

NOTICE OF COMMENT PERIOD

The Nebraska State Bar Association proposed rules for naming a designated attorney to take over responsibilities for attorneys who represent clients drawn from the public who have died, are disabled, or otherwise are unable to practice law. After an initial public comment period and further consideration, the Nebraska Supreme Court directed that revised rules governing succession planning should be published for a new comment period.

The Nebraska Supreme Court invites interested persons to comment on proposed Neb. Ct. R. § 3-1101 et seq., Nebraska Attorney Succession Planning Rules. Anyone desiring to submit a public comment for the Supreme Court's consideration should do so via email to joshua.shasserre@nejudicial.gov with the following text listed in the email subject line: **Neb. Ct. R. §§ 3-1101 et seq., 3-322, and 3-328**. Comments will be accepted through December 2, 2024.

The full text of the proposal is available below. To obtain a paper copy, please call the Clerk's Office at 402-471-3731.

CHAPTER 3: ATTORNEYS AND THE PRACTICE OF LAW

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Article 11: ~~(Reserved for future use.)~~ Nebraska Attorney Succession Planning Rules.

§ 3-1101. Designated attorney requirement.

Purpose. Nebraska attorneys who represent clients drawn from the public, whether sole practitioners or practicing in a law firm or other organization, must take steps to prepare their practice for their own disability, death, disbarment, or other inability to practice law before the need arises. Failure to prevent neglect of client matters due to death or disability may violate Neb. Ct. R. Prof. Cond. § 3-501.3. Diligence. See Comment [5].

These rules set forth requirements so that client interests may be properly protected and, if required, there exists a plan for orderly wind-up of a firm's business.

§ 3-1102. Designated attorney applicability and authority.

(A) Each Nebraska attorney who represents clients drawn from the public shall name an attorney ("designated attorney") to protect the interests of the designating attorney's clients in the event the designating attorney has been suspended by an order of the Court

placing the member on disability inactive status pursuant to § 3-311, or is shown to be unable to properly discharge his or her responsibilities to clients due to disability, disappearance, death, disbarment, or abandonment of a law practice.

(1) Sole practitioners. A sole practitioner representing clients drawn from the public shall name an attorney who has agreed to be the designated attorney. For purposes of this rule, a sole practitioner means a licensed attorney practicing alone with no associate attorneys or an attorney practicing in association with other sole practitioners who do not own equity in the attorney's practice.

(2) Attorneys in firms. All attorneys in firms or organizations of two or more attorneys representing clients drawn from the public shall designate an attorney in the firm or organization as a designated attorney to be responsible for assuming all duties provided by this rule.

(B) Authority of Designated Attorney. The authority of the designated attorney takes effect upon the following:

(1) an order of the Court placing the designating attorney on disability inactive status pursuant to § 3-311, or

(2) it is otherwise reasonably believed the designating attorney is unable to properly discharge his or her responsibilities to clients due to disability, disappearance, death, disbarment, or abandonment of a law practice, or

(3) it is otherwise reasonably believed the designating attorney is temporarily disabled but during the period of such temporary disability is unable to properly discharge his or her responsibilities to clients.

§ 3-1103. Duties and responsibilities of designated attorney.

(A) The designated attorney may take whatever actions may be required or deemed appropriate under any such circumstance to first protect client interests and secondarily to protect the designating attorney's interests. This includes but is not limited to reviewing client files of the designating attorney, notifying the designating attorney's clients of the situation, and maintaining the designating attorney's practice to the extent feasible or practicable. The attorney designated under this rule also is authorized to prepare final trust accountings for clients, make trust account disbursements, properly dispose of inactive files, arrange for storage of files and trust account records, and otherwise

properly wind-up the business of the designating attorney, if required. Upon separate agreement between the designating and designated attorney, the designated attorney may undertake other duties and responsibilities as provided by any such agreement.

(B) Lawyer-Client Privilege. The designated attorney should be bound by the lawyer-client privilege with respect to the records of individual clients, except to the extent necessary to carry out the duties and responsibilities under this rule. A designated attorney shall not examine any document or acquire any information from any file or client containing real or potential conflicts.

(C) The designated attorney shall notify in writing all of the present clients of the designating attorney of the reason why the designating attorney can no longer serve his or her clients and shall also notify in writing all attorneys or opposing counsel involved in pending legal or other matters being handled by the designating attorney of the reason the designating attorney can no longer practice law.

(D) The designated attorney's responsibilities and duties shall end upon the following:

(1) a client of the designating attorney retains new counsel;

(2) all duties provided under this rule have been completed;

(3) to a particular client, when the designated attorney and client engage in their own attorney client relationship;

(4) the designating attorney has a temporary disability that has resolved, and the designating attorney is able to return to the active practice of law.

§ 3-1104. Designating attorney.

(A) Each designating attorney who represents clients drawn from the public must have a written plan that at a minimum provides to the designated attorney:

(1) the location of user credentials to allow the designated attorney to access necessary computer systems, case management programs, email accounts, and other technology that would assist the designated attorney in performing his or her duties and responsibilities under this rule;

(2) the location of the list of active clients and location of client files; and

(3) firm or business bank account information and trust account information.

(B) Authorization.

(1) The plan may authorize the designated attorney to collect fees, pay firm expenses and client costs, compensate staff, terminate lease agreements, liquidate or sell the practice, or perform other law firm administration tasks.

(2) The plan must include language to make the designated attorney's powers durable in the event of the designating attorney's disability. See Neb. Rev. Stat. § 30-4004.

(C) The plan shall be updated when there is a change in designated attorney, if the designating attorney changes employment or moves law firms, or if information in the plan, such as location of client files, changes.

§ 3-1105. Exemptions.

The following are exempt from naming a designated attorney under this rule:

(A) attorneys with an inactive law license;

(B) active licensed attorneys who are not engaged in private practice and/or do not represent clients drawn from the public;

(C) attorneys with an active law license that represent clients drawn from the public who reside out of state and have no Nebraska clients.

Certification exempting the attorney from the requirements of this rule shall be done annually.

§ 3-1106. Annual designation.

(A) The designation shall be updated annually through the attorney's Nebraska Supreme Court Attorney Services Division account on or before the dates listed in § 3-803(B)(6). The designating attorney shall certify that the designated attorney has agreed to serve as the designated attorney. All designated attorneys will be asked to confirm that they have agreed to serve as a designated attorney. If there is no change to a designated

attorney from year to year, the designating attorney will be asked to confirm there is no change when completing annual registration.

(B) If an attorney cannot find a designated attorney after reasonable requests, the attorney shall contact the Nebraska Counsel for Discipline to obtain a list of lawyers who have indicated willingness to serve in that capacity.

(C) If there is a change in designated attorney or if the designating attorney changes employment or moves law firms, the designating attorney shall update the designated attorney information through the attorney's Nebraska Supreme Court Attorney Services Division account immediately, but at least within 30 days of such change.

(D) Failure to provide a designated attorney and have a succession plan may be grounds for disciplinary action. See Comment [5], Neb. Ct. R. Prof. Cond. § 3-501.3. Diligence. Failure to designate an attorney or falsely designating an attorney through the Attorney Services Division website who has not agreed to serve may cause the Supreme Court to enter an order to show cause why the designating attorney's license to practice law should not be administratively suspended.

§ 3-1107. Designated attorney as trustee; payment provisions; immunity.

(A) A designated attorney, entity, or the Nebraska Counsel for Discipline may petition the Supreme Court, at any time, for appointment of the designated attorney as the trustee or appointment of an independent trustee under the provisions of § 3-328, as applicable.

(B) Payment for designated attorney. A designated attorney may seek reimbursement for expenses related to the duties outlined in this rule and may seek compensation not to exceed the hourly rate allowed for appointed trustees under § 3-328. The designated attorney shall seek payment from the following sources, in the following order:

(1) the designated attorney may seek payment first from the designating attorney or the designating attorney's firm's operating or business account;

(2) the designated attorney may seek payment from the designating attorney's estate, if deceased, with the personal representative or administrator of the designating attorney's estate, but if those funds are insufficient to compensate the designated attorney, then;

(3) the designated attorney may seek payment from the Counsel for Discipline Cash Fund as a trustee by making a filing with the Nebraska Supreme Court for appointment as a trustee under § 3-328.

(C) A designated attorney acting pursuant to this rule shall be immune from suit for any conduct in the course of his or her official duties under this rule.

§ 3-1108. Education and training.

The Nebraska Supreme Court shall develop educational materials and provide annual training on the duties and requirements of this rule.

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Article 3: Discipline Procedures for Lawyers.

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§ 3-322. Immunity and privileges.

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(B) The Counsel for Discipline, his or her representatives, and members of the Disciplinary Review Board, Committees on Inquiry, and Advisory Committee; the director and any members of the Nebraska Lawyer's Assistance Program; a designated attorney acting pursuant to § 3-1101 et seq.; a trustee appointed pursuant to § 3-328; and all others (whether or not members of the Association) whose assistance is requested by any of the foregoing in connection with the enforcement of these rules shall be immune from suit for any conduct in the course of their official duties under these rules.

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§ 3-328. Appointment of a trustee.

In addition to any of the foregoing procedures within these rules relating to disability inactive status, disbarment, or suspension of an attorney, the following measures may be taken for the protection of client interests and secondarily for the protection of the lawyer's interests:

(A) Appointment of a Trustee. If an attorney (i) has been suspended by an order of the Court placing the member on disability inactive status pursuant to § 3-311; (ii) is shown to be unable to properly discharge his or her responsibilities to clients due to disability, disappearance, death, or abandonment of a law practice and there is no showing that ~~an arrangement has been made for another lawyer~~ a designated attorney was named to discharge the responsibilities; or (iii) has been disbarred or suspended pursuant to §§ 3-310 or 3-312 or has surrendered his or her license under § 3-315 and there has been a failure to comply with § 3-316 client notification requirements, the Court may appoint a lawyer to serve as trustee to inventory the files, sequester client funds, and take whatever other action seems indicated to protect the interests of the clients, affected attorney, and any other affected parties.

(1) Trustee Bound by Lawyer-Client Privilege. The trustee should be bound by the lawyer-client privilege with respect to the records of individual clients, except to the extent necessary to carry out the order of the Court.

(2) The trustee shall notify in writing all of the present clients of the ~~disbarred or suspended member~~ affected attorney of the fact of such disbarment or suspension of the reason for appointment and shall also notify in writing all members and nonresident attorneys involved in pending legal or other matters being handled by the ~~disbarred or suspended member of his or her altered status~~ affected attorney of the reason for appointment.

(3B) Report and Compensation. ~~The trustee shall receive compensation for his or her services as established by the Court and may be reimbursed for travel and other expenses incidental to the performance of his or her duties. The trustee shall make reports to the Supreme Court as directed by order of the Court. The trustee may receive compensation for his or her services as established by the Court and may be reimbursed for travel and other expenses incidental to the performance of his or her duties. The trustee shall first seek to be compensated from the affected attorney's or law firm's business or operating account and, if the affected attorney is deceased, may secondarily seek payment from the affected attorney's estate with the personal representative or administrator of the estate. If those funds are insufficient to compensate or reimburse the trustee, the trustee may seek payment from the Counsel for Discipline Cash Fund upon motion and affidavit to the Supreme Court. At its discretion, the Counsel for Discipline may seek reimbursement for the trustee's fees and expenses for protection for the clients' interest and secondarily for the protection of the lawyer's interests, from the affected attorney's estate, if deceased, through an administrative claim.~~