Board of Pharmacy.

Problems with the Proposed Rule:

1. Incapacity is Not Defined:

The proposed rule does not define “incapacity” nor does it reference the existing rule (17-213). I believe “incapacity” should be defined so that both the planning attorney, the transitional attorney, and the client understand what happens when. This is especially important when there may be temporary “incapacity”, such as when there is a problem with anesthesia. Also, I believe that the Supreme Court should explicitly state who defines when an attorney becomes incapacitated.

2. How is the Transitional Attorney Notified and Problems with Gaps?

The proposed rule does not state or give any guidance about how a transitional attorney is notified that the planning attorney is unable to practice law. This is a critical deficiency if transitional attorneys are penalized for missing deadlines, etc. Thus, I believe that the Supreme Court should explore how transitional attorneys can be notified of their duties before a rule goes into effect. I also believe there should be qualified immunity for transitional attorneys unless there is gross negligence or improper dealings. Furthermore, without a mechanism for notification I can contemplate major problems with malpractice insurance in that there could be a gap between the time the planning attorney becomes unable to practice – either temporarily or permanently – and when the transitional attorney even looks at the case, and this gap could be detrimental to the client’s case. For example, a social security client could conceivably have a hearing scheduled during this gap. This is especially problematic in situations involving the Federal Court or the federal agencies in which these state procedures do not even apply! Although I believe there should be an automatic stay in state court or during state proceedings to allow the transitional attorney time to review the case, it is not clear how this would work in Federal Court or when a transitional attorney is before a Federal Administrative Tribunal or Agency. This is especially problematic when the “transitional attorney” examines the case and realizes he does not have the expertise or knowledge to take that case and needs to either communicate with the client or suggest that the client contact a particular attorney. Again, related to this issue is that it is not clear to me when a client relationship is formed, especially in those cases in which the attorney does not even have the subject matter knowledge to take a case. For example, I do not have any knowledge in tax law, immigration law, family law, patent law, federal copy right law, or bankruptcy. Therefore, I cannot and will not take a case involving those areas and I may need to contact an attorney in those areas to even figure out who I could refer the case to or give a name for that client to contact. What happens if

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the only person the transitional attorney would could identify to help that person is an out of state lawyer who is not licensed in New Mexico! In employment law (and I am a past Chair of the Employment and Labor Law Section), there are very few attorneys in New Mexico who practice in the Federal Worker's area or handle Federal Black Lung cases. What happens if the attorney who is contacted by the transitional attorney or by the client has a conflict? Whose insurance governs during this "unknown period"?

3. Solo Attorneys are Handicapped:

Third, the proposed rule handicaps solo attorneys in the rural areas. The proposed rule assumes there is a one to one relationship, meaning that there is a single planning attorney and a single transitional attorney. In rural areas, there may not be a back-up or transitional attorney who is able and willing to serve. What happens to those planning attorneys? Should they just retire? I really think that if the proposed rule goes into effect it could discourage new attorneys from practicing as solo attorneys and most attorneys (I think) who practice in rural areas are solo attorneys.

4. Problems with Financial Institutions and Out of State "Transitional Lawyers":

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There may be solo attorneys whose family members are attorneys in other states. Given that attorneys must be licensed in New Mexico in order to manage Trust Accounts, this rule may need to be amended to allow solo attorneys in rural areas to have transitional attorney who can manage all of the planning attorney's affairs. The Supreme Court should encourage the Succession and Transition Committee (I am a liaison to that Committee from the Solo and Small Firm Section of the New Mexico State Bar as I am the Chair and Chair-Elect of that Section) to explore banking and financial institutions and determine if there can be a cooperative agreement with the banking institutions and the Supreme Court to allow solo and small firm attorneys to work with these financial institutions.

In conclusion, although I strongly believe that all attorneys, including solo attorneys, need to do succession planning in order to protect clients and the public when attorneys are unable to practice law, I believe that the proposed rule has too many gaps and problems to be implemented as written.

APR - 5 2018

**REPORT FROM SOLO AND SMALL FIRM SECTION'S  
SUBCOMMITTEE ON SUCCESSION PLANNING**



The Solo and Small Firm Section of the New Mexico State Bar is submitting this Report in response to the proposed Rule 16-119.

**General Comments:**

We already have a current disciplinary rule 17-213 that covers the confidentiality of files, and the procedure to inventory the files (although paragraph C(1) will not apply if the attorney is dead, this rule might be amended.) The Subcommittee wants to know why the court is creating 16-119 when we already have an existing rule.

The Subcommittee understands why the Code of Professional Responsibility Committee and the Supreme Court may want to encourage or require attorneys to do succession planning in order to protect clients and the public in general. According to Charles Noland, a member of the Subcommittee, a member of the Succession and Transition Committee, and a past Administrator of the Client Protection Fund, "I would guess the Code of Professional Responsibility Committee is primarily recommending that the court require every active lawyer, with special emphasis on sole practitioners, to fulfill the now well established ethical duty to foresee the possible need to handle unplanned future events and designate a successor. As a byproduct, I can imagine that the D-Board will be relieved when most lawyers who become unable to practice have designated a successor who can help affected clients without the need for Supreme Court intervention and disciplinary counsel can focus on their main mission."

**Despite good intentions, the Solo and Small Firm Section of the New Mexico State Bar has a number of concerns with the proposed rule, 16-119.** In accordance with Article X, Section 10.2 of the State Bar bylaws, we state: "[Our] position is neither endorsed nor approved by the State Bar of New Mexico."

**Concern 1: Purpose and Scope of the Rule**

From the outset, the Supreme Court should be clear as to the purpose of the transition lawyer. Is the transition lawyer's role simply to ensure that clients are notified that their lawyer is incapacitated, or is it to take over the incapacitated lawyer's practice, to sell it, or to wind it down? We believe that the interest of the Supreme Court is to protect clients from loss of their rights due to the death or incapacity of licensed members of the bar. Anything beyond that infringes on the estate plan, or lack thereof, of the planning lawyer. The role of the transition lawyer should be clearly delineated, and limited, to returning files to clients, and taking steps necessary to notify courts and opposing counsel of the incapacity, so as to protect clients' rights until they can take the necessary steps to transfer their matters to new counsel of their choosing.

A second benefit of clarifying the purpose of the Rule would be to help to define the scope of the duty. In particular, is the transition lawyer responsible for distributing only active files, or does he need to collect closed files from storage and attempt to locate all of the former clients as well?

We believe that the primary interest of the Supreme Court in this matter being the protection of the clients from the potential loss of their rights during the immediate aftermath of an incapacity or death, that the transition lawyer should only be responsible for open and active files. This limitation of responsibility would also mean that the transition lawyer would not be required to bill open files and collect outstanding bills. This should be a matter for the planning lawyer's personal representative. If the PR needs to hire a lawyer to assist with those business matters, then that is a private matter. If the purpose of the Rule is to protect clients, we see no reason to encourage transition lawyers to take over matters that they may find in the planning lawyer's office. In fact, that could create the appearance of impropriety, unless the client has discussed that possibility in advance of planning lawyer's incapacity and the client has agreed to that transition without the immediate pressure to make a decision upon learning that their chosen attorney will no longer be able to handle their case. We believe that the better practice would be to give the client a list of attorneys who practice in the applicable area, or to refer them to the State Bar referral services. If the planning lawyer wants to leave a list of attorneys to whom he would refer his clients if need be, he can do so as part of his planning process.

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## **Concern 2: Notification and Approval of Clients Prior to the Incapacity**

If the transition lawyer's role is limited to inventorying and returning files to clients, then there is no need to require disclosure of the transition lawyer's identity in advance. Requiring the notification and possible approval of every client, in advance, will be an unwieldy burden, and it may lead to less planning, not more. Circumstances will change across the course of a lawyer's life, and the nature of his practice will change over the years. The person agreeing to be the transition lawyer will experience changing circumstances as well. If it is difficult to change transition lawyers because of the need to obtain approval of all existing clients, necessary updating of the plan may not happen.

We think the better practice would be to allow planning lawyers to designate one or more attorneys to share the responsibility of inventorying files and notifying clients, courts and opposing counsel of the clients' need to find new counsel. By allowing a pool of attorneys to act as the transition lawyer, it will be easier for solo practitioners to find other attorneys willing to take on that burden, and the burden can be shared when one of the group is in need. We can imagine situations where the designated transition lawyer has predeceased the incapacitated lawyer, or may be on vacation, or in trial, or for some legitimate reason may not be able to respond promptly when the need arises. Also, older lawyers may find it difficult to enlist another lawyer for this job, especially if they are already in poor health.

We believe that it will prove impractical to notify and obtain consent from clients to have a particular transition lawyer in advance of the need for one. It may be workable to require licensed attorneys to notify clients at the time of retention that there is a plan for succession, but the clients need only be informed that if they suspect that their attorney is deceased or incapacitated, that they can contact the State Bar to find out who will be distributing their files. Finally, if a group has been formed to mutually address the need to assist any member of the group, and the purpose of the group is merely to notify parties and distribute files, then we can

perceive no ethical issues which would require the transition teams to have the clients' pre-approval to collect their files and return them to the clients. Should the group encounter any conflicts of interest during the inventory process, the lawyer with the conflict would be able to hand that file to another member of the group.

### **Concern 3: Notification of the Transition Lawyer**

The proposed rule is silent on the method of notification of a successor attorney regarding the solo's incapacity or death. It is not uncommon for solo attorneys to live alone, without families and also to operate without support staff. Death may occur at any time. Will there be a requirement of an all's-well message sent every hour? Should a solo attorney die, how many default judgments are likely to occur before a welfare check is performed? In any other business, choosing a successor without a commitment to a target date – the date the successor takes over – is a mistake.

Additionally, several ethical issues arise for the transition attorney:

- **Confidentiality:** The client must give consent to have any confidential information shared with a successor attorney.
- **Conflicts:** The successor attorney will need to conduct a conflict check if the review of client confidential information is undertaken in order to return the file to the client or transfer the file.
- **Barratry:** If the successor attorney is contacting a solo's former clients or wishes to represent them, he or she should be aware of potential restrictions under NMSA 1978 § 30-27-3(C), (D) and the Disciplinary Rules with respect to barratry or solicitation.

### **Concern 4: Incapacity is Not Defined.**

The proposed rule states that the successor attorney would take over in the event of "extended incapacity." This term is vague and undefined. The Court of Appeals in *Lane v. Levi Strauss & Co.*, 1979-NMCA-012, ¶¶ 12, 19, 92 N.M. 504, 590 P.2d 652, notes that no prior case or law in the State had defined temporary or permanent disability and then set about to do so. The Court held that, "temporary disability" is that which lasts for a limited time only while the workman is undergoing treatment. This classification anticipates that eventually there will be either complete recovery or an impaired bodily condition which is static. *Hiatt v. Department of Labor and Industries*, 48 Wash.2d 843, 297 P.2d 244 (1956). Temporary disability ceases when the injured workman's physical condition becomes static or stationary. *Home Insurance Company v. Industrial Commission*, 23 Ariz. App. 90, 530 P.2d 1123 (1975). NMSA 1978, § 52-1-25.1(A) reflects this view in part.

Scientific American published a report in 2014 remarking on the effects of general anesthesia, such as temporary memory loss, hallucinations, and some patients over 60 years of age experiencing a month of delirium following surgery. How then is this rule to protect the attorney who has to take time away from the office but is incapable of expressing this wish? As written,

by the time the attorney recovers, the practice is likely to be eviscerated with cases sent away to other attorneys.

**Concern 5: Need for an Automatic Stay.**

It is likely that most instances where a transition lawyer must act will occur unexpectedly. Clients' rights may be lost if deadlines are missed through no fault of any attorney involved in the transition. We suggest that the Supreme Court consider creating an automatic stay, at least for state court cases, of 60-90 days for any deadlines, including statutes of limitations, on cases that the IL had accepted, should an attorney be deceased or declared incapacitated. This would do more to protect clients than any other provision of the proposed rule. While a stay might not be enforceable in federal courts or administrative actions, it would be an expression of public policy in New Mexico that would likely be given weight by other courts, especially if the exercise of sound discretion is called for to protect a client's rights.

**Concern 6: How is the Solo Attorney's Estate Protected?**

Under the proposed rule, how is a solo attorney's estate protected following death or permanent disability? This is particularly important if the attorney maintained a trust account. The deceased attorney or one that is permanently disabled will be incapable of explaining to the transition attorney which part of the trust funds is owed to clients and which belongs to the attorney. A successor attorney would therefore have to painstakingly examine each file to determine what work had been performed, the hourly rate, the length of time taken to complete the different tasks, and so forth, to arrive at an amount to be deducted from the trust account. This may be a matter for the Client Protection Fund, but the rule should ensure that care is taken to determine the portion of trust account funds belonging to the dead, missing, or disabled attorney.

**Concern 7: The Need for Qualified Immunity as Written in NMRA 17-213**

The transitional attorney should have qualified immunity and should be immune from liability from the attorney who was suspended, disbarred, resigned, died or became incapacitated except for injury to such clients caused by intentional, willful, or grossly negligent breach of duties.

Without such qualified immunity, it is difficult to see how solo attorneys can afford to act as transitional attorneys for other attorneys, and without qualified immunity it is hard to know whether professional liability insurance companies will want to cover these "transitional attorneys."

**Concern 8: Professional Liability Insurance.**

The Subcommittee believes that the Supreme Court should appoint a subcommittee of the Succession and Transition Committee involving professional liability issues as different companies providing insurance in New Mexico appear to cover the “transitional attorney” differently. The subcommittee would be tasked with reviewing every malpractice insurance policy and collecting information from each insurance company regarding protection of the transition attorney.

Some examples of differences between policies:

A CNA policy would cover for work done as the successor attorney for the planning attorney who was insured by a different company. The problem might arise if the successor attorney is covered by a non-CNA company. The ALPS policy limits coverage for each attorney to professional services provided on behalf of the "Named Insured" firm. ALPS might make an exception for covering as a successor, but it could be an issue based on that policy language.

**Concern 9: As proposed, the rule places undue burden on solo attorneys.**

The proposed rule assumes that every planning attorney will have one transitional attorney. This is likely to place an extreme hardship on solo attorneys, and especially on those attorneys who live and practice in rural areas. This is particularly the case when the rule does not state with any specificity what files the transitional attorney is responsible for handling. For example, there are a number of areas in which cases may be “open” for five years and if the transitional attorney is responsible for 5 years in the past then this may be too burdensome for solo attorneys. Furthermore, if the planning attorney has more than 50 “open cases”, this may also be very difficult for the transitional attorney to be responsible for. Ann Waters, a CNA broker, suggested to Charles Gurd that possibly retired attorneys might be able to help with succession planning. However, as currently conceived it is the Subcommittee’s opinion that in order for the New Mexico attorneys to be in compliance with the Proposed Rule, attorneys must be fully licensed. A related problem is that in order for an attorney to be a transitional attorney for the purposes of Trust Accounting that attorney must be an attorney who is licensed in New Mexico.

Respectfully Submitted,

*Charles B. Gurd*

Charles Gurd

Chair of the Solo and Small Firm Section of the New Mexico State Bar

Submitted to New Mexico Supreme Court: 5 April 2018

LAW OFFICES OF

# MIKE MILLIGAN

(915) 544-5587  
FAX (915) 544-2773  
email: elpasomike13@aol.com

ATTORNEY AT LAW  
4171 N. Mesa  
SUITE B-201  
El Paso, Texas 79902

*Certified in Labor & Employment  
and Civil Trial Law by the Texas  
Board of Legal Specialization*

*Licensed in Texas and New Mexico,  
State and Federal Courts*

April 4, 2018

SUPREME COURT OF NEW MEXICO  
FILED

APR - 9 2018

New Mexico Supreme Court  
c/o Joseph Moya  
237 Don Gaspar Ave., Suite 104  
Santa Fe, NM 87501



Re: Proposed New Disciplinary Rule 16-119

To the Court:

The above proposed Rule will require all solo practitioners to have not only a succession plan, but to have any "Good Samaritan" colleagues sign the agreement in advance along with every single one of the lawyer's clients. Firms of more than one lawyer need only have the succession plan. And, of course, there are no requirements at all for government and corporate attorneys. I write to express my extreme disapproval and outright fear of this calamity for New Mexico's solo practitioners.

Some members of the Court are no doubt familiar with my past criticisms of deficiencies in predecessors to the current draconian proposal. Beginning in 2003, I inveighed against Rule 17-213 for its lack of any qualified immunity protection for the "inventorying attorney." This Court finally listened in 2012 by adding Subparagraph F to the Rule. In 2014, as secretary to the Board of Directors for the Senior Lawyers Division, I warned about the proposed State Bar Succession Manual, suggesting that the Section "recommend adoption by rule, or statute if necessary, automatic extension of time limits in cases where the attorney suddenly and unexpectedly dies or becomes disabled; appropriate amendment to the Rules of Professional Conduct to prevent service of pleadings or other papers on a party who is suddenly and expectedly unrepresented; amendment of NMRA 17-213 to allow District Courts [not just the Supreme Court] to appoint an 'inventorying attorney;' and inclusion in any protocols for individual succession planning language that the entire procedure is advisory only and non-compliance therewith shall not be considered professional malpractice."

I duly moved to include that as an agenda item. The Chair of the ensuing board meeting ignored it and instead recognized someone working on the Succession Manual project to dismiss my suggestions as completely lacking in merit. One of the things I wrote down that he said is that the Succession Manual was necessary because of this Court's "concern about elderly solos who are losing it." I left the meeting in disgust.

Now, the New Mexico State Bar Association doubles down, specifically targeting solo practitioners with rules that will effectively put us all out of business. I have a succession plan, a committee of my friends licensed in Texas and New Mexico who have agreed to pitch in and help my wife Carol or me in shutting down when the first of us goes down. These are my closest friends in the profession excepting only the ones who, like me, enumerate their professional futures in single digits. But lawyers in mid-career very often make changes, moving hundreds or even thousands of miles away for greener pastures, becoming judges, or going to work for corporations or law firms that will not allow them to be Good Samaritans to me or my widow. As I think of the current almost completely female membership of my succession committee, I cannot think of a single one who would bind herself to her commitment in writing.

And I would be very reluctant to extract such a promise from my friends. The proposed Rule, of course, ignores my suggestions intended to give the "transition lawyer" enough time to ensure the clients' interests do not suffer in the transition. No extension of deadlines, no prohibition of opportunistic conduct by opponents, and no option for the Good Samaritan(s) to proceed under Rule 17-213.

But wait, there's more. Completely gone from the proposed Rule is the detailed qualified immunity which this Court wisely added to Rule 17-213 in 2012. Good Samaritans must take their chances as they try to find the time in their own busy schedules to help the bereaved spouse and clients. I can only imagine what my malpractice insurance carrier would think of my assuming such a gigantic risk.

As the Court may already know, I called last week to get a roster of the Code of Professional Conduct Committee. Of the 17 lawyers on that committee, I saw only two solo practitioners. Everybody else was employed by the Government, a firm, or the judiciary. It's easy for people with no skin in the game to bemoan "elderly solos who are losing it."

This Court can, of course, justify the new rule as necessary for the protection of the public. In so doing it could, perhaps, say it was following Justice Oliver Wendell Holmes Jr. When he was urged by a passerby to "Do justice, sir," he snapped back, "That's not my job." Whose job is it? Nobody will hold this Court accountable when solos start dropping like flies. Within a fairly short time, no more than five years, all of us Atticus wannabes will be as dead as the dinosaurs. The very rich and the very poor will still have representation, but the great middle, who resort to solos without gatekeepers, will go unrepresented. They'll blame it on greedy lawyers as they see the Rule of Law disappear.

Having said all this, I want to make very clear that I take the whole issue of succession planning very seriously. Not only do I have my succession committee, I am not taking any new cases except for short-term projects or as second chair to a younger lawyer. The nationwide actuarial preoccupation of the American judiciary and bar leadership has forced us solo practitioners into a kind of morbidity, thinking constantly of death or disability. As members of

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my succession committee drift away, I have other friends who will step up. That's the approach recommended by my carrier, Attorney Protective, but it certainly won't pass muster if the Court adopts the new rule.

We solos have responsibility to do our part to provide an orderly succession, but the new rule effectively places the entire burden on us. I can tell you right now, it's too heavy. Sudden death or disability of lawyers is a problem for the entire profession – all lawyers, including judges and lawyers insulated (at least temporarily) from concern. I detect no sharing of concern in the proposed new Rule.

This is the first time in my 50 years of law practice that I have addressed any Court in such blunt words and tone. Perhaps this Court will dismiss me as an elderly solo who's losing it. If they had a voice, my poor and desperate clients would probably say, "We'll take whatever we can get."

There is a moral dimension to what we do as judges and lawyers. I urge you to consider that and reject the proposed Rule.

Respectfully yours,



Michael T. Milligan  
New Mexico Bar No. 14998

MTM/cm

SUPREME COURT OF NEW MEXICO  
FILED

APR 11 2018



**Your Name**  
Fletcher R. Catron

**Phone Number**  
5059821947

**Email**  
fcatron@catronlaw.com

**Proposal Number**  
Proposal 2018-12 (Rule 16-119)

**Comment**

"Regardless of the form, clients must be informed of a lawyer's succession plan and client consent must be obtained such that any transition lawyer can appropriately access confidential client information and conduct conflict checks when necessary."

As written, the rule could be interpreted to require that the written transition plan be presented to the client upon initial consultation. I doubt that is what is intended, but I would prefer to see the rule rephrased to simply require the transition lawyer to send notice to the impaired/deceased attorney's clients prior to his review of the files. I would also like to see a fixed period, after notice, after which the transition lawyer could review the file even if he has not received a response from the client.