16-119. Lawyer succession planning.

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.

[Adopted by Supreme Court Order No. 21-8300-027, effective for registration statements submitted under Rule 24-102.1 NMRA on or after October 1, 2022.]

Committee commentary. —

General Principles

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.

[2] 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.

Determining Incapacity

[3] Incapacity or disability 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.
Role of Assisting Lawyer

Upon reasonable confirmation of the designating lawyer’s extended incapacity, disability, or death, the assisting lawyer should take those steps provided for in the succession plan. 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. 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.

Notice to Clients

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

Fees

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
Numerous resources are available to assist a designating lawyer in engaging in effective succession planning, including those materials available on the State Bar of New Mexico’s website under the tab “for Members: Supreme Court Commissions: Succession and Transition Committee.” All lawyers are encouraged to avail themselves of these materials.

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