

**PROPOSED REVISIONS TO THE RULES GOVERNING DISCIPLINE
PROPOSAL 2020-004**

March 3, 2020

The Disciplinary Board has recommended amendments to Rule 17-213 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 April 2, 2020, 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.

17-213. Appointment of counsel.

A. **When appointed.** Whenever an attorney is disbarred, suspended, resigns, becomes incapacitated or dies and no partner, executor or other responsible party capable of conducting the respondent-attorney's affairs is known to exist, the Supreme Court, upon request of chief disciplinary counsel or chief disciplinary counsel's designee, may appoint an attorney or attorneys, including chief disciplinary counsel or chief disciplinary counsel's designee, to inventory the files of the respondent-attorney and to take such action as seems indicated to protect the interests of clients of the attorney, as well as the interest of the attorney. In addition to the assessment of costs provided by Rule 17-106 NMRA, the Disciplinary Board or Supreme Court may assess against a respondent-attorney any reasonable costs incurred by a client or inventorying-attorney that were incurred because of the suspension, disbarment or resignation of the respondent-attorney. An inventorying-attorney also may apply to the Disciplinary Board for reimbursement of costs incurred because of the incapacitation or death of a respondent-attorney, which the board, in its discretion, may grant.

B. **Confidentiality of files.** Any attorney appointed pursuant to this rule shall not disclose any information contained in any files so inventoried without the consent of the client to whom such file relates, except as necessary to carry out the order of the Court appointing the attorney to make such inventory.

C. **Procedures.**

(1) The inventorying attorney shall prepare a list of all client files obtained by the inventorying attorney from the attorney who was suspended, disbarred, resigned, died or

became incapacitated and provide this list to disciplinary counsel, identifying each matter by client name, last known address and phone number, the status of the matter (open or closed) and, if closed, the date the matter was closed.

(2) The inventorying attorney shall send to all clients of the attorney who are named on the list provided to disciplinary counsel written notice of the appointment of an inventorying attorney at the client's last known address, the grounds which required such appointment, and, for active cases, the need of the clients to obtain substitute counsel. Additionally, commencing within one (1) month after being appointed, the inventorying attorney shall publish once each Sunday for three (3) consecutive weeks in a newspaper of general circulation available in the county in which the suspended, disbarred, resigned, deceased or incapacitated attorney was maintained the attorney's principal office notice of the appointment of the inventorying attorney and instructions on how to contact the inventorying attorney for further information.

(3) A file may be returned to a client upon the execution of a written receipt, or released to substitute counsel upon the request of the client and execution of a written receipt by such counsel. The inventorying attorney shall deliver all such receipts to disciplinary counsel at the time of filing the application for discharge. On approval by the New Mexico Supreme Court of the application for discharge of the inventorying attorney, all files remaining in the possession of the inventorying attorney shall be transferred to the Office of Disciplinary Counsel and, thereafter, maintained for a period of five (5) years. After five (5) years, the files may be destroyed by disciplinary counsel in a secure manner which protects the confidentiality of the files provided that six (6) weeks before the destruction of such files, disciplinary counsel shall publish once each Sunday for three (3) consecutive weeks in a newspaper of general circulation available in the county in which the suspended, disbarred, resigned, deceased, or incapacitated attorney was maintained the attorney's principal office ~~[notify the client or former client at the last known address]~~ that the file will be destroyed on a date six (6) weeks after the date of the ~~[letter]~~ last publication unless the file is retrieved from the Office of Disciplinary Counsel by the client or former client prior to that date.

(4) The inventorying attorney may be authorized by the New Mexico Supreme Court to ascertain the identity of clients to whom refunds of unearned fee payments should be made, to take possession of all client trust funds, to make distributions of trust funds as to which there are no legitimately disputed claims of entitlement and to safeguard trust funds as to which there are legitimately disputed claims of entitlement until such claims can be resolved. If so authorized, the inventorying attorney shall reconcile trust account records, compile a list of all clients to be reimbursed, and compile a list of all disputed claims of entitlement and provide such list to disciplinary counsel. The inventorying attorney shall deliver to disciplinary counsel at the time of filing the application for discharge a complete, final accounting of all trust fund transactions. Whenever any sum of money is payable to a client or former client and the inventorying attorney is unable to locate the client or former client, after notice to the client's or former client's last known address, the inventorying attorney shall, after six (6) weeks have passed after notice as set forth above, apply to the court in which the action was brought, or, if no action was commenced to the New Mexico Supreme Court, for an order directing payment to the disbarred, resigned, suspended or incapacitated lawyer, or the deceased lawyer's estate, of any fees and disbursements that are owed by the client and the balance, if any, to the New Mexico Client Protection Fund for safeguarding and disbursement to persons who are entitled thereto. Whenever any remaining trust funds cannot be determined to be payable to the lawyer, the lawyer's estate, or the lawyer's current or former clients, the inventorying attorney shall apply to the court in which

the action was brought, or, if no action was commenced to the New Mexico Supreme Court, for an order directing payment of all remaining trust funds to the New Mexico Client Protection Fund for safeguarding and disbursement to persons who are entitled thereto.

D. **Role of inventorying attorney.** An inventorying attorney is not deemed to be representing the clients of the attorney who was disbarred, suspended, resigned, died or became incapacitated unless the inventorying attorney and the client or former client enter into a separate representation agreement. Such an agreement may be reached only after the client or former client is notified, in writing, that he or she has the right to seek other counsel.

E. **Statute of limitations.** The filing by disciplinary counsel of an application for the appointment of an inventorying attorney under these rules shall toll any statute of limitations, any limitation on time for appeal, and any other such limitation period for a period of 180 days from the date that the application is filed with the New Mexico Supreme Court.

F. **Liability of inventorying attorney.**

(1) Except as provided in Subparagraph (2) of Paragraph F of this rule, an inventorying attorney appointed under these rules shall:

(a) Not be regarded as having an attorney-client relationship with clients of the attorney who was suspended, disbarred, resigned, died or became incapacitated, except that the inventorying attorney shall be bound by the obligation of confidentiality imposed by the Rules of Professional Conduct with respect to information acquired as an inventorying attorney;

(b) Have no liability to the clients of the attorney who was suspended, disbarred, resigned, died or became incapacitated except for injury to such clients caused by intentional, willful, or grossly negligent breach of duties as an inventorying attorney;

(c) Be immune to separate suit brought by or on behalf of the attorney who was suspended, disbarred, resigned, died or became incapacitated.

(2) If the inventorying attorney and any client or former client of the disbarred, resigned, suspended, incapacitated or deceased lawyer enter into a separate representation agreement to allow the inventorying attorney to represent the client or former client, the normal and customary attorney-client relationship shall then exist between the inventorying attorney and the client or former client and the provisions contained in Subparagraph (1) of Paragraph F of this rule shall no longer apply or be effective as to that client or former client from the date such agreement is reached. Such provisions shall, however, remain effective for such client or former client for any services performed as an inventorying attorney prior to the date of the retention agreement, and shall likewise remain effective for all other clients or former clients of the lawyer who is disbarred, resigned, suspended, incapacitated or deceased.

[As amended, effective August 1, 1988; as amended by Supreme Court Order No. 06-8300-032, effective January 15, 2007; by Supreme Court Order No. 12-8300-008, effective April 5, 2012; as amended by Supreme Court Order No. _____, effective _____.]