

**PROPOSED REVISIONS TO THE RULES OF PROFESSIONAL CONDUCT  
PROPOSAL 2018-035**

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 **November 29, 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.

---

**[NEW MATERIAL]**

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

A. **Succession plan.** Every attorney practicing law in the state of New Mexico (hereafter sometimes referred to as the "designating attorney") must have a written succession plan, either alone or as part of a law firm plan, specifying the steps to be taken in the event of the designating attorney's extended incapacity from practicing law, or the designating attorney's disability or death. At a minimum, the plan must include the following:

- (1) the identity of the lawyer or law firm designated to carry out the terms of the succession plan (the "assisting lawyer");
- (2) a current list of active clients and cases;
- (3) the location of information necessary to access the designating attorney's client files and other client information including computer and other relevant passwords; and
- (4) information on the designating attorney's trust and operating accounts and corresponding records.

B. **Notice of Plan.** The designating attorney must notify the assisting lawyer of, and the assisting lawyer must consent to, the designation as an assisting lawyer in a writing signed by the designating attorney and the assisting lawyer, or by electronic communication acknowledged by both the designating attorney and assisting lawyer. Attorneys must also notify their clients of the existence of the succession plan.

C. **Certificate of Compliance.** Every attorney shall annually certify to the state bar, as part of the registration statement filed pursuant to Rule 17-202 NMRA, that the attorney, or the

law firm employing the attorney is in compliance with this rule. In the case of a single attorney or a law firm employing only a single attorney, the designating attorney, each attorney shall include on the registration statement the name or names of the assisting lawyer. In the case of attorneys or law firms employing more than one attorney each attorney shall identify on the registration statement the person or persons responsible for the law firm's succession plan. The state bar shall retain the original of each registration statement and, upon request, shall provide a copy to the disciplinary board.

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

**Committee commentary.** —

### **General Principles**

[1] When an attorney is unexpectedly unable to practice for an extended period of time, the attorney'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 designating attorney can avert or mitigate such harm. The goal of succession planning is to protect the interests of the designating attorney's current clients by creating and implementing a succession plan to take effect when the designating attorney is unable to practice law due to extended incapacity, or the attorney's disability, or death. The incapacity of the designating attorney may be temporary or permanent.

[2] The level of sophistication of a succession plan should be determined by each designating attorney's or law firm's circumstance. As part of the succession plan the designating attorney can arrange for the assisting lawyer to take steps to promptly distribute the client matters, including any trust funds due to the clients, directly to the clients or to other lawyers chosen by the clients. Alternatively, the designating attorney may draft the plan such that, with the clients' consent, the assisting lawyer will assume responsibility for the interests of the designating attorney's clients, subject to the right of the clients to retain a different lawyer or law firm other than the assisting lawyer. These examples are not meant to be exhaustive.

### **Determining Incapacity**

[3] Incapacity or disability may be determined: (1) by a Court with competent jurisdiction; (2) as defined in the succession plan; (3) as certified by a competent medical professional; or (4) as otherwise agreed between the designating attorney and the assisting lawyer.

### **Role of Assisting Lawyer**

[4] Upon reasonable confirmation of the designating attorney's extended incapacity, disability, or death, the assisting lawyer should take those steps provided for the succession plan. If the assisting lawyer forms an attorney-client relationship with the designating attorney's clients, the assisting lawyer will be subject to the existing rules and duties attendant to the attorney-client relationship. Otherwise, this rule is not intended to create liability between the assisting lawyer and either the clients of the designating attorney or the designating attorney, absent intentional, willful, or grossly negligent breach of duties by the assisting lawyer.

### **Notice to Clients**

[5] The designating attorney must notify his or her clients of the existence of the attorney's succession plan. Preferably this should be done by including such information in the retainer agreement. The designating attorney should also inform clients that in the event the client learns of the attorney's extended incapacity, disability, or death, the client may call the State Bar of New Mexico for further information.

**Fees**

[6] Attorneys' fees, if any, to be paid to the assisting lawyer shall be in accordance with Rules 16-105, 16-115, and 16-504 NMRA.

**Other Resources**

[7] Numerous resources are available to assist a designating attorney in engaging in effective succession planning, including those materials available on the State Bar of New Mexico website under the tab "for Members: Supreme Court Commissions: Succession and Transition Committee." All attorneys are encouraged to avail themselves of these materials.

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

Google Groups

## Proposed Rule 2018-035 Comments

John Darden <johndarden@zianet.com>  
Posted in group: nmsupremecourtclerk

SUPREME COURT OF NEW MEXICO  
FILED

Oct 26, 2018 4:13 PM

OCT 26 2018

Mr. Moya,



I am a sole practitioner and retired from the active practice of law though I still keep my license active for arbitrations. I was first admitted in Arizona in September, 1969 and in New Mexico in January, 1970. My NM legal service included 16 ½ years as a United States Magistrate Judge. Next September I will have been a lawyer 50 years.

My law practice is me alone with no staff. I perform arbitrations for various organizations such as the American Arbitration Association (on several panels), Financial Industry Regulatory Authority (FINRA), The Forum, Construction Disputes Resolution Services, and possibly others in the future where I have my name and resume. I have for example at the request of parties to the American Arbitration Association managed an arbitration in 2018 outside management of that Association. The local district court has appointed me to various positions including as a Special Master and an Umpire in an insurance dispute. Should I die or become incapacitated there can be no succession other than as appointed by these entities. I do not control who follows me. I have also performed this year individual pro bono time for the Catholic Diocese of Las Cruces as at onetime I was President of the Board of Governors of that Diocese. What I did for the Diocese in 2018 is occasional and is more on the counselling side of the law practice (Counsellor at Law) to the former Bishop who has now been reassigned to a larger Diocese in California. If requested by his replacement, I will without hesitation consult with the new Bishop. This pro bono participation as well is not something where a succession plan is in order.

I have made arrangements with my step-son who is an actively licensed NM lawyer but works for an Atlanta law firm in its Austin, Texas office as well as two Las Cruces actively licensed lawyers to correctly notify any entity where I have an active case of my demise or incapacity and to follow any rules at the time.

Proposed Rule 2018-035 does not however recognize that many sole practitioners move from private practice to mediation and arbitration practices similar to my situation. And, it does not consider the pro bono activities we may participate in which do not involve more than occasional advice. Please carve out an exception for individuals in my situation.

Respectfully,

John A. Darden III

200 W. Las Cruces Avenue, Suite D

Las Cruces, NM 88005-1803

(575) 523-5071 Home Telephone