STATE BAR OF NEW MEXICO
ETHICS ADVISORY COMMITTEE
FORMAL ETHICS ADVISORY OPINION

FORMAL OPINION: 2023- 001

TOPIC: Mandatory Succession Planning

RULE(S) IMPLICATED: Rule 16-119 NMRA (2023).

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MANDATORY SUCCESSION PLANNING

Rule 16-119 NMRA became effective October 1, 2022, and its reporting requirements became effective with the 2023 license renewals. With each annual renewal, the reporting requirements must be confirmed or updated. However, many lawyers may be unaware of the new rule and its requirements. This opinion seeks to provide general guidance on a lawyer's obligations under Rule 16-119 NMRA.

What Does the Rule Say?

Rule 16-119 NMRA provides:

A. **Succession plan.** Every lawyer practicing law in the state of New Mexico (the "designating lawyer") 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 lawyer's extended incapacity from practicing law, or the designating lawyer'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) the location of information necessary to access the designating lawyer's current list of active clients, client files, and other client information including computer and other relevant passwords; and

(3) information on the designating lawyer's trust and operating accounts and corresponding records.

B. **Notice of plan.** The designating lawyer 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 lawyer and the assisting lawyer, or by electronic communication acknowledged by both the designating lawyer and the assisting lawyer. Lawyers must also notify their clients of the existence of the succession plan.

C. **Certificate of compliance.** Every lawyer shall annually certify to the State Bar of New Mexico, as part of the registration statement filed under Rule 24-102.1 NMRA, that the lawyer or the law firm employing the lawyer is in compliance with this rule. In the case of a single lawyer or a law firm employing only a single lawyer, the lawyer shall include on the registration statement the name or names of the assisting lawyer. In the case of lawyers or law firms employing more than one lawyer, each lawyer 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.

Why Was This Rule Adopted?

Comment [1] to Rule 16-119 NMRA provided the general rationale for the adoption of the Rule:

> When a lawyer is unexpectedly unable to practice for an extended period of time, the lawyer's clients, staff, and practice are at risk of significant harm. By taking proactive steps to plan for an unexpected interruption in practice, including implementation of a succession plan, a designating lawyer can avert or mitigate such harm. The goal of succession planning is to protect the interests of the designating lawyer's current clients by creating and implementing a succession plan to take effect when the designating lawyer is unable to practice law due to extended incapacity, or the lawyer's disability or death. The incapacity of the designating lawyer may be temporary or permanent.

As with many of the Rules, Rule 16-119 is ultimately designed to protect the interests of clients. In this case, the Rule attempts to provide a framework through which the basic client interests of continuing representation and proper handling of trust funds may be accomplished when their current lawyer is faced with an unexpected interruption of practice.

To Whom Does the Rule Apply?

The Rule applies to "*Every* lawyer practicing law in the state of New Mexico." Rule 16-119(A) NMRA (Emphasis added). Such a lawyer is referred to as the "designating lawyer." On its face, the Rule applies to any and all lawyers engaged in the provision of legal services in New Mexico. The Rule applies to solo practitioners and lawyers practicing within both small and large firms or organizations, and lawyers in private or public practice. There is no exception for lawyers practicing law in New Mexico who are in-house counsel, counsel for public agencies (including but not limited to state or federal agencies, offices of public defenders or district attorneys), foreign lawyers (whether licensed in another state or country), or even "retired" or "semi-retired" lawyers.[1] Moreover, as noted in Rule 16-119(C) NMRA, any lawyer renewing their license must "certify to the State Bar of New Mexico, as part of the registration statement … that the lawyer or the law firm employing the lawyer is in compliance with this rule." Again, under the Rule, a licensed lawyer would be in compliance under two circumstances: (1) a succession plan is in place or (2) the lawyer is not practicing law in New Mexico.

How does a lawyer working for a public agency or as in-house counsel comply with the Rule*?*

A lawyer representing a public agency or a corporate entity as in-house lawyer might only represent one client, or not have multiple clients, case files, or IOLTA trust accounts. By example, an assistant district attorney represents the State and not any individuals. However, lawyers representing agencies and companies still have active matters on which they are the lead attorney. Hopefully the organization already has or can draft written guidelines and policies to use if a lawyer voluntarily leaves employment or is fired. These same guidelines and policies should, if not already done, be expanded to apply if a lawyer involuntarily leaves due to incapacity or death. In such a case, someone in the organization will gather the files or existing matters on which the lawyer was working, redistribute the work, access computers with IT's help, and otherwise make sure the lawyer's matters are handled going forward. At license renewal time, the lawyers at the organization should be able to certify that they comply with the Rule because they are part of a "law firm" plan, and they can identify the lawyer responsible for the plan as "the District Attorney" or "the Chief Deputy" or other lawyer who coordinates the response when a lawyer leaves due to disability or death.

What Must be Included in the Succession Plan?

While there is no single correct succession plan, every succession plan must cover at least three subjects:

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[1] The Committee understands that the Code of Professional Conduct Committee is currently considering amendments to the Rule that will, among other things, exempt justices, judges, and court-appointed hearing officers acting in their judicial capacity because such persons are prohibited from practicing law while so acting.

(1) the name and contact information of the lawyer or law firm designated to carry out the terms of the succession plan (referred to as the "assisting lawyer");

(2) the location of information necessary for the assisting lawyer to access the designating lawyer's

a. current list of active clients,

b. client files, and

c. other client information including computer and other relevant passwords; and

(3) information on the designating lawyer's trust and operating accounts and corresponding records (such as the name of the financial institution with which the designating lawyer has trust account(s) and operating account(s), the corresponding account numbers, and records by which the assisting lawyer can determine what funds belong to which client, third party, or to the designating lawyer or that lawyer's law firm.

The succession plan should also provide some guidance to the assisting lawyer on how to proceed with matters and trust account issues upon the designating lawyer's incapacity, disability or death. As provided in Comment [2] to the Rule:

> The level of sophistication of a succession plan should be determined by each designating lawyer's or law firm's circumstance. For example, as part of the succession plan the designating lawyer 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 lawyer may draft the plan such that, with the clients' consent, the assisting lawyer will assume responsibility for the interests of the designating lawyer's clients, subject to the right of the clients to retain a different lawyer or law firm other than the assisting lawyer. Some designating lawyers may choose to designate more than one lawyer or a pool of lawyers as the assisting lawyer. These examples are not meant to be exhaustive or exclusive, but rather to suggest that there is great flexibility allowed by the rule in the crafting of the succession plan.

The designating lawyer should consider the nature of their practice in providing other information that may be helpful to the assisting lawyer (and correspondingly, to the client(s). By example, those in private practice with multiple clients may include more details on how the client matters are designated as opposed to a lawyer in public practice who has only one client. Even lawyers with only one client must consider the nature of their practice (e.g., do they handle numerous cases on behalf of their client, do they engage outside counsel for various matters, do they handle matters independent of other lawyers representing the client, etc.).

How Should Incapacity or Disability be Determined?

The succession plan should include some basis by which incapacity or disability can be determined. As noted in Comment [3] to the Rule there is no single way to determine incapacity or disability. Such a status "may be determined in many ways, including the following: (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 lawyer and the assisting lawyer."

What is the Role of the Assisting Lawyer?

As provided in Comment [4], once the assisting lawyer has reasonably confirmed extended incapacity, disability, or death of the designating lawyer, the assisting lawyer should proceed in accordance with the succession plan. Additionally, the comment advises on the liability of assisting lawyers based upon whether the assisting lawyer forms an attorney-client relationship with any of the designating lawyer's clients:

> [a] If the assisting lawyer forms an attorney-client relationship with the designating lawyer's clients, the assisting lawyer will be subject to the existing rules and duties attendant to the attorney-client relationship.
>
> [b] Otherwise, this rule is not intended to create liability between the assisting lawyer and either the clients of the designating lawyer or the designating lawyer, absent intentional, willful, or grossly negligent breach of duties by the assisting lawyer.

Additionally, Comment [6] provides that any attorney fees paid to the assisting lawyer "shall be in accordance with Rules 16-105 (Fees), 16-115 (Safekeeping property), and 16-504 (Professional independence of a lawyer) NMRA."

Who Needs to Know About the Succession Plan?

As stated in Rule 16-119(B), the designating lawyer must notify the assisting lawyer in writing of the succession plan and the assisting lawyer must consent to the appointment by signature or electronic means. In law firms or organizations having multiple lawyers, those lawyers must be informed of the existence of a law firm or organization succession plan. As noted above, in the process of license renewal, the State Bar will be informed of the existence of a succession plan. Additionally, each client must be informed of "the existence of the succession plan." In the case of new engagements, this notification may most easily be handled by a notice contained within the engagement letter. In the case of existing clients (there is no exception for informing existing clients), a written communication (by either hard copy or electronic means) should be provided. This notice to pre-existing clients (*i.e.*, persons or entities that were clients prior to the lawyer's adoption of a succession plan) might be included with the next billing statement or other communication with the client.

Although not required by the Rule, both the designating lawyer and the assisting lawyer should consider notifying their respective professional liability carriers of the designation and the acceptance of the designation and discuss any coverage questions they may have.

Are There Other Considerations?

Yes! A lawyer must be mindful of all other obligations owed to clients under the Rules. Without limitation, this would include:

- obligation of designating lawyer to maintain confidentiality (*see* Rule 16-106 NMRA); *this confidentiality must be maintained until the succession plan is triggered* and then, if the client has been informed of the succession plan and of the assisting lawyer(s), the sharing of information should be treated as "impliedly authorized", at least to the extent necessary to allow for the succession plan to be fulfilled;
- obligation of the assisting lawyer upon receiving confidential information to maintain confidentiality under Rule 16-106 NMRA (which should only occur if the succession plan has been triggered);
- obligations of lawyers to maintain proper communications throughout the succession process (*see* Rule 16-104);
- obligation of the designating lawyer to proceed with competence in selection of an assisting lawyer (the degree of which would be dependent upon the nature of the succession plan) (*see* Rule 16-101 NMRA); and
- obligation to have, and to follow, a succession plan that provides reasonable diligence and promptness on behalf of the client (*see* Rule 16-103).