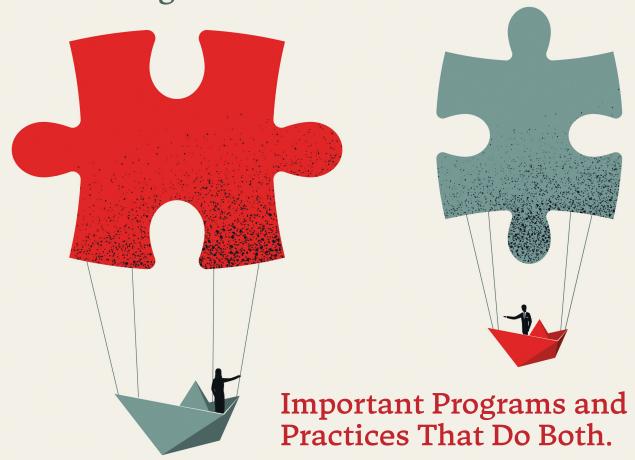
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Lawyers and **Succession Planning** A Little Planning Now, A Lot Less Panic Later

Thus, the need for

every lawyer to take

affirmative steps to plan

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cessation of practice,

voluntary or otherwise.

cannot be overstated,

particularly for those

practicing in a solo

practice setting.

awyers face many challenges every day: client demands, constant deadline pressure, ■the stress of operating a business and practicing law. Most find it rewarding. Most also plan on retiring someday. And most, like every other person, are at risk for an unplanned event such as an injury, illness, incapacitation, disability or death, which makes it temporarily or permanently impossible to continue in practice of law. An interruption or cessation of practice, voluntary or otherwise, carries with it a substantial risk that clients will be abandoned by their lawyer in the middle of the clients' matters. It also creates a risk that colleagues, staff, friends and family will be left scrambling to make sense of the lawyer's practice at a time of

great personal stress.

Of course, the duties that a lawyer owes to his or her client under the Rules of Professional Conduct, including duties of competence, diligence, communication and the safekeeping of confidences and property, mandate that a lawyer not abandon a client and the client's legal needs. Thus, the need for every lawyer to take affirmative steps to plan for an interruption or cessation of practice, voluntary or otherwise, cannot be overstated, particularly for those practicing in a solo practice setting. By doing so, you can protect your clients, your family, your staff and your reputation in times of uncertainty and, hopefully, avoid personal and financial strife as well as unnecessary disciplinary complaints.

Effective Oct. 1, 2022, every lawyer practicing in New Mexico is required to have a succession plan, either alone, or as part of a law firm plan. See Rule 16-119 NMRA. The succession plan must have, at a minimum, the steps to be taken in the event a lawyer dies, or becomes disabled or incapacitated. Id. The plan must identify the lawyer or law firm designated to carry out the succession plan, the location of and information necessary to access the lawyer's current list of active clients and cases, including client files, as well as computer files and related passwords, and information on and the records attendant to the lawyer's bank accounts, both trust and operating. Id. Notice of the plan, and written consent and agreement to serve under the plan, must be given to and

By William D. Slease

obtained from the lawyer or law firm designated to carry out the succession plan. Id. Clients must also be given notice that their lawyer has developed

a succession plan. Id. Beginning with the licensing registration statement in the Fall of 2022, lawyers will have to certify compliance with the mandatory succession planning rule. Id.

The Rule itself sets out the minimum requirements for compliance. There are many things that you might consider in developing a plan for your expected or unexpected cessation of practice. Some of the issues include, but are not limited to:

- who will close or manage my practice if I am away for an extended period of time or never return?
- will that person take over the representation of clients (with the clients' permission) or simply inventory my files and funds and distribute them to the clients and substitute counsel?
- do I have an updated client list and an updated list of closed matters and can they be easily located?
- does the person who will step in to close or manage my practice, or some other responsible party:
 - know where my files are located, physically and on computers, and can they access the files (does anyone know my computer password)?
- know where my calendars are located so that all deadlines can be tracked and either met or conveyed to clients and any substitute counsel?
- have access to my time and billing records and know how to generate bills and collect fees that may be due to me or
- have access to my unpaid invoices and instructions on how to make payments that may be outstanding?
- know where my bank accounts, operating and trust, are held, and where the trust ledgers, reconciliations, and other bank operating account and trust account records are located?

- do I need to execute a limited springing power of attorney or some other legal document to allow someone to sign on my bank accounts and will my banker accept such a power of attorney?
- what sort of other written agreements should I enter into with the person or persons who I would like to close or operate my practice?
- how will clients, courts and opposing counsel be notified of my interruption or cessation of practice?
- should I consider disability and/or practice interruption insurance, including overhead expense coverage, and monthly disability income insurance?

This list is not intended to be exhaustive. The point is to begin thinking about and planning now, while you have time and the ability to carefully consider the issues and craft a plan for succession, rather than leave others to manage a stressful and chaotic crisis in your professional and personal life without any guidance from you.

Fortunately, there are many good resources available to you to help with succession planning. For starters, long before Rule 16-119 was enacted by the New Mexico Supreme Court, the now sunsetted New Mexico Lawyers Succession and Transition Committee developed a handbook and associated materials and

By engaging in thoughtful preparation now, a lawyer can not only comply with Rule 16-119, but can ensure that today's planning avoids tomorrow's panic.

resources to assist lawyers in New Mexico with succession planning. Those materials can be accessed through the State Bar of New Mexico

website at www.sbnm.org/pdp and www. sbnm.org/successionplanning. Moreover, many malpractice carriers are starting to insist that a lawyer provide information to the carrier about the lawyer's succession planning. Counsel for these carriers may be able to help you design a plan that works for your situation and complies with the Rule. There are also a number of articles and forms available online that lawyers can use as a resource

in succession planning; just search for "lawyer succession planning."

Every New Mexico lawyer is encouraged to use these resources and take action now to plan for the future. By engaging in thoughtful preparation now, a lawyer can not only comply with Rule 16-119, but can ensure that today's planning avoids tomorrow's panic.

William D. Slease is the Professional Development Program Director of the State Bar of New Mexico. PDP offers services and resources to State Bar members in the area of law practice management. This includes continuing education courses, "how-to" manuals and workshops, and information, sample forms, checklists, and assessments on best practices for lawyers. Prior to the State Bar, he served as Chief Disciplinary Counsel for the Disciplinary Board of the New Mexico Supreme Court.



Have You Heard? It Makes More Than Good "Cents" to Maintain **Malpractice Insurance** By Briggs Cheney

Introduction

This article first appeared in 2006 in a series of articles on professional liability insurance. It was part of the State Bar's Lawyer Professional Liability and Insurance Committee's effort to encourage lawyers who did not have liability insurance to reconsider that decision. Much has happened since 2006. The New Mexico Supreme Court enacted Rule 16-104 NMRA requiring all lawyers who are engaged in the private practice of law and who do not maintain professional liability insurance in specified minimum amounts (minimum \$100,000 per claim/\$300,000 aggregate coverage) to provide their clients with written notice of that fact and obtain a client signature acknowledging the lawyer's lack of minimum professional liability insurance.

Rule 16-104 is, in and of itself, a strong incentive for the lawyer to purchase professional liability insurance, but if that incentive is not enough or more prodding is required, this updated article focuses on the economics which justify having professional liability insurance and the basics on obtaining coverage.

The Mathematics of **Professional Liability Insurance**

$$y = \frac{cd + dd + (3 lr)}{gb}$$

y = Years you have to practice without a claim for "going bare" to make sense

cd = Cost of defending yourself in a legal malpractice action

dd = Cost of responding to or defending a disciplinary complaint

lr = Lost revenue during the pendency of a legal malpractice claim

gb = Savings from "going bare"

For purposes of this equation, the following assumptions have been made: the minimum cost of defending a no liability/slam dunk legal malpractice claim is \$25,000. For a claim where there is possible liability, defense costs can run from \$50,000 to \$350,000. For a claim where there is real liability, the cost of defense can be

much higher. It is difficult to provide an average cost of defense for a legal malpractice lawsuit; it's not your average rear-end collision case. For that reason, \$100,000 fairly represents a cost of defense for an average legal malpractice claim.

The average life span of a legal malpractice claim is three years, but I've tried legal malpractice cases which were much older. Indeed, one that was eight years old and another which was almost twelve years old. While three years as an average is reasonable, it can be much longer.

A lawyer who has been sued for legal malpractice will experience an annual 10-20% decrease in his or her gross revenues. If you have not experienced a malpractice suit, this comment may seem unusual. If you have been sued, you understand. Dealing with the emotions of the claim and the frustration of the legal system that all our clients have to endure, having to respond dutifully to defense counsel, the lingering feelings of embarrassment and uncertainty of how it will end, all impact the lawyer's ability to practice law. Using as an example a lawyer grossing \$300,000 a year, the loss of revenue can translate to as much as \$135,000.

Almost every lawyer in his or her legal career will have to respond to a disciplinary complaint filed by a disgruntled client. The cost of responding to a disciplinary complaint is not an insignificant expense. Most professional liability policies issued today provide for some form of coverage for disciplinary matters, generally reimbursement coverage with a cap ranging from \$2,500 to \$25,000. This reimbursement coverage allows the lawyer to retain his/her own attorney and the company will reimburse the lawyer up to the coverage cap. The coverage is another benefit of having professional liability insurance and one which should not be ignored.

There has been a marked increase in the filing of disciplinary complaints. The reason for the increase is not clear but being confronted with a disciplinary complaint is a very real possibility. That a lawyer will be confronted with at least one disciplinary complaint in his or her career is a fair assumption. The average cost for responding to such a complaint is \$10,000

The average annual premium for professional liability insurance can range from \$2,500 to \$6,000. It is difficult to estimate an average annual premium because the premium depends on the limits of

coverage, whether coverage is defense inside or outside of limits ("Pac Man" coverage), the nature of a lawyer's practice, and various other factors. Premiums also are subject to being skewed by past claim histories, years in practice, the type of practice, and other factors. For present purposes, \$4,000 is used as a reasonable annual premium.

Applying the above assumptions to the formula, to make any economic sense, a lawyer would have to practice 81 years without a claim to justify not purchasing malpractice insurance. And remember, that number does not take into consideration the cost of paying a settlement or judgment.

Shopping for Professional Liability Insurance Shop early and everywhere.

The first art of shopping for legal malpractice insurance is to shop early. If you wait until the eve of the renewal date of your policy, you lose the opportunity to shop for the best policy at the best price. Begin shopping no later than 60 days before your current policy's renewal date; 90 days is better.

The current professional liability insurance market is not a tight market.

Enough companies provide coverage to New Mexico lawyers. A list of professional liability insurance carriers and brokers can be found on the State Bar website at www.sbnm.org/lplic. But the number of companies should not lull a lawyer into complacency. The application process has become more labor-intensive. If the lawyer applies to more than one company (which is encouraged), the process of comparing and negotiating coverage can be very time-consuming. You should solicit a quote from several companies. While the lawyer's staff may assist, the lawyer should be intimately involved in this process.

Renewing with the same company is often desirable.

Regardless, it is wise to shop the market. Price is seldom a good reason for choosing one carrier over another. The reason you want to shop every year is for policy and coverage features (e.g., defense within limits, amount of indemnity coverage, disciplinary coverage, tail or prior acts coverage). Has your existing carrier eliminated a coverage feature that another carrier is now offering and that is important to you?

Use the brokers.

Develop relationships with them. Be honest with them. You want them to know all your problems. The underwriting process has evolved over the years into a sophisticated negotiation process and the broker is best trained in that kind of negotiation. The broker may have relationships with a company for which he or she is writing which may prove invaluable to a lawyer (or firm) who has a problem (e.g., a past claim, a new practice area viewed a higher risk by a company, a problem lawyer in the firm). Use your insurance broker just as you hope your client uses your professional services.

Where the malpractice market has changed is in the decision to aggressively engage in underwriting. For years, malpractice carriers seemed to pay little attention to the details of an individual lawyer's or firm's claim history and instead relied on

regional loss data. Companies are now focusing on each insured and through the application process, companies are gathering detailed information on claims, losses, cost of defense on past claims, information on disciplinary complaints, and more precise information on an applicant's areas of practice. Based on this information, companies are making decisions on whether to insure and adjusting premiums accordingly.

The preceding point warrants additional comment. The application has become critically important in the process of purchasing malpractice insurance. As noted, this is not a task the lawyer should delegate to the legal assistant or office manager. It is critical that the information provided on any application be completely accurate. Neglecting to report a disciplinary complaint or a past claim or mischaracterizing the firm's areas of practice can result in the carrier challenging coverage through a declaratory judgment action when a claim is later filed. There was a time when insurance companies were extremely hesitant to challenge a lawyer on its professional liability coverage. Those days are over. Companies have experienced large losses in the legal malpractice arena, and they may seek to avoid coverage where a lawyer insured has not fulfilled the lawyer's duties and obligations in the application process.

A final note on shopping for insurance and about what is not discussed in this article. There much more to consider when shopping for insurance that is not addressed here-the limits of coverage, the deductible, defense within and outside of coverage, tail coverage, disciplinary coverage. For more on those topics, consider the reviewing the summary and article from the Lawyers Professional Liability and Insurance Committee that discusses such topics, which you can read at https://bit. ly/3OBcOK3.

Conclusion

Almost every lawyer in

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an insignificant expense.

Whether maintaining professional liability insurance should be every lawyer's professional responsibility and obligation is the subject of considerable debate. Regardless of which side of that debate you favor, the mathematics (i.e., the economics) strongly suggest that having professional liability coverage only makes sense.

Briggs F. Cheney is Of Counsel with Dixon, Scholl, Carillo P.A. He attended the University of New Mexico (Bachelor of Business, 1969; and J.D., 1972). He has long been involved with the State Bar of New Mexico's Lawyers Professional and Liability Insurance Committee and the Judges and Lawyers Assistance Program.



Written as a collaborative effort by the Client Protection Fund Commission

What is the Client Protection Fund?

The Commission on Client Protection was established by the New Mexico Supreme Court in 2005 as a permanent commission of the State Bar of New Mexico. The Commission oversees the Client Protection Fund (CPF or the Fund). CPF's stated purpose is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in the courts of New Mexico. The Rules Governing the Client Protection Fund are Rules 17A-001 et seq. NMRA.

... the legal profession is collectively responsible for the protection of the integrity of the profession and its clients.

How is CPF Funded?

CPF is funded by an annual assessment of \$15 per actively licensed lawyer in New Mexico.

What is an Eligible Claim?

To be eligible for reimbursement by the Fund, the claimant's loss must be caused by the dishonest conduct of a lawyer and must have arisen out of and by reason of a client-lawyer relationship or a fiduciary relationship between the lawyer and the claimant.

Is Death Really Considered Dishonest Conduct?

What constitutes dishonest conduct for purposes of CPF paying a valid claim may not be as obvious as one would think. Certainly, if a lawyer ignores the cardinal rule—it is not the lawyer's money until it is earned and takes unearned client funds for the lawyer's own use, that would constitute dishonest conduct. But what about a lawyer who dies leaving an empty trust account and insufficient trust accounting records to determine whether the trust funds that clients claim should be on deposit, were actually earned or properly disbursed by the lawyer before his/her death? In other words, does the scenario of "my lawyer died, my case is still going, there should be money in trust, and the trust account is empty" constitute "dishonest conduct" by the deceased lawyer? CPF has determined that the definition of

"dishonest conduct" under the CPF governing rules is met when a lawyer dies leaving improperly maintained trust records to demonstrate the proper expenditure or earning of expected but missing trust funds.

To be eligible for reimbursement by the Fund, the claimant's loss must be caused by the dishonest conduct of a lawyer and must have arisen out of and by reason of a client-lawyer relationship or a fiduciary relationship between the lawyer and the claimant.

What are the Current Issues Facing CPF?

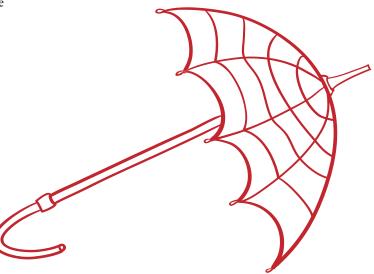
The main issues currently facing CPF are whether the \$15 annual assessment is sufficient to sustain the Fund for the next several years, and how to impress upon lawyers the importance of understanding, observing, and complying with the rules governing trust accounting and the safekeeping of client property. At the end of 2020, the Fund had more than \$1 million in its bank account. Historically, the Fund has typically paid less than \$100,000 annually in claims. Recently, however, the number of meritorious claims and the resulting CPF payments have been significantly higher. Specifically, the first three months of 2022 saw the CPF pay more than \$150,000 to clients. The overwhelming majority of this money went to clients of deceased lawyers who had zero balances in their trust accounts and insufficient records to demonstrate the proper expenditure or earning of expected trust funds. In some cases, the trust account general ledger and individual client ledgers were missing. There was no evidence of monthly reconciliations as required by Rule 17-204 NMRA. There were no invoices or entries documenting when and why trust account deposits were made or when and why trust account withdrawals were made and what work supported the withdrawals. Moreover, some lacked a written fee agreement outlining the scope of work (e.g., "I will

represent you through a trial but not an appeal"), and the fees and costs associated with the work ("my hourly rate is \$275 per hour plus GRT, and you have agreed to pay a retainer of \$X" or, in a flat fee arrangement, "I will represent you in this matter for a refundable flat fee of \$X" incrementally earned in accordance with the following benchmarks).

Of course, if a lawyer ignores the rules of trust accounting and safekeeping, by failing to have written fee agreements, by not depositing and keeping unearned fees in trust, and by failing to maintain proper trust account records to demonstrate when fees are earned, the lawyer puts himself/herself at risk of not just a meritorious CPF claim, but a disciplinary complaint. If the lawyer dies and his/her records are deficient or non-existent, the lawyer leaves clients in a particularly precarious position; not only have the clients they lost their lawyer, they may have also lost the very funds they need to continue absent a payout from the Fund. But even in that case, it will take some time while the claims are investigated, and the Disciplinary Board and CPF try to sort out the deceased lawyer's trust account. Unfortunately, that might be time that the clients cannot spare.

The bottom line is that the legal profession is collectively responsible for the protection of the integrity of the profession and its clients. Compliance with basic trust accounting rules and strictly observing the concept of safekeeping client funds is not only the required thing to do, but also the right thing to do; for the lawyer, for the lawyer's business, for the lawyer's estate in the event of death, and most importantly, for the lawyer's clients.

Learn more about the Client Protection Fund at www.sbnm.org/cpf.





magine there was a way for New Mexico attorneys to close the Justice Gap by continuing to do one common, healthy business practice every day. In accordance with Supreme Court Rule¹, every attorney must maintain unearned fees and other client funds in an IOLTA. By banking at an institution offering voluntarily higher interest rates an attorney's IOLTA will generate considerable funds for the underserved populations in New Mexico.

Ok, but what is "IOLTA?"

IOLTA is an acronym for 'Interest on Lawyers' Trust Accounts.' When an attorney receives unearned fees such as a retainer or holds other client funds, this money is required to be held in an IOLTA, a pooled trust account, separate from operating and personal funds. While the funds sit in this mandatory, specialized account, they earn interest.

In the late 60s and early 70s, IOLTA programs were established as a method to generate funds for civil legal services provided to low-income and underserved populations in Australia and Canada. By the late 1970s, the Florida Bar, among other organizations, began establishing IOLTA programs in the United States. Currently, IOLTA programs exist in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands.²

These funds, at no expense to attorneys or the public, generate significant resources, enumerated below, to support organizations whose mission it is to provide civil legal services to the underserved and under-represented populations in New Mexico.

Imagine there was a way for New Mexico attorneys to close the Justice Gap by continuing to do one common, healthy business practice every day.

The Justice Gap in the United States

According to the Legal Services Corporation (LSC), nearly a million people seeking legal help for civil services are turned away each year due to a lack of resources.3 This justice gap is the difference between civil legal assistance available and that which is necessary to meet the needs of low-income individuals.

The LSC estimates that 92% of low-income Americans cannot get sufficient, if any, legal assistance for civil legal problems. They also note that, "Nearly three quarters (74%) of low-income households experienced at least one civil legal problem in the previous year."4 Additionally, "a third (33%) of low-income Americans had at least one problem they attributed to the COVID-19 Pandemic."5

The 2022 Justice Gap Study reported that civil legal service organizations "... are unable to provide any or enough legal help for an estimated 1.4 million civil legal problems (or 71% of problems) that are brought to their doors in a year."6

Simply put, there are not enough resources to help everyone in need.

New Mexicans, suffering from these statistics, need help. Your IOLTA interest can facilitate that aid.

Where exactly does the money go?

This summer marks the end of the Access to Justice Fund Grant Commission 2022-2023 Awards cycle.

The ATJ Fund Grant Commission is a commission of the State Bar of New Mexico whose mission is to be the financial steward of the New Mexico Supreme Court Fund for Access to Justice (ATJ Fund). The ATJ Fund consists of funds generated from Interest on Lawyer's Trust Accounts (IOLTA), Pro Hac Vice fees, and donations by attorneys on their license renewal forms.

Annually, the Commission solicits grant applications from qualified civil legal service providers showcasing new and on-going projects, that, as nonprofit organizations, provide civil legal services to low-income New Mexicans.

In the 2022-2023 Grant cycle a total of \$900,000 was awarded; of that, \$600,000 came from IOLTA generated funds. The following civil legal service providers were awarded grants:

- Access to Justice Commission
- Disability Rights NM:
- DNA People's Legal Services
- El Calvario United Methodist Church
- Enlace Comunitario
- NM Center on Law and Poverty
- NM Immigrant Law Center
- NM Legal Aid
- Pegasus Legal Services for Children
- Santa Fe Dreamers Project

Where Lawyers Bank Matters

It truly matters where attorneys hold their IOLTA funds. The State Bar, as part of its role in administering the IOLTA program, certifies banks that are authorized to hold IOLTAs. The interest from these specialized accounts is remitted by the banks to the State Bar of New Mexico for yearly disbursement to civil legal service providers through the annual Access to Justice Fund Grant Commission awards cycle. In New Mexico, IOLTA approved financial institutions are required to pay interest rates as defined in Rule 24-109(B) NMRA. Leadership

Circle Banks are banks that go above and beyond those requirements.

For example, in 2021, many banks paid .1% interest on IOLTAs. During that same time, banks in the Leadership Circle were paying .35% interest on IOLTAs. The interest paid on an IOLTA holding \$100,000 in a Leadership Circle Bank, compounding monthly, over the course of a year would be \$4,281.80 as opposed to a non-Leadership bank where accumulated interest would be \$1,281.80. The Leadership Circle Bank offers more than a three times increase

in value.

Simply put,

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In light of the recent changes to the Federal Funds Rate, this difference will continue to increase. For example, at a 1% interest rate, the annual interest on the same account would be \$12,682.50. At a low interest rate, IOLTA generated \$600,000 for the 2022 ATJ Grant Fund distribution. If every New Mexico IOLTA account, which hold millions of IOLTA dollars, was held at a Leadership Circle Bank, the revenue generated and subsequent impact would be extraordinary.

Choosing a bank that opts to pay a higher interest rate on IOLTA funds, is choosing to advocate for underserved New Mexicans as well as supporting a healthy business practice. Consider choosing one of the following State Bar of New Mexico Leadership Circle banks for your business and IOLTA needs: BMO Harris, Century Bank of Santa Fe, Enterprise Bank and Trust, Pinnacle Bank and Wells Fargo.

The State Bar regularly reaches out to certified IOLTA banks to invite them to join the Leadership Circle. If the bank where your IOLTA is held is not in the Leadership Circle, please encourage them to join the Circle.

Kate Kennedy is the director of special programs at the State Bar of New Mexico where she implements regulatory programs such as IOLTA, Bridge the Gap Mentorship and MCLE. She has been with the State Bar since 2018.

Endnotes

¹Rule 16-115 NMRA, Rule 17-204 NMRA, Rule 24-109 **NMRA**

² https://iolta.org/what-is-iolta/ioltahistory/#:~:text=IOLTA%20programs%20were%20first%20 established, Rico%2C%20 and %20 the %20 Virgin%20 Islands.

- ³ https://justicegap.lsc.gov/resource/executive-summary
- ⁴ https://www.lsc.gov/initiatives/justice-gap-research
- ⁵ https://www.lsc.gov/initiatives/justice-gap-research
- ⁶ https://justicegap.lsc.gov/resource/executive-summary/

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Help **New Mexico** Wildfire Victims

In partnership with the **Federal Emergency Management Agency** and the American Bar Association's Disaster Legal Services Program, the State Bar of New Mexico Young Lawyers Division is preparing legal resources and assistance for survivors of the New Mexico wildfires.

A free legal aid hotline is available and we need volunteers!

Individuals who qualify for assistance will be matched with New Mexico Lawyers to provide free, limited legal help.

- Assistance with securing FEMA and other benefits available to disaster survivors
- > Assistance with life, medical, and property insurance claims
- > Help with home repair contracts and contractors
- > Replacement of important legal documents destroyed in the disaster
- Assistance with consumer protection matters, remedies, and procedures
- > Counseling on landlord/tenant and mortgage/foreclosure problems

Volunteer Expectations

Volunteers do not need extensive experience in any of the areas listed below. FEMA will provide basic training for frequently asked questions. This training will be required for all volunteers. We hope volunteers will be able to commit approximately one hour per week.

> Visit www.sbnm.org/wildfirehelp to sign up. You can also contact Lauren E. Riley, ABA YLD District 23, at 505-246-0500 or lauren@batleyfamilylaw.com.





