

**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
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

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Oct 26, 2018 4:13 PM

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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



New Mexico
Courts

Terri Saxon <suptls@nmcourts.gov>

Rule Proposal Comment Form

1 message

mailservices@sks.com <mailservices@sks.com>

Thu, Nov 1, 2018 at 12:15 PM

To: supjdm@nmcourts.gov, suptls@nmcourts.gov

Your Name

Karen E. Wootton

Phone Number

5755269695

Email

karen@woottonlegal.com

Proposal Number

2018-035

Comment

As a sole practitioner in Las Cruces, a relatively small legal community, there are few attorneys with a similar background who could step in for me. In each instance, there would likely be a conflict in some case or transaction at the time of my death or disability. I would like to see that possibility addressed in some way, preferably with a statement that the "successor attorney" would be able to assist in obtaining appropriate substitute counsel without being deemed to have a conflict. Thank you. Similarly, I would need to provide passwords etc. to that attorney, who would like have a conflict with one or more clients when I provide that information, and would like the Rule or comments to specifically authorize that.

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**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 2018-035, which if adopted would create a new Rule 16-119 NMRA.

General Comments:

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.

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 assisting lawyer. In the comments to the proposed rule, it is suggested that the assisting attorney and the designating attorney prepare a plan that fits the circumstances and the wishes of the two. While this is great in theory, in practice it leaves something to be desired. We are concerned with some practical issues.

Most of New Mexico is rural and there are few attorneys outside of the big cities like Albuquerque or Las Cruces. Within the Seventh District there are 41 active attorneys with the majority in Socorro County. The Fourth District has 97 active attorneys with the majority in Taos County. The Ninth District has 67 active attorneys with the majority in Curry County. More importantly, how many attorneys in a particular district are licensed in federal court or handle technical matters such as federal trademarks, social security, the new guardianship and conservator law, or workers' comp? A lawyer in any one of these areas might need to seek an attorney in one of the big cities to act as an assisting counsel but the clients are less likely to be willing to be represented by someone outside of the district. At a minimum, clients would have travel costs and higher fees. Then there is the matter of stays. Even the vague commentary states that the assisting attorney must take steps to distribute the client matters. But in a practical sense, the assisting attorney must be familiar with the type of practice and capable of determining the statute of limitations for the particular file. Social Security or Workers' Comp attorneys might have well over a hundred active files. An assisting attorney, responsible for his or her own practice, now has to travel to a new office where the designating attorney may have arranged the files in a different manner and the assisting must decode the filing system and locate the papers that tell whether the statute of limitations is fast approaching. Because of these issues, we think the rule does not acknowledge how difficult it will be to find solo attorneys to act as assisting attorneys to other solo attorneys in rural areas. We also believe that the rule does not adequately address the concerns of rural clients.

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

If the assisting lawyer's role is limited to inventorying and returning files to clients, then there is no need to require disclosure of the assisting 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 assisting lawyer will experience changing circumstances as well. It may be difficult to change assisting lawyers because of the need to obtain approval of all existing clients. What happens if the "assisting attorney" himself or herself dies or becomes incapacitated.

We think the better practice would be to allow designating 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 assisting lawyer, it will be easier for solo practitioners to find other attorneys willing to take on that burden. We can imagine situations where the designated assisting 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 assisting 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. If this is the case, then there must be personnel within the State Bar who is delegated the responsibility of identifying that individual. 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 Assisting Lawyer

The proposed rule is silent on the method of notification of an assisting lawyer regarding the lawyer's incapacity or death. A method of notification must be determined before this rule becomes effective, not afterwards. It is not uncommon for solo attorneys to live alone, without families and 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 assisting attorney:

- **Confidentiality:** The client must give consent to have any confidential information shared with an assisting lawyer.
- **Conflicts:** The assisting 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 assisting lawyer 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 as Defined is Harsh

The commentary for incapacity is harsh. As written, by the time an incapacitated lawyer has recovered, the practice is likely to be eviscerated with cases sent away to other attorneys. No attorney can plan to take over another's practice for an unknown period of time. It is understood that the purpose is to protect the client, but the outcome of this Rule will be to force solo attorneys to associate with others.

Concern 5: Need for an Automatic Stay

It is likely that most instances where an assisting lawyer must act will occur unexpectedly. Clients' rights may be lost if deadlines are missed through no fault of any lawyer 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 designating lawyer had accepted, should the designating die or be 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 assisting lawyer which part of the trust funds is owed to clients and which belongs to the attorney. A successor lawyer 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 assisting lawyer should have qualified immunity. That is, the assisting lawyer should be immune from liability from the designating lawyer who was suspended, disbarred, resigned, died or became incapacitated except for injury to such clients caused by his or her 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 assisting attorneys for other attorneys, and without qualified immunity it is hard to know whether professional liability insurance companies will want to cover these “assisting lawyers.”

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 “assisting lawyer” differently. We would encourage that Insurance Subcommittee be given the task of reviewing every malpractice insurance policy and collecting information from insurance company regarding protection of the assisting lawyer so as to encourage uniformity of malpractice coverage involving “assisting lawyers.”

Concern 9: The Rule Places Undue Burden on Solo Attorneys

The proposed rule assumes that every designating lawyer will have one assisting lawyer. 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 assisting 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 assisting attorney is responsible for 5 years in the past then this may be too burdensome for solo attorneys. Furthermore, if the designating attorney has more than 50 “open cases”, this may also be very difficult for the assisting lawyer 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 an assisting attorney for the purposes of Trust Accounting that attorney must be an attorney who is licensed in New Mexico.

Respectfully Submitted,

Charles B. Gurd Submitted to the NM Supreme Ct: 1 November 2018

Charles Gurd
Chair of the Solo and Small Firm Section of the New Mexico State Bar
Bar No.: 7442

Comments
Supreme Court Proposal 2018-035
Proposed Rule 16-119 NMRA
Lawyer Succession Planning

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The proposed rule suffers from a glaring omission---an exemption from the rule for lawyers not engaged in the private practice of law. No client protection purpose is served by burdening lawyers who have no clients with the requirements of this proposed rule.

The common sense principle that it makes no sense to apply rules like the proposed rule to lawyers not engaged in the private practice of law is already recognized in the rules. Rule 24-109 NMRA, regarding IOLTA trust accounts, includes such an exemption in Paragraph B. (8).

A lawyer is exempt from the requirements of this paragraph if

- (a) the lawyer is a judge, an employee of a local, state, federal, or tribal government, corporate counsel, or a teacher of law, **or is otherwise not engaged in the private practice of law;**
- (b) the nature of the lawyer's practice is such that the lawyer does not hold IOLTA-eligible funds of any client or third person;
- (c) the lawyer does not have an office within the State of New Mexico or has the client's or third person's permission to hold the funds out of state; or...

(Rule 24-109, Paragraph B. (8) (a) (b) (c), emphasis added).

The original version of Proposed Rule 16-119 NMRA, published for comment as Proposal 2018-012, contained a similar exemption.

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.

(Proposed Rule 16-119 Paragraph C., Proposal 2018-012). For unknown reasons (the Committee commentary is silent on the change), Paragraph C. was omitted from the current Proposal 2018-035.

As the specific exemptions listed in the deleted Paragraph C. acknowledge, there are substantial numbers of lawyers who have no private clients to protect. For example, as worded, without an exemption provision, the proposed rule would apply to every judge in New Mexico, including the members of this court. Any rule that requires judges to comply with a mandatory succession requirement is over broad and should be narrowed with a well-crafted exemption for lawyers who are not engaged in the private practice of law in New Mexico. That exemption should include descriptive language like the bolded language in Paragraph B. (8) (a) of Rule 24-109 (“...**or is otherwise not engaged in the private practice of law;**...”) in order to avoid inadvertent omissions from any list or the application of the rule of statutory construction that where a statute contains a list, that list is exclusive.

There is always a significant risk of inadvertent omission in trying to define a universe of people through a list. For example, Rule 24-109, Paragraph B. (8) (a) includes judges and teachers of law, while Paragraph C. of Proposal 2018-012 did not. Yet, the reasons for exempting judges and law professors are as strong as those for exempting in house counsel and government lawyers. Other examples come quickly to mind: (1) a lawyer working for a think tank like Think New Mexico or the Santa Fe Institute, who maintains an active license, but does not practice law, and (2) a retired lawyer who does not practice and has no clients, but choses to maintain an active license rather than opting for inactive status.

The deleted Paragraph C. of Proposal 2018-012 fails to avoid the pitfall of inadvertent omission from a list because it contains a list of types of exempted lawyers, but no descriptive language. As noted above, that list omitted judges and teachers of law, who absent descriptive language would not have been eligible for an exemption. On the other hand, Paragraph B. (8) (a) of Rule 24-109 effectively captures the universe of lawyers to whom an exemption should apply because in addition to a list, it contains the bolded language, “...**or is otherwise not engaged in the private practice of law;**...”

I would propose that Paragraph C. of Proposal 2018-012 be reincorporated into Proposal 2019-035 as a new Paragraph D., with edits for formatting and to include the previously discussed bolded language and types of lawyers omitted from the list in the previous Paragraph C. The proposed Paragraph D. is set out immediately below. For the court’s ease of reference, the language added or changed in the previous Paragraph C. is highlighted.

D. 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 a judge, 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, or as a teacher of law, or who has otherwise not been engaged in the private practice of law within the State of New Mexico. Any lawyer claiming an exemption from this rule must do so on the certificate of compliance set forth in Paragraph C. 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, complying with the notice provisions of Paragraph B and filing a certificate of compliance with the lawyer's next annual registration statement.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Robert J. Malone". The signature is written in black ink and is positioned above the printed name and license number.

Robert J. Malone
License Number 8998

**CHARLES GURD'S RESPONSE TO PROPOSAL 2018-035
PROPOSED RULE 16-119
THAT REQUIRES MANDATORY SUCCESSION PLANNING**

My name is Charles Gurd. I am a solo attorney who has been practicing law for 25 years. I have practiced in federal court and before state and federal administrative agencies. Although I am the past Chair, Chair, and Chair-Elect of the Solo and Small Firm Section of the State Bar, I am submitting these comments as my own: these comments do not necessarily reflect the Board nor the Section as a whole. The solo and small firm section has already submitted its report that was drafted by the subsection on succession planning. These are my own comments.

A. General Comments:

The proposed rule should not become effective because it is vague. Although the comments are somewhat detailed, they are not binding on us. The rule itself does not tell us how we are to conduct ourselves. Furthermore, the rule violates the attorney-client relationship. If one of the reasons for discipline is the lack of communication by attorneys to their clients, then this rule just doubles the amount of work solo attorneys have, which may cause more solo attorneys to violate the rules of professional conduct. Therefore, the proposed rule has the unintended consequence of encouraging attorneys to leave solo practice. Is the Supreme Court going to institute a rule requiring middle and large size firms to represent rural clients since rural clients are primarily represented by solo and small firm attorneys! Although I strongly believe in succession planning for attorneys, especially solo and small firm practitioners, I also believe that the rules must be fair and must focus on clients. These proposed rules are not fair and they do not focus on clients. In fact, if implemented they could adversely affect clients.

B. Specific Problems with the Proposed Rule:

1. Who Enforces this Rule?

The rule does not state who enforces the rule and how the rule is enforced. Furthermore, does the State Bar have the ability to track the names of the "assisting lawyer" and the "Succession Plan."

2. Incapacity is Not Defined:

The proposed rule does not define "incapacity" nor does it reference the existing rule (17-213). Although the comments give various ways "incapacity" can be defined, it is not clear which one the Disciplinary Board will choose to enforce, if it is the Disciplinary Board that makes that decision.

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3. How is the Assisting Lawyer Notified?

The proposed rule does not give any guidance about how an assisting lawyer is notified that the designating attorney is unable to practice law. This is a critical deficiency if the assisting lawyer is penalized for missing deadlines, etc. Thus, I believe that the Supreme Court should explore how an assisting lawyer can be notified of their duties **before** the rule goes into effect. I also believe there should be qualified immunity for an assisting attorney unless there is gross negligence or improper dealings. Again, there is a suggestion that the assisting lawyer will have qualified immunity or that there will be a stay, but this is not set forth in the rule, but only in the comments. Again, the comments are not binding on us. 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 designating attorney becomes unable to practice – either temporarily or permanently – and when the assisting lawyer even looks at the case. 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 assisting attorney time to review the case, it is not clear how this would work in Federal Court or when an assisting lawyer is before a Federal Administrative Tribunal or Agency. This is especially problematic when the “assisting lawyer” examines the case and realizes he or she 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, it is not clear to me when a client relationship is formed, especially in those cases in which the lawyer 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 law. 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 the only person the assisting lawyer 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 area Federal Worker’s Compensation or handle Federal Black Lung cases. What happens if the lawyer who is contacted by the assisting lawyer or by the client has a conflict? Whose insurance governs during this “unknown period”?

4. No Automatic Stay in the Body of The Rule:

Again, it is really problematic that there is no automatic stay in the rule. If there is no automatic stay in the rule, then I think it is likely that many lawyers will leave the field of solo practice.

5. No Qualified Immunity in the Body of the Rule:

For the reasons stated above, without qualified immunity I think it is likely that many solo attorneys will leave the field of solo practice.

6. “Active Cases” is Not Defined:

This proposed rule is really burdensome on solo practitioners as solo attorneys in the field of social security practice, public benefits or tax and estate planning may have hundreds of active cases.

7. Why is the Assisting Lawyer Responsible for All of the Designating Lawyer’s Trust Account and Operating Business Accounts?

Requiring the assisting lawyer to be responsible for the designating attorney’s operating business accounts is extremely burdensome on solo practitioners who want to assist and represent their clients. Although big firms have “business managers” many solo practitioners do not. It is unclear how this requirement serves the best interests of clients.

8. Solo Attorneys are Handicapped:

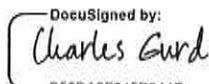
Finally, the proposed rule handicaps solo attorneys in the rural areas. The proposed rule assumes there is a one to one relationship, meaning that there is a single designating attorney and a single assisting lawyer. In rural areas, there may not be a back-up or transitional attorney who is able and willing to serve. What happens to those designating 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 it is my understanding that most attorneys who practice in rural areas are solo attorneys or small firm attorneys.

9. Problems with Financial Institutions and Out of State “Transitional Lawyers”:

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 an assisting lawyer who can manage all of the planning attorney’s affairs. The Supreme Court should encourage the Succession and Transition Committee 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, I believe that the proposed rule has too many gaps and problems to be implemented.

Respectfully Submitted,

DocuSigned by:

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Charles B. Gurd
Bar No.: 7442

Submitted: 9 November 2018

Google Groups

Proposed Revision to NMRA 16-119, Lawyer Succession Planning

SUPREME COURT OF NEW MEXICO

Mike Milligan <elpasomike13@aol.com>

FILED

Nov 9, 2018 4:33 PM

Posted in group: nmsupremecourtclerk

NOV 9 2018

To the Court:



As with all other lawyers who have thus far commented on the above matter, I have serious concerns about the proposed rule. Between now and the comment deadline (November 29), I expect the Court will receive additional comments of the same tenor. The common denominator of the criticism leveled against the proposed rule is that it represents oversimplification of an enormously complex problem which would be more appropriate for legislative consideration. That would enable discussion of different points of view, not just by lawyers but the general public as well. Especially helpful would be the opinions of persons living in small towns where the effect of the proposed rule might be an adverse impact on, if not elimination of, legal services.

If this Honorable Court is nevertheless determined to proceed with this project, I respectfully suggest that the rule actually adopted be modified by including the highlighted language and deleting the struck-out language, as set out below verbatim for ease of understanding by all concerned:

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 or electronically stored 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(s) or law firm(s) designated to carry out the terms of the succession plan (the "assisting lawyer(s)");
- (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. Determining Incapacity. 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(s).

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

D. **Liability of the Assisting Lawyer(s).** Except as provided in subparagraph D(4) below, the assisting lawyer(s) serving under this rule shall (1) not be regarded as having a lawyer-client relationship with the clients of the designating attorney, except that the assisting lawyer(s) shall be bound by the obligation of confidentiality imposed by the Rules of Professional Conduct with respect to information acquired as assisting lawyer(s); (2) have no liability to clients of the designating attorney except for injury to such clients caused by intentional, willful, or grossly negligent breach of duties by the assisting lawyer(s); (3) be immune to separate suit brought on behalf of the designating attorney; and (4) have the right to accept employment with the designating attorney's clients, subject to the existing rules and duties attendant to the attorney-client relationship.

E. **Grace Period for Assisting Lawyer(s).**

(1) A lawyer shall not take advantage of any lawyer's death, incapacity, or disability by moving, requesting, or urging any court, administrative agency, or other adjudicatory body to enforce any deadline against a client of a lawyer who has died or become incapacitated or disabled from practicing law, for a period of forty-five (45) days after the date of the lawyer's death, incapacity, or disability.

(2) The death, incapacity, or disability of a lawyer in a litigation matter shall be considered good cause for tolling of any deadline or limitation except for those which are designated jurisdictional by the statute creating them.

F. **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(s). 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(s) 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(s). 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.~~
[Moved to Rule, Section B]

Role of Assisting Lawyer

[4] Upon reasonable confirmation of the designating attorney's extended incapacity, disability, or death, the assisting lawyer(s) should take those steps provided for the succession plan. The assisting lawyer(s) should also have discretion to consult as reasonably necessary any other persons with knowledge of the designating attorney's practice, including without limitation, courts, opposed and allied counsel, family members, personal friends, creditors, and others having practice-related contracts with the designating attorney. All courts and attorneys should recognize the authority of the assisting lawyer(s), absent good and sufficient cause for doing otherwise. ~~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.~~ [Moved to Rule, Section D(4)] ~~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.~~ [Moved to Rule, Section D(2)]

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(s) 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, which are advisory only.

[Adopted by Supreme Court Order No. _____, effective _____.]

I heartily thank the Bench and Bar of this beautiful and humane state I deeply admire for considering my suggestions.

Respectfully submitted,

Michael T. Milligan
New Mexico Bar No. 14998

Law Office of Mike Milligan
4171 N. Mesa St., Suite B-201
El Paso, Texas 79902
915-544-5587
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ElPasoMike13@aol.com



New Mexico
Courts

Terri Saxon <suptls@nmcourts.gov>

Rule Proposal Comment Form

1 message

mailservices@sks.com <mailservices@sks.com>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov

Sat, Nov 17, 2018 at 11:46 PM

Your Name
Barry Green

Phone Number
5059891834

Email
BarryGreenLaw@msn.com

Proposal Number
2018-035

Comment

I respectfully disagree with 2 requirements of this proposed rule. First, I do not think it would be a good idea to require attorney's to notify their clients of the existence of the succession plan for 2 reasons. 1) if a succession plan is required of all attorneys, then the general public will know that and individual notifications are not necessary; and 2) these type notifications cause client's unnecessary confusion and concern that something may happen to their case without their knowledge or permission.

Second, I do not think it is a good idea to require passwords be provided the succession attorney. My computer is encrypted and certain individual files are also encrypted. Security protocol is to changes passwords frequently. Requiring those passwords be given to another attorney would discourage changing them often. My family has those passwords and I would prefer my succession attorney obtain the passwords from my family.

Thank you for your consideration. Barry Green

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NOV 19 2018

A handwritten signature in black ink, appearing to be "T. Saxon", written over a horizontal line.



New Mexico
Courts

Terri Saxon <suptls@nmcourts.gov>

Rule Proposal Comment Form

mailservices@sks.com <mailservices@sks.com>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov

Sat, Nov 17, 2018 at 11:46 PM

Your Name
Barry Green

Phone Number
5059891834

Email
BarryGreenLaw@msn.com

Proposal Number
2018-035

Comment

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Thank you for your consideration. Barry Green

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NOV 19 2018

A handwritten signature in black ink, appearing to be "JPA", with a horizontal line extending to the right.

Google Groups

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Lawyer succession plan

NOV 19 2018

Ronald VanAmberg <rvanamberg@nmlawgroup.com>

Nov 19, 2018 4:38 PM

Posted in group: nmsupremecourtclerk



Dear Mr. Moya - I have serious doubts whether I can ever comply with these requirements of the proposed rule. Over my 40+ years of practice I've served over 1100 clients. Most of them I will never see again, but many contact me on a sporadic basis to perform some limited services. The clients I am working on one month I will not be working on the next month. Who is an active client is impossible to determine on any accurate basis. Any client list I can prepare will be obsolete shortly. I also do not know who I could get to commit to servicing my practice. My partners are not willing to do that, nor would I expect any other lawyer to take on this potential malpractice liability. I also question the propriety or ethics of revealing clients' identity. This appears to be a violation of attorney-client privilege. Many clients do not want it revealed that they are seeking legal advice and have legal problems. Also, what if someone is identified as a client, but actually is now being serviced by a different attorney? What is the liability for misrepresenting that status? I've only talked to a few attorneys about this and they are all concerned, some to the point of outrage. One attorney says that if this rule goes through he will terminate his practice because he cannot comply with this. I think the rule is ill advised and wholly unworkable. Upon an attorney's death or disability, that attorney's staff notifies the court and parties in any active litigation. Notice is sent to then active clients and arrangements made to transfer the file. Files are maintained and transferred if inquiries are made by former clients seeking services. Ron Van Amberg

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New Mexico
Courts

Terri Saxon <suptls@nmcourts.gov>

Rule Proposal Comment Form

1 message

mailservices@sks.com <mailservices@sks.com>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov

Wed, Nov 21, 2018 at 9:45 AM

Your Name
James Edward Hollington

Phone Number
5058439171

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Proposal Number
2018-35

SUPREME COURT OF NEW MEXICO
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NOV 21 2018

Comment

I urge that this Succession Planning rule be tabled for further study and alternative solutions. The mandate to associate with successor designated attorneys raises complex issues of client consent and additional conflict of interest concerns. I agree with all the concerns expressed in comments to date. In addition this proposed rule has the unintended affect of over burdening solo and small firms. The legal professional liability carriers should be heard as some are already pushing insureds to develop such plans and incentives in premiums could be much more effective. Finally, a special committee of state bar or NMSC could be formed to intercede to protect clients in event of death or disability where no succession plan is in effect. Thank you for considering these comments. comment attached

Upload

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comments to proposed Rule 16-119

William Moore <wmooremdlaw@verizon.net>

Nov 21, 2018 10:10 AM

Posted in group: nmsupremecourtclerk

Joey D. Moya, Clerk

New Mexico Supreme Court

P.O. Box 848

Santa Fe, New Mexico 87504

nmsupremecourtclerk@nmcourts.gov

SUPREME COURT OF NEW MEXICO
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NOV 21 2018



Re: Comments to proposed Rule 16-119

Dear Mr. Moya:

While I fully concur with attorney Mike Milligan's April 4, 2018 letter to the Court regarding proposed Rule 16-119, I have additional comments. I moved to New Mexico a year ago after gaining admittance to the New Mexico Bar in November of 2016. I have been a solo practitioner for nearly thirty five years, initially in rural South Dakota and then Baltimore, Maryland where I practiced until I moved to Albuquerque.

On October 18th I attended a forum for Court of Appeals candidates. Every candidate expressed serious and heartfelt concern regarding the lack of legal services in rural New Mexico. Proposed Rule 16-119 will deter recent law school graduates from moving to rural areas that need them the most, as expressed by the sentiments of Mr. Milligan. However, I also am aware of the Court's 2001 edict that all law practices should strive to ensure that safeguards are in place to protect their client interests in the event of attorney illness or other misfortune. I understand and appreciate the Court's frustration regarding the Bar's failure to comply with the Court's edict and the Court's decision to mandate each attorney have a succession plan. I also recognize the Court's inherent power to regulate the practice of law.

However, the fundamental issue which the proposed rule seeks to address, human mental and bodily frailty and mortality, is not limited to attorneys. Real estate brokers are also fiduciaries and also handle trust account funds as do escrow companies. Secondly, Rule 16-119 while attempting to address the issue of client interests, fails to foresee the ethical issues it will create and its inherent conflict with New Mexico statutes and case law. The "assisting lawyer" is a de facto conservator or a personal representative, despite not being identified as such. The rule is irreconcilable with current law as prescribed in title 45 chapter 3 of the NMSA (1978) which deals with probates of decedent's estates. (see section 45-3-709)(PR must take control of decedent's property and is a fiduciary). Conservators are also fiduciaries who have a duty of loyalty to the disabled person, must preserve the protected person's estate and must avoid conflicts of interest. See section 45-5-417 NMSA (1978). During a probate of an estate, the PR owes a fiduciary obligation to the heirs and creditors. Both a PR and a conservator must avoid a conflict of interest, and any transactions involving a substantial conflict of interest are voidable. Unquestionably the assisting attorney, who desires to be substituted for the designating lawyer in a pending lawsuit has a conflict of interest in the context of a solo practitioner who has died or is incapacitated. Who negotiates the terms of compensation for the "designating

lawyer"? What about his/her heirs or creditors? Who speaks for them? I assume open client files are property of the decedent's or disabled person's estate. The proposed rule raised serious and complex issues regarding the "assisting lawyer's" legal authority to dispose of pending files vis a vis a personal representative and/or a conservator and the proposed rule's interaction with probate and conservatorship statutes and accompanying case law. Finally, the proposed rule fails to recognize New Mexico statutes authorize individuals to utilize durable power of attorneys which could be signed by the designating attorney to legitimately address the issue of attorney disability.

I propose the rule be redrafted to require every lawyer have a will and a durable power of attorney designation. Current probate, conservatorship and power of attorney statutes could be tweaked to address not only lawyers but escrow companies as well as real estate brokers. I also suggest banks and/or credit unions be considered as the designated lawyers "assisting lawyer" in the sense they can act as a conservator or PR or agent. Financial institutions oversee trust accounts and thus can access them, to address the issue of the scarcity of rural attorneys a bank exists in most every small town in rural New Mexico and are not mortal. I also suggest the state bar request lawyers submit themselves as candidates to perform the role of "assisting" attorneys, thus an agent, conservator or PR will have a ready list of substitute attorneys to suggest to the client.

Finally, there are several statutes which also should be considered. Section 36-2-15 NMSA (1978) provides for a stay of pending litigation and requires opposing counsel to notify the opposing party that their lawyer is dead or incapacitated and that he/she/it needs to hire substitute counsel. Furthermore, a court has equitable power to stay deadlines in the event of death or incapacity of counsel. Secondly, fee division as envisioned by the proposed rule is also problematic. See section 36-2-31 NMSA (1978). While I can appreciate that a "designating lawyer" and "assisting lawyer" will agree in theory how the division of fees will work, that is not reality. No one knows at what stage a lawyer will suddenly die or be incapacitated. Agreements to agree are not enforceable, thus section 36-2-31 will be violated under the current version of the proposed rule. Either a conservator or a PR, or an agent can negotiate the terms of compensation for the "designating lawyer", thus protecting heirs and creditors, while simultaneously respecting the rights of the client and "assisting lawyer".

Sincerely,

William Moore, Esq.

303 Central Avenue NE

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Google Groups

Proposal 2018-035 Succession Planning

Michael Schwarz <barrister@pobox.com>

Posted in group: nmsupremecourtclerk

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Nov 27, 2018 10:00 AM

NOV 27 2018

To the Court:



I have been a member of the New Mexico Bar since 1980. I have served on the Rules of Professional Conduct Committee for 16 or so years as well as a hearing officer for the Disciplinary Board at numerous occasions. I am a sole practitioner for the past 33 years. I am opposed to this Rule as currently written.

First, the rule seems to address a situation which I don't know is problematic. Is there an actual need for the rule? What are the concerns? How frequently have they surfaced?

Mr Van Amberg raises a good point as to "active clients". What does that mean? I have clients which see me one year and then come back five years later for another legal matter. For those in mediation or arbitration work, under that scenario, as pointed out, there is no truly "active client". A workable definition is necessary.

Has there been any input from professional liability carriers on the impact of this rule would have on rates and coverages? I am not aware of this. And several commentators to the rule suggest that their input would be much appreciated before finalizing the rule. Such a rule may skyrocket premiums thereby making the delivery of legal services less available to those less fortunate.

Multi-jurisdictional practice may place the lawyer in an untenable position. Has someone checked to see if other jurisdictions would find the NM rule problematic and thus subject that multi-jurisdictional lawyer to discipline in another jurisdiction. Also, this Court cannot effectively cloak an assisting lawyer with immunity in NM when the assisting lawyer may bungle the matter for a client who is in another state.

As Mr Green pointed out: Passwords frequently change as required by New Mexico Taxation and Revenue and several financial institutions. I would prefer to let my spouse or PR have access to that information. A possible idea would allow the Disciplinary Board access to the IOLTA account in NM. This may be subject to certain federal regulatory proscriptions. But if access is necessary, a pro forma order issued by the Supreme Court may be the easiest.

I hope the Court will find these comments helpful and should the Court require additional input from me, I am most willing to assist.

Michael Schwarz*

P O Box 1656

Santa Fe, NM 87504-1656

505.988.2053 (voice)

ms@nmbarrister.com

*Practicing Primarily in Employment and Civil Rights Law

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NOV 28 2018



COMMENTS TO PROPOSED NEW RULE 16-119 "LAWYER SUCCESSION PLANNING"

I respectfully submit these comments to the proposed new Rule 16-119 regarding Lawyer Succession Planning. I am in solo practice since 1992. I practice primarily in the area of personal injury and have done so since I passed the Bar in 1981.

It is unclear if the Court perceives a significant problem with incapacity among existing members of the Bar and if a problem exists, if it is not being adequately addressed by attorneys or existing remedies.

1. The rule requires a "current list of active clients and cases." It does not designate when or how often the list must be updated or if that information must be submitted to both the assisting lawyer and the Supreme Court. It is unclear if "cases" refers to litigation matters. As an attorney practicing in personal injury, the client list could change frequently as new cases are obtained.
2. The rule requires "information on the designating attorney's trust and operating accounts and corresponding records." The "information" and "corresponding records" required are not defined and it is unclear what information may be required. The rule does not provide for any procedure for the assisting attorney to obtain access to bank records or how to obtain authority to distribute trust or general funds as required that would comply with state or federal banking law or any separate rules or regulations of the bank. Presumably this would require a court order or written authorization from the designating attorney. The designating attorney would be unable to provide written authorization if disabled. Although general funds may be required for expenses related to client cases, these funds are income of the designating attorney. There are no guarantees that general funds would not be misappropriated either intentionally or otherwise. In the case of permanent incapacity, case related expenses would presumably be borne by the assisting attorney as the new attorney of record for the client.
3. The rule requires notification to clients of the existence of the succession plan. The Comments state that "preferably" the client should be informed in the retainer agreement. This seems unnecessary at the time of retention and may suggest to the client that a fear of incapacity is present. There seems to be no reason why clients could not be informed of the plan and what action may be taken if incapacity occurs. A form letter could be provided to the client by the staff of the designating attorney or by the assisting lawyer on the determination of incapacity.
4. Most problematic, the rule does not define what constitutes incapacity. The Comments suggest that incapacity could be determined "by a Court with competent jurisdiction." The rule does not designate whether the designating attorney or the assisting attorney would bear the expense of this procedure and whether that procedure would be required

to proceed under existing New Mexico law. Present New Mexico law could be described as onerous in determining incapacity and appointment of a guardian (requiring the appointment of an attorney to represent the alleged incapacitated person, the examination and report of a qualified health care professional, appointment of a visitor, and numerous hearings as well as significant time issues). The rule does not provide a stream lined procedure for the determination of incapacity for lawyers and any such procedure that does not comply with existing law would implicate statutory and constitutional issues for any lawyer alleged to be incapacitated on either a temporary or permanent basis.

The Comments suggest that incapacity could be defined in the succession plan. No guidelines are proposed to assist the designating attorney or assisting attorney in defining incapacity and whether it would be required to comply with existing law. This also implicates the concerns stated above.

The rule suggests that incapacity could be determined by a competent medical professional. It is not required by the rule that this determination be in compliance with existing New Mexico law and implicates the concerns stated above.

The rule suggests that incapacity could be “otherwise agreed between the designating attorney and the assisting lawyer.” No guidance is provided in defining incapacity or what the designating lawyer and assisting lawyer should define as incapacity and whether the designating lawyer is required to waive existing protections of New Mexico law to determine incapacity whether temporary or permanent.

Because there is no definition of incapacity and the procedure to determine incapacity, and whether that procedure must conform to existing New Mexico law to determine incapacity, there is concern for abuse of that procedure. Furthermore, why would lawyers not be entitled to the protection of existing New Mexico law regarding the determination of incapacity.

These concerns are particularly problematic in the case of solo attorneys.

Thank you for the opportunity to submit these comments and your consideration thereof.

DUANE LIND
LAW OFFICES OF DUANE LIND, LLC
10400 Academy Road NE, Suite 140
Albuquerque, NM 87111
Telephone: 505 292 6400
Email: duane@duanelindlaw.com

NOV 29 2018

Comments, Proposal 2018 – 035 / NMRA 16-119 and commentary.



Prefatory Notes

I favor adoption of the proposal as to succession planning requirements, but I am under the impression that inclusion of all practicing lawyers makes the proposed rule overbroad. More specifically, it seems to me that the rule is functionally not applicable to various categories of lawyers, such as government lawyers and in-house corporate counsel. Given that, I respectfully recommend your consideration of changes like or substantially equivalent to the following language.

Comments/Suggestions:

First, insert a new paragraph after B, as follows:

“C. Exemption. The requirement of succession planning in part A. shall not apply to attorneys whose sole practice is on behalf of a governmental agency (federal, state, local, tribal or other), non-profit or not-for-profit agency, or as in-house counsel for a business or corporation or similar or equivalent entity(ies), where, in the event of a lawyer’s termination of employment, or death, or disability, continuity of legal services is provided by assignment of one or more other lawyers employed by the same entity as the terminated, deceased or disabled lawyer.”

Edit current paragraph C and re-letter as paragraph D. –

“D. Certificate of Compliance. Every attorney shall annually certify ... the attorney is in compliance with Part A. of this rule or is subject to exemption under Paragraph C. ...”

New comment –

“[8] Paragraph C. of the rule is meant to recognize that succession planning by individual attorneys employed by a governmental agency (federal, state, local, or tribal), non-profit or not-for-profit agency, or as in-house counsel for a business or corporation typically have neither the capacity or the need to plan for succession in the same measure as attorneys practicing as solo practitioners or as part of law firms. For such attorneys, planning for continuity of legal services is in the control of the employing agency, business, or corporation, and not in the control of the individual attorneys.

Respectfully submitted,

Sasha Siemel
Member of the State Bar of New Mexico
505-224-1482
November 29, 2018



New Mexico
Courts

Terri Saxon <suptls@nmcourts.gov>

Rule Proposal Comment Form

1 message

mailservices@sks.com <mailservices@sks.com>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov

Thu, Nov 29, 2018 at 9:12 AM

Your Name
James R Wood

Phone Number
5058816401

Email
jwood@goodwillnm.org

Proposal Number
2018-035

Comment

The applicability of this rule should not be applied to judges, an employee of a corporation handling legal matters for that corporation, attorneys for governmental entities (federal, state, tribal, municipal, local, etc.), teachers of law, or attorneys not otherwise engaged in the private practice of law in the state of New Mexico. As corporate counsel, the corporation that employs me would prefer to make their own decision should the need arise regarding whether to employ another attorney in my position or whom, if any, to refer legal matters to outside the corporation.

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Comments on Proposed Rule 16-119

Assumption 1- The NM bar has an obligation to protect the public from harm resulting from attorneys who suffer death, disability or incapacity.

Assumption 2- The NM Bar also has an obligation to provide access to justice to as many people in NM as is reasonably possible. *"Our dedicated and professional judges and employees are committed to fulfilling the Judiciary's obligation to provide equal access to justice under the law."* Chief Justice Judith Nakamura, NM Supreme Court 2017 Annual Report *"No organization of lawyers can long survive which has not for its primary object the protection of the public."* Roberts P. Hudson First President of the State Bar of Michigan (I have been seeing this adage monthly for 38 years in the Michigan Bar Journal.)

Assumption 3- The NM judicial system is currently grossly underfunded:

- A. NM judges are at the bottom of compensation compared to the entire country.
- B. NM has recently run out of money to pay jurors.
- C. NM public defenders are grossly overworked and underpaid.
- D. I heard then Chief Justice Daniels at a CLE in Santa Fe discuss the NMSC's need for scrounging promotional pens from local merchants, using both sides of copier paper and other "cost saving" measures to provide its services.
- E. I am aware of numerous District Courts who are understaffed due to the need for "vacancy savings".

Assumption 4-Solo practitioners (SP) currently provide legal services to thousands of NM residents who are unable to obtain legal services from larger firms due, in my experience, to the lack of money available to pay the retainers demanded by larger law firms.

Assumption 5- NM has already experienced an enormous growth in unrepresented litigants in civil cases rising from 27,396 in FY 2011 to more than 32,718 in FY 2017. That is up from 35% to 51% which suggests that a lack of access to lawyers already exists among the general public and it appears to be getting substantially worse as time goes by.

Assumption 5- Banks, mortgage companies, insurance companies, corporations, make up 0% of the unrepresented civil litigants as a matter of law. Wealthy people likely make up an extremely

small percentage of the unrepresented civil litigants in NM and if they do make up a large percentage it is by choice rather by necessity.

Assumption 6- As a practical matter, and likely as an unintended consequence, the proposed rule places a much different and much more difficult burden on SPs than it does on larger firms, partnerships, LLCs and other similarly situated attorneys.

Assumption 7- All NM lawyers share equally the obligation to provide services resulting in access to the judicial system and to protect the public no matter what the size of their practice or the size of the organization with which they are affiliated.

Assumption 8- Any burdens created by the succession rule ought to fall equally on all members of the NM Bar as a consequence of the privilege to practice in NM.

Assumption 9- As a consequence of adopting the succession rule, as proposed, numerous SPs in NM, perhaps most particularly in more rural areas where other local attorneys are as a practical matter, "designated adversaries" on numerous files will simply be unable to comply with the rule as proposed.

QUESTIONS

I have not seen, nor do I know if a cost-benefit analysis of the proposed rule is available. Nor am I aware of the scope of the problem being addressed by the proposed rule. It is hard to address a solution to the succession issue *vis a vis* the proposed rule without knowing the size of the problem. Do succession issues relate to one attorney or dozens or hundreds of attorneys in New Mexico annually?

Who is handling succession issues currently and how much time does it take to do that?

Is the time involved with creating, filing, monitoring and effectuating succession plans as proposed in the rule likely to be less than, equal to or greater than the time currently being spent on those issues?

Is there an enforceable ethics opinion in existence in NM that would authorize, without penalty and without running afoul of the other Rules of Professional Responsibility, a successor attorney to agree to assume the designating attorney's client trust accounts and thereafter represent the designating attorney's clients, sight unseen as to the client(s), conflicts of interest, facts, relevant law, impending deadlines (discovery responses, trial dates, statute of limitations, etc.) attorney/client privileged communications?

Is there anything in NM law that provides for any sort of automatic stay (certainly the time it takes to file, answer, reply, set and hear a motion would be unworkable here) on applicable deadlines if the successor attorney agreed to handle the designating attorney's files? Equally certainly any sort of stay of an applicable statute of limitations would require legislative action?

Death is easy to define. Disability and incapacity are undefined terms in the proposed rule. Is a designating attorney disabled or incapacitated if she is going to Brazil for vacation, goes on a drinking binge, undergoes chemo therapy, has a tummy tuck scheduled or is about to blow a

deadline for which he or she needs the extension occasioned by any stay of proceedings due to such agreed upon (as is authorized by the proposed rule) “incapacity” or “disability”?

What would be the impact, if any, with a malpractice insurance carrier of agreeing to be a successor attorney, most especially without an automatic stay of deadlines either during the period of disability or incapacity or for a shorter term?

GENERAL COMMENTS

Given the above and dozens of other concerns, not included for brevity, about a successor attorney undertaking the representation of the designating attorneys clients, it seems as if the proposed rule may or may not be cost-effective, is way overbroad, practicably impossible and very likely to create more problems than it could solve.

What a proposed rule could address is how to define disability or incapacity and then create a workable solution to the problem of promptly returning the client’s unused legal fees and promptly returning to them their file and nothing more. Even with that limited goal it would also require some sort of additional court rule(s) to cover the impending deadline issues once an incapacity or disability had been claimed and established.

With that reduction in scope of any proposed rule in mind it would seem as if a more appropriate succession rule would include:

1. A definition of incapacity or disability within a court rule and a procedure for claiming such that would also provide due process if contested.
2. A provision to forthwith notify the clients of the death, disability or incapacity of their legal counsel.
3. A provision for a bonded employee of the State Bar to disburse the unused legal fees to the client forthwith.
4. A provision for a named individual, who would not have to be an attorney, to distribute to the clients their files forthwith either at the dead, disabled or incapacitated attorney’s office or at the local District Court whichever is more practicable.

Theoretically the bonded State Bar employee could be paid for with a relatively modest increase in Bar Dues. If the scope of this succession issue is so vast that it would require more than one employee to handle it then I would propose an increase in the District Court filing fee of \$10 to cover the cost of each District Court to appoint, and to pay, a local attorney to handle the succession issues. In the First Judicial District that would generate \$118,670, in the Second \$406,470, in the 4th 44,450 and so on. That assumes that the Districts generate succession issues somewhat comparable to their caseloads. It also assumes that legal problems are not likely to be solved for free and that the Bar is not eleemosynary by nature, predilection or design.

ILLUSTRATIVE EXAMPLE

In 2011 I had a fellow employee whose home was damaged by loss of the substrate under the foundation. Her home was literally cracking apart, visibly cracking floors, walls, and pipes. A

particularly penurious and parasitical insurance carrier whose name I will not reveal, suffice it to say they have customers in all states, sent her a check for \$652, representing as they determined it a "courtesy" since they owed nothing under the homeowner's policy and assessed the damage at \$1,652. Thus the check for \$652 less the \$1,000 deductible.

In my experience and her family's experience there isn't much you can do with \$652 to replace the entire foundation of a house let alone the walls, floors and pipes. I advised her to shop around for legal counsel to address the issue. She did and the cheapest legal counsel she found wanted \$25,000 for a retainer, others wanted as much as \$50,000 or no part of it at all. Being a regular NM working family they did not have the resources to pay that kind of retainer, or any kind of retainer for that matter.

She kept dozing off at work because she said she couldn't sleep for fear her vigas were so cracked they were going to fall on her and her husband. To buy the peace at work I undertook the representation without a retainer of any sort. Only 24 months later the insurance carrier had paid out more than \$500,000 to relocate her family and then fix her house. After a trip to Federal Court the carrier also paid my legal fees.

This does not make me a hero. Most, if not all, SPs have similar stories. It does illustrate that SPs often have a different economic model and perhaps more of a riverboat gambler mentality than does or can a traditional law firm, deciding which cases to undertake by committee, based upon their own economic model, overhead and the like. It also demonstrates that SPs in NM fill a gap in access to the legal system.

CONCLUSION

Assuming the good faith involved in the creation of the proposed rule; and, with great deference and appreciation for the volunteer efforts involved in that creation I think the proposed rule is improvident at best. I further think that the rule if implemented, as proposed, would have drastic unintended consequences to the great detriment of the general public. This proposed rule seems to be of dubious advantage in terms of cost effectiveness and in terms of actually providing a reasonable remedy to the issues being addressed. We need to start over and create a more reasonable, more efficient (time/cost) effective procedure. We need a rule that is not likely to impede or to limit the availability of affordable legal services to average New Mexicans.

We need a rule that does not further tip the access to the court system scales in favor of the corporate, the privileged and the moneyed. Thank you.

/S/ Cbjames NM 7700

Also admitted in Michigan and Colorado

Electronically signed

Google Groups

Re: Comments on the Proposed Attorney Succession Rule

Leslie Law, P.C. <ml@leslielawtaos.com>

Nov 29, 2018 12:51 PM

Posted in group: nmsupremecourtclerk

A further concern is the transfer or assumption of my trust account. Only an attorney can sign on a trust account. POA's of a solo's non attorney spouse aren't allowed. Are we supposed to put another attorney not part of a solo's practice on a trust account? I am not comfortable with allowing another attorney be put on my trust account. Likewise creating a POD or TOD for the assisting attorney? Who oversees that? What if the assisting attorney is not able because of their own case load to assume all of the responsibility of a second full practice immediately as the rule requires?

On 2018-11-29 12:15, Leslie Law, P.C. wrote:

Dear Justices:

For solo practitioners in small towns in rural areas, this rule creates an almost impossible burden, administratively and financially. It is designed for and to protect big firms, as usual, just like giving financial breaks to big firms who send multiple members to a SBNM CLE. Think of the little guys, please. The solos have tried to work with Bill Slease to no avail. Please do not approve this rule as written. Here are practical issues for rural area attorneys who are nearly all solos.

1. Case status and clients matters change daily. The administrative burden is ridiculous for a solo with one or two assistants.
2. In rural areas, there are few if any younger lawyers available to be on call for anyone's solo practice. It is also difficult to find trained and competent assistants for a solo practice.
3. Why would any lawyer want to take on the liability of accepting another attorney's work? Whose malpractice would cover a problem that may arise after the designating attorney is dead or incapacitated?
4. Rural area lawyers make much less profit than attorneys in the 3 cities in New Mexico. How are we in rural supposed to pay for this? How about a tax on firms of 4 or more to compensate solos practices with this burden?
5. Clients don't have to accept representation of a designating attorney's choice of a successor. A blanket letter to all clients of a designating attorney by a successor can just tell them to get their own new lawyer-which doesn't solve one thing for a client in the midst of a legal matter.

Please think again on approving this rule without exceptions or practical help for solos and small firms. You are just forcing older lawyers to just shut down their practices now to avoid the future issues.

Mary Lane Leslie

SUPREME COURT OF NEW MEXICO
FILED

NOV 29 2018

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MICHELLE M. WARREN'S RESPONSE TO PROPOSAL 2018-035
PROPOSED RULE 16-119
THAT REQUIRES MANDATORY SUCCESSION PLANNING

NOV 29 2018



The Code of Professional Conduct Committee ("Committee") is recommending new Rule 16-119, Lawyer Succession Planning, under Proposal 2018-035 ("Proposal"), be added to the Code of Professional Conduct.

The scarcity of lawyers in rural areas of New Mexico is not unknown. Potential clients in rural areas have less mobility or resources with which to access attorneys. The Proposal may have an unintended consequence of making the legal commodity scarcer.

There may be a less onerous way to resolve the concerns of the Committee by utilizing best practices. No succession plan may be needed if Rule 24-102 NMRA (Annual License Fee) were amended by the New Mexico Supreme Court ("Supreme Court") to include certain best practices within the annual Licensing Statement as issued by New Mexico State Bar ("Bar"). For example, here are six proposed actions the Committee could take in lieu of an assisting attorney. With these measures in place, it's far less likely there will be a crisis when an attorney becomes incapacitated or is deceased.

1. **Client Retention Agreement ("Contract"), onus on client for regular contact.**

More consideration needs to be given to the client retention agreement or contract between an attorney and their client stating the client's duty to stay in contact with their lawyer. Client is put on notice at time of signing. Ideally, contact should be maintained weekly, or, at a minimum, every 30 days; however, criminal or civil matters may have different contact requirements, so a case by case basis time period likely will have been established. This would, arguably, help the client keep apprised of any issues with their lawyers' unavailability, incapacity, disability, or death. Language in the contract would inform the client that should such circumstances of their lawyers' unavailability arise during an open matter, the client would be advised to contact the Bar regarding a lawyer referral. The Supreme Court could require the Bar to have active attorneys attest this condition has been added to the Contract on the annual Licensing Statement.

MICHELLE M. WARREN'S RESPONSE TO PROPOSAL 2018-035
PROPOSED RULE 16-119
THAT REQUIRES MANDATORY SUCCESSION PLANNING

2. **Client Retention Agreement (“Contract”), attorney Trust Account disbursement.** Clients should be advised by their attorney’s estate or personal representative (PR) within 30 days after the attorney’s date of death that a final billing, if any, and a disbursement, will be made. If any dispute arises regarding trust fund accounting, bank records could be provided to the Disciplinary Board. The Supreme Court could require the Bar to have active attorneys attest this condition has been added to the Contract on the annual Licensing Statement.

3. **Docket control.** Attorney malpractice insurers require attorneys to have appropriate docket control policies and procedures as to their client files, calendars, tickler systems, et al., such as an electronic and/or hardcopy client filing system that is kept under lock and key and/or encrypted, that passwords are changed at least every 30-90 days, and to identify the person(s) responsible for maintaining access and security to such systems. Access to these docket files and items could be provided to the Supreme Court by the deceased attorney’s personal representative or estate. For those attorneys not holding professional liability insurance, they should be required by the Bar to have such policies and procedures in place and attest to this on a yearly basis when they submit their Bar Licensing Statement. Rule 17-202(A) NMRA (Registration of Attorneys) already requires attorneys admitted to practice to submit their address of record and the street address where client files or other materials related to the attorney’s practice are located, telephone number, and email address of record. The Supreme Court could require the Bar to have active attorneys describe their docket controls on their annual Licensing Statement.

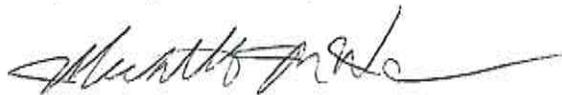
4. **Alternate attorney contact.** Malpractice insurers also require solo practitioners to provide the name of a specific attorney or firm who will be responsible for an attorney’s affairs should they be absent for an extended period of time (i.e. business trip, vacation, illness, etc.). The Supreme Court could require the Bar to have active attorneys supply such a name on their annual Licensing Statement.

MICHELLE M. WARREN'S RESPONSE TO PROPOSAL 2018-035
PROPOSED RULE 16-119
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5. **Attorney's Personal Representative or Estate.** Another manner in which to protect attorney-client privilege might be the personal representative sending a list of active client or case files to the Supreme Court or Bar within 30 days of an active attorney's death. The Bar could add this acknowledgment on an active attorney's annual Licensing Statement.

6. **Notice from New Mexico Vital Records and Health Statistics ("Vital Records") upon death.** The Supreme Court could require the Bar to provide an active attorney list to the Vital Records department. Upon the death of an active attorney, Vital Records could forward such name to the Bar. Bar could then require attorney's estate to notify deceased attorney's client base. This might be a safe method in which to protect attorney-client privilege. The Bar could add this process as an acknowledgement on an active attorney's annual Licensing Statement.

Respectfully Submitted,



Michelle M. Warren
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Submitted: 29 November 2018