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Lawyer Liability
Insurance

ATKINSON, THAL & BAKER, P.C.

Atkinson, Thal & Baker, P.C. congratulates each of its partners on being named to *2012 Super Lawyers*. Douglas Baker and John Thal were also listed among the New Mexico "Top 25."



The firm also announces that Jody Brent Mullis joined the firm as an associate attorney effective February 1, 2012. Mr. Mullis formerly prosecuted cases with the Fifth Judicial District.



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Survey of Lawyers Who Do Not Have Legal Malpractice Insurance

By Jack Brant

"I am more concerned about finding and affording health insurance for... my family."

New Mexico lawyers are not required to maintain legal malpractice insurance, also called "lawyers professional liability (LPL) insurance." The question of whether such insurance should be mandatory has been debated for years, both in New Mexico and around the country. Currently, only Oregon requires licensed attorneys to maintain LPL insurance; however, in Oregon a "captive" insurance program essentially guarantees that every licensed attorney can purchase LPL coverage. One of the primary reasons LPL insurance is not mandatory in the rest of the country is that not all lawyers are insurable. Also, making such insurance mandatory could essentially empower insurance companies to determine who can and cannot practice law. However, the value of LPL insurance is widely recognized.

In 2009, the New Mexico Supreme Court promulgated Rule 16-104(C) of the New Mexico Rules of Professional Conduct. Rule 16-104(C) requires any lawyer who either has no LPL coverage or has less than \$100,000 per claim/\$300,000 in aggregate coverage to so advise his/her client, in writing, at the time of the initial engagement to provide legal services. The required client notification form is included in Rule 16-104(C). The rule also requires written notice to each client if a lawyer's LPL insurance lapses or is terminated during the course of the representation. The Supreme Court promulgated the rule both as a client protection measure and as an

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Survey Results: What About Them?

By Daymon Ely

In the recent survey conducted by the State Bar Lawyers Professional Liability and Insurance Committee, the most frequently noted reason for not purchasing insurance was that the cost of purchasing malpractice insurance is too high. Let me try to put this concern to rest.

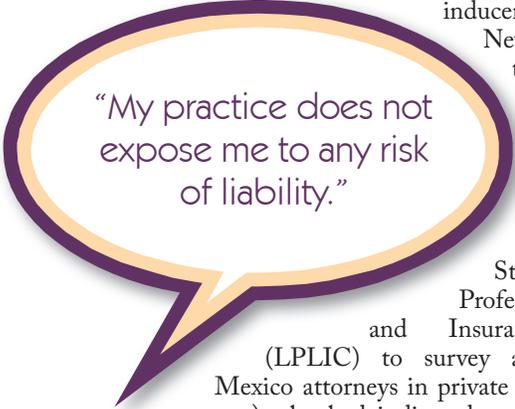
For most young lawyers, the cost of malpractice insurance is actually pretty cheap—about \$1000 per year. This is because the insurance company is not insuring these attorneys for a lengthy history (referred to as the "tail"). For the majority of attorneys, the cost is around \$2,500 per year depending on the coverage limits one is looking for. Obviously, the limits you want, the number of times you have been sued, and your area of practice (e.g., securities or class action work) are all factors that could increase the amount you spend, but a \$300,000 policy for most attorneys is not likely to be cost-prohibitive.

"If insurance is in place, the lawyers give up defense decisions to the insurance adjusters."

On the flip side, I am still seeing lawyers suggesting that if they don't have insurance they won't be sued. I am a plaintiff's attorney who sues attorneys, and I know this is not the case. I, and the other attorneys I know who sue attorneys, will sue you if there is a case. The fact that you do not have insurance will not discourage us from pursuing the case to judgment and, if necessary, into bankruptcy.

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State Bar Surveys Members on
Legal Malpractice Insurance



“My practice does not expose me to any risk of liability.”

inducement to uninsured New Mexico lawyers to obtain LPL insurance.

In 2011, the New Mexico Supreme Court directed the State Bar Lawyers Professional Liability and Insurance Committee (LPLIC) to survey all licensed New Mexico attorneys in private practice (about 23 percent) who had indicated on their annual dues form that they did not currently have LPL insurance.

The Supreme Court is interested in trying to determine the reasons why some New Mexico lawyers do not carry insurance, in large part to determine whether there may be things that the Court or the State Bar can do to assist uninsured lawyers in obtaining LPL coverage.

The LPLIC surveyed 503 State Bar members. Reflecting a response rate of 38 percent, 203 lawyers responded to the voluntary survey.

The survey asked the respondent to confirm whether he/she had LPL insurance and was in private practice. Sixty-five percent confirmed that they were in private practice and did not have LPL coverage. In addition to the questions below, the survey also set out a number of statements commonly heard in the debate over mandatory LPL insurance and asked the degree to which the respondent agreed or disagreed with the statement.

“If you are engaged in the private practice of law and do not have a policy of professional liability insurance, please briefly explain the reasons why you have not obtained such a policy.”

The most common response was “cost.” However, a fairly large percentage within that category stated that their practice was quite limited. A number of respondents were essentially retired or semi-retired or did only, or primarily, *pro bono* representation. A number of others had another job that was primary, with only a very limited law practice. Otherwise, the responses ran the gamut from distrust of insurance companies, to being “very careful” in the practice, to not wanting to “bet against myself,” to “choosing to walk the high wire without a net.” A number of respondents answered that they simply did not need LPL insurance. One opined that having LPL insurance creates a false sense of security and a conflict of interest with the Rules of Professional Conduct.

“Is there anything the State Bar could do to help you in locating or purchasing such coverage?”

The majority of the responses fell into two categories: make coverage for part-time practice more available or affordable, and create a “captive” insurance program (like the one in Oregon). The LPLIC has considered whether such a program might be possible in New Mexico and so far such a program does not appear to be financially viable here.

“If cost is a factor in obtaining such insurance, please indicate how much you believe you could pay per month for such a policy.”

The highest percentage answered “zero.” Of those answering with an amount, the answers ranged from \$20 per year to \$500 per month. The number of respondents listing high cost as a factor but stating a willingness to pay \$100 per month and up for insurance suggests that many lawyers misperceive what LPL insurance actually costs. Policies are available well within the \$150 per month price range.

“If you have applied for but been declined insurance, please provide the reasons that you were given for the declination.”

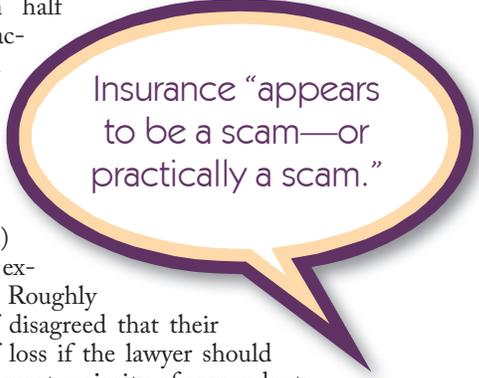
Only two respondents stated that they had been declined coverage by an insurance company.

“If the Supreme Court required you to obtain insurance coverage, how would that affect your practice?”

The majority of respondents said that they would stop practicing if mandatory insurance became a reality. Another high percentage stated that they would comply but would have to raise rates, stop doing *pro bono* work, or live on less income.

Responses to statements commonly heard in the debate over mandatory LPL insurance

Slightly more than half agreed that their practice *did* expose them to the risk of a professional liability claim; the rest were apparently under the impression (probably mistaken) that they were not exposed to such a risk. Roughly half agreed and half disagreed that their clients face a risk of loss if the lawyer should make a mistake. The great majority of respondents agreed that being “judgment proof” was *not* their reason for being uninsured. Most of the respondents believed that clients do not assume lawyers are insured. The great majority indicated that they had no trouble advising clients that they are not insured.



Insurance “appears to be a scam—or practically a scam.”

The Supreme Court and the State Bar would like to thank those lawyers who responded to the survey and will continue to evaluate the results in the hope of finding ways to improve service to the bar and to the public.

About the Author

Jack Brant has been practicing law in New Mexico for nearly 30 years. His practice has concentrated on defending lawyers and accountants in professional malpractice lawsuits, as well as defending lawyers in disciplinary matters and counseling lawyers on insurance and risk management issues. He is the current chair of the State Bar Lawyers Professional Liability and Insurance Committee.

For more information on professional liability insurance, visit LPLI Committee’s website at <http://www.nmbar.org/AboutSBNM/Committees/LPL/LPL.html>.

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 has promulgated a new rule (Rule 16-104 NMRA) requiring all lawyers who are engaged in the private practice of law and who do not maintain professional liability insurance (minimum \$100,000 per claim/\$300,000 aggregate coverage) to provide their clients with written notice of that fact.

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

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

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 last year I tried a legal malpractice case which was eight years old and I am scheduled to try another which is almost twelve years old. Three years as an average is reasonable, but 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 all of 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/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/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 carriers writing in New Mexico can be found on the State Bar website: <http://www.nmbar.org/AboutSBNM/Committees/LPL/lplcompanies.html>. 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 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?

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 as

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 mischarac-

terizing 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 will 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.

Conclusion

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

About the Author

Briggs Cheney has represented lawyers in civil, disciplinary and licensing matters for the last 39 years in New Mexico. He is of counsel at Sheehan & Sheehan PA in Albuquerque.



“Do I, Or Don’t I, Call My Professional Liability Insurance Company?”

What Should the Lawyer Do?

By Briggs Cheney

Of course you call your insurance company when a claim is filed, but what about those situations that occur before a claim or a lawsuit is filed?

This article is not designed to be exhaustive but rather to address that fear which seems to pervade the bar: “If I call my professional liability carrier, my policy will be terminated or not renewed or my rates will be increased.” After more than 39 years of defending attorneys and working with professional liability carriers, I can promise you that just making a call will not in and of itself lead to any of these results.

Three pre-claim occasions determine when a lawyer should consider calling his or her insurance company: (1) to ask a question of the risk management hotline; (2) to take advantage of disciplinary coverage; and (3) when the lawyer becomes aware of a possible or threatened claim.

Risk Management Hotline

Not all companies provide hotlines, but it is not uncommon. Almost always, these services are separate from the company’s claim or underwriting departments and are often out-sourced to lawyers experienced in risk management and professional ethics. Such hotlines are a service to the insured, they are free and they are **confidential**.

Disciplinary Coverage

Many, if not most, professional liability policies will provide disciplinary coverage. This coverage comes in different forms and generally has a cap or maximum limit. It is often what might be called *reimbursement coverage*—the insured lawyer selects his/



her own counsel, pays that counsel and the company reimburses the insured lawyer up to the cap. Other policies are more akin to liability coverage, and the company will pay the selected counsel directly. Again, payment is limited to the amount of disciplinary coverage provided.

Too often, lawyers do not avail themselves of this valuable coverage, thinking that telling the company that they have been the object of a disciplinary complaint will impact coverage or rates. This isn’t a sound long-term analysis. If the lawyer will just think about the application he/she completed for the existing coverage and the renewal application completed with the same company or a new carrier, an applying lawyer is asked to disclose any disciplinary complaints. If the lawyer thinks a disciplinary complaint is going to be a secret, it will be a short-lived secret.

Companies make this coverage available for a reason—as a risk prevention tool. The company would prefer to head off a claim before it becomes a claim. The company also wants its insureds to have legal advice so they do not make the careless mistake of representing themselves, a mistake which may turn a defensible claim into an indefensible or more dangerous claim. Disciplinary coverage is a benefit to the insured and, ultimately, to the company as well.

A lawyer’s professional liability policy is an asset.

The Potential or Threatened Claim

Almost without exception, every professional liability policy requires the insured to provide the company with written notice of *potential* or *threatened* claims. This requirement is often

overlooked or ignored by lawyers for a variety of reasons and it can have very serious consequences. But what is the distinction between a *threatened claim* and a *potential claim*?

A *threatened claim* is not difficult to understand and the insured lawyer generally knows when that happens. It would seem reasonable to say that a *potential claim* is something short of the client threatening the insured lawyer with a lawsuit. A potential claim might be an adverse ruling by the court, a sidebar comment by the judge, a question raised by opposing attorney on the record calling into question a decision or action by the insured lawyer, or a missed case authority or statute discovered only by the insured which might or might not play a role in what happens in the case. A host of other events are also possible which do not lead to or have not yet led to a client saying, "I am going to sue you," but which would arguably represent a potential mistake or misstep.

Even with these examples in mind, it can be difficult to distinguish between a threatened and a potential claim, but struggling to make this distinction overlooks a more important point: the reality of claims-made coverage. For purposes of this discussion, the down-and-dirty explanation of claims-made coverage is that the company will only have responsibility for claims which are filed or **reported** during the policy period. When the term of the policy ends, the company is off the hook. That is where *potential* or *threatened* claims come into play. The lawyer who hesitates or equivocates can find himself or herself without coverage, even though he or she has maintained continuous coverage.

The lawyer who does not report a potential or threatened claim for whatever reason(s) (including arrogance, embarrassment, or fear) during the policy period¹ when the lawyer had notice of a potential mistake may experience an expensive lesson in insurance law, such as the one described in the hypothetical below.

"Joe Lawyer" is insured by XYZ Insurance Company under a claims-made policy whose term ends December 31, 2010. In August of 2010, Joe misses a deadline to disclose expert witnesses in a case set for trial in March 2011. Joe files a motion to extend the deadline for disclosing experts and is confident that the judge will grant him that relief. The hearing is set for January 5, 2011. Joe, confident his innocent mistake will be rectified at the hearing, says nothing to his client or the company before December 31, 2010, when his policy term ends, nor does Joe make any reference to this problem on his renewal application completed before December 31, 2010. The court denies Joe's request at the January 5, 2011, hearing and when the case goes to

trial in March of that year, his client does not prevail due to a lack of expert testimony. Joe's client sues him for legal malpractice in October 2011. When he reports this claim to the company, they ultimately advise him that there is no coverage for the claim because he had failed to provide notice of a *potential claim* in August 2010. Joe's protestations that he "did not know" back in

August 2010 are met with this response from the company: "Then, why did you file that motion to extend the deadlines? And why didn't you at least raise the issue on your renewal application?"

The above hypothetical actually happens. However, all Joe had to do in August 2010 was to write the simplest of letters to

XYZ Insurance Company saying no more than the following: "I missed an expert disclosure deadline. I have filed a motion to extend the deadlines which I am confident will be granted, but if I am wrong, there could exist a potential claim against me. If I can provide further information, please contact me." The company then would have been on notice of the potential claim and likely would have just filed Joe's letter with no other response unless and until the potential claim was filed. In my experience, it is the rare occasion where such a letter will impact a lawyer's coverage or renewal of coverage. By writing that simple letter, Joe would have "triggered coverage" under his then-existing claims-made coverage with XYZ Insurance Company, and when the client sued him, he would have had coverage, not under his then-existing coverage, but under the policy which ended on December 31, 2010.

Conclusion

A lawyer's professional liability policy is an asset. It is like a computer or a legal treatise or any other asset the lawyer has purchased for his/her practice. If you do not make use of it, whether due to arrogance, embarrassment, fear, or something else, you are making a mistake. Don't be afraid of your policy. If you do make use of it (and advise the company of potential claims), it is also an asset which can "keep on giving" should a claim be filed beyond the term of the policy.

Endnotes

¹ Or, during an extended reporting period, but that is a topic for another day.

About the Author

Briggs Cheney has represented lawyers in civil, disciplinary and licensing matters for the last 39 years in New Mexico. He is of counsel at Sheehan & Sheehan PA in Albuquerque.

The lawyer who does not report a potential or threatened claim... may experience an expensive lesson in insurance law.

For more information on professional liability insurance, visit LPLI Committee's website at <http://www.nmbar.org/AboutSBNM/Committees/LPL/LPL.html>.

To Repair or To Sue – What Should You Do?

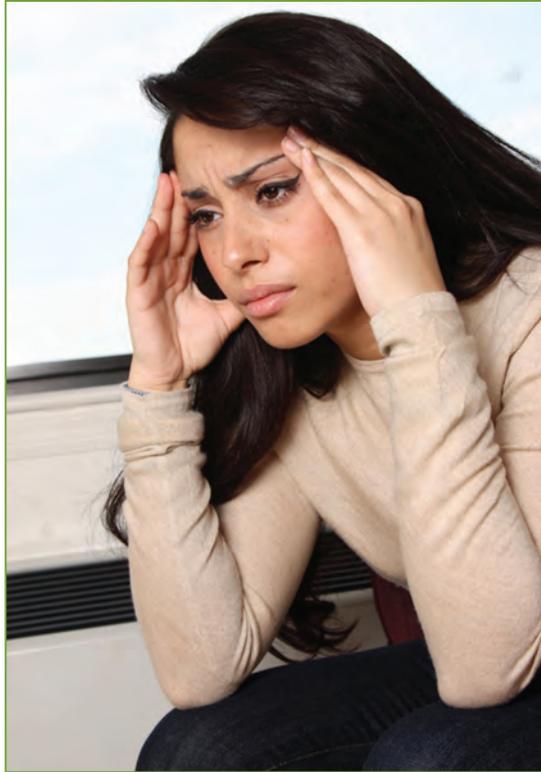
By John Bannerman and Briggs Cheney

“To err, is human; to forgive, divine.” Every professional makes mistakes and lawyers make their share. But every mistake does not cause harm, and even when harm results, it can sometimes be repaired if not totally fixed. When a lawyer is asked to evaluate the merits of a claim against another lawyer, one of the first questions that should be addressed is, can the mistake be fixed? While the primary duty is to the client, it may be in the client’s best interests to repair the problem rather than sue the lawyer who caused it. It is a fundamental premise of New Mexico law that a plaintiff must mitigate damages, and repairing the harm is a form of mitigation.

A legal malpractice case usually involves a case-within-a-case. This means the damages that may be recoverable against the lawyer are usually the amount of damages that would have been recovered but for the lawyer’s negligence. Thus, when a statute of limitations is missed, the underlying lawsuit needs to be tried before the damage caused by the lawyer’s negligence can be determined. Failures to give notice under the New Mexico Tort Claims Act or to exhaust administrative remedies are other examples of when the case-within-a-case rule applies.

In *Jaramillo v. Hood*, 93 N.M. 433, 601 P.2d 66 (1979), the New Mexico Supreme Court held that the statute of limitations against a former lawyer may begin to run when the client hires a new lawyer. In *Jaramillo*, the court held that “appellant was in a position to ascertain or discover the harm or damage to her as a result of the alleged defect in the execution of decedent’s will each time she changed lawyers.” *Id.* at 434, 601 P.2d at 67. Implicit in the holding is the fact that the second lawyer has a duty to evaluate what the first lawyer did or did not do and whether the first lawyer caused the client harm or damage. This duty, the authors submit, includes the duty to determine whether the potential damage caused by what the first lawyer did or did not do can be repaired or fixed and, if it can, to take the necessary steps to fix the problem before suing the first lawyer.

Many lawyers, however, prefer to ignore the obligation and sue the negligent lawyer. They may do this without regard to their client’s duty to mitigate or the potential issues that may arise in the case-within-a-case. Instead, they may let the underlying statute or appeal period run (if it has not done so already), and then sue the negligent lawyer; or they may file a legal malpractice lawsuit without regard to the options available to reduce or eliminate the underlying damage. The choice to attempt a repair or sue is not limited to litigation situations.



An example of a non-litigation case where a duty to mitigate arose is *Akutagawa v. Laflin, Pick & Heer, P.A.*, 2005-NMCA-132, 138 N.M. 774, 126 P.3d 1138, in which the Court of Appeals held that the refusal to accept an offer to fix the underlying problem could bar the *entire claim* against the lawyer who created the problem. In *Akutagawa*, the defendant offered to bear the cost of making the “repair,”¹ but the client declined the offer.

In *Akutagawa*, a simple amendment to the trust agreement was all that was required to repair the perceived damage. When a statute of limitations is missed, there may be an argument to extend the deadline based upon equitable tolling or estoppel if the carrier in the underlying case was involved in settlement negotiations when the statute ran. In a failure to give New Mexico Tort Claims Act notice to the proper entity, there could be a number of potential approaches: (a) the statute was extended by incapacity; (b) the correct agency had actual notice; and/or (c) a suit against individual state

employees could be pursued.

The legal cost of attempting or making the repair can become a recoverable element of damages in a suit against the negligent attorney. See *First National Bank of Clovis v. Diane, Inc.*, 102 N.M. 548, 698 P.2d 5 (Ct. App. 1985). If a suit is filed or other legal action is taken to attempt the repair, accurate time records should be retained. If the court determines there is not a basis for repair, the original complaint can be amended to name the offending attorney as a defendant. Thus, the judge who handled the attempted repair will be aware that a reasonable effort was made by the client to correct the first lawyer’s mistake.

Practice Pointers:

1. When a lawyer makes a mistake:
 - a. Do not throw up your hands in despair. Immediately confer with another experienced lawyer to determine if there is any way to mitigate or eliminate the damage that may result from the mistake.
 - b. Immediately call your carrier, give notice, and ask the carrier to assist you in mitigating or repairing the damage, and then follow the recommendation of your carrier.
 - c. Carefully evaluate the conflict of interest that may arise if you attempt to repair the problem. Too often this can make the situation worse.

- d. After giving notice to and consulting with the carrier, you may eventually need to inform the client in writing of the mistake and what can be done to mitigate the potential damage. In many circumstances, the lawyer who made the mistake may need to withdraw from the matter.
 - e. If the lawyer withdraws from the matter, every page, note and piece of paper in the lawyer's entire file should be numbered before the original is given to the next attorney, and the lawyer should keep a copy.
2. If you are an attorney evaluating the potential of a claim against another attorney:
- a. Do not shout "hooray" and order a BMW.
 - b. Confer with an experienced lawyer to determine if there is any way to mitigate or eliminate the damage that may result from the mistake.
 - c. Make a demand on the negligent attorney and the attorney's carrier that they repair or mitigate the damage at their expense and advise them that if they do not accept the offer, you will proceed to attempt to repair or mitigate the harm and your fees and costs will be an element of the client's damages.
 - d. If the lawyer or the carrier accepts the offer, cooperate to the extent you can without compromising the client's interests. This may include agreeing that the fact a repair is going to be attempted will not be used as evidence in a later lawsuit that the first lawyer was negligent. *See* Rule 11-407.
 - e. If the first lawyer or the carrier declines to take corrective action to repair or mitigate damages, document that they had an opportunity and declined, begin keeping accurate time records, and attempt to mitigate on your own.
 - f. Be careful and do not make the situation any worse by your own negligent conduct in attempting the repair.
 - g. Be aware of and counsel the client that a failure to repair or mitigate may be used by the original lawyer as a full or partial defense to any claim for damages.

Endnotes

¹ The problem arose in a trust in which a specific clause was inadvertently omitted by a secretary and the omission went unnoticed by the lawyer. The omission could be easily corrected by judicial reformation.

About the Authors:

John Bannerman is the senior member of Bannerman & Johnson PA and a past chair of the Lawyer Professional Liability and Insurance Committee. He has been listed in *Best Lawyers in America* and *Southwest Super Lawyers*. He represents lawyer and health care clients.

Briggs Cheney has represented lawyers in civil, disciplinary and licensing matters for the last 39 years in New Mexico.

Survey Results: What About Them? *continued from page 3*

There is certainly a lack of understanding that any lawyer can be sued, even if he or she has only a limited practice. Comments in response to the survey included: "My practice does not expose me to any risk of liability." "I develop a close and drank [sic] relationship with my clients." My favorite was, "I scored high on the Professional Liability Rules of Ethics." One believed he would not be sued because he is "very careful." Unfortunately, no matter how limited, careful or wonderful your relationship is with your client, if you are practicing law, then you can make a mistake. If the mistake rises to the level of a cause of action, you are: (1) risking your assets, and (2) increasing the risk that you will wind up representing yourself.

I am consistently surprised that lawyers do not understand they have an obligation to protect their clients that exists independent of protecting themselves. The best example from the survey responses is this statement: "I am more concerned about finding and affording health insurance for. . . my family than I am about malpractice coverage." I promise you, each and every one of your clients thinks you have malpractice coverage unless you have followed Rule 616-104 NMRA, which requires you to disclose, in writing, that you don't have coverage. And being a lawyer is entering into a relationship of trust with clients. Your clients trust you to do the right thing, and that includes being there with insurance coverage when you have failed them.

Now remember, we were seeking comments on malpractice insurance. Keeping that in mind, some of the comments were just bizarre.

"If insurance is in place the lawyers give up defense decisions to the insurance adjusters and lawyer which [is] unacceptable." Insurance "appears to be a scam—or practically a scam." "Insurance premiums should not exceed \$20 a year." Some quick retorts: (1) if you have no insurance, you will be in charge, congrats; (2) if you have insurance, your clients won't think it's a scam and neither will you; and (3) \$20 a year. Have you filled up your gas tank lately? It was nice that we got some specific suggestions, such as "Close the law school for a decade to balance supply and demand for lawyers so we don't have to [deal?] with our expenses so closely."

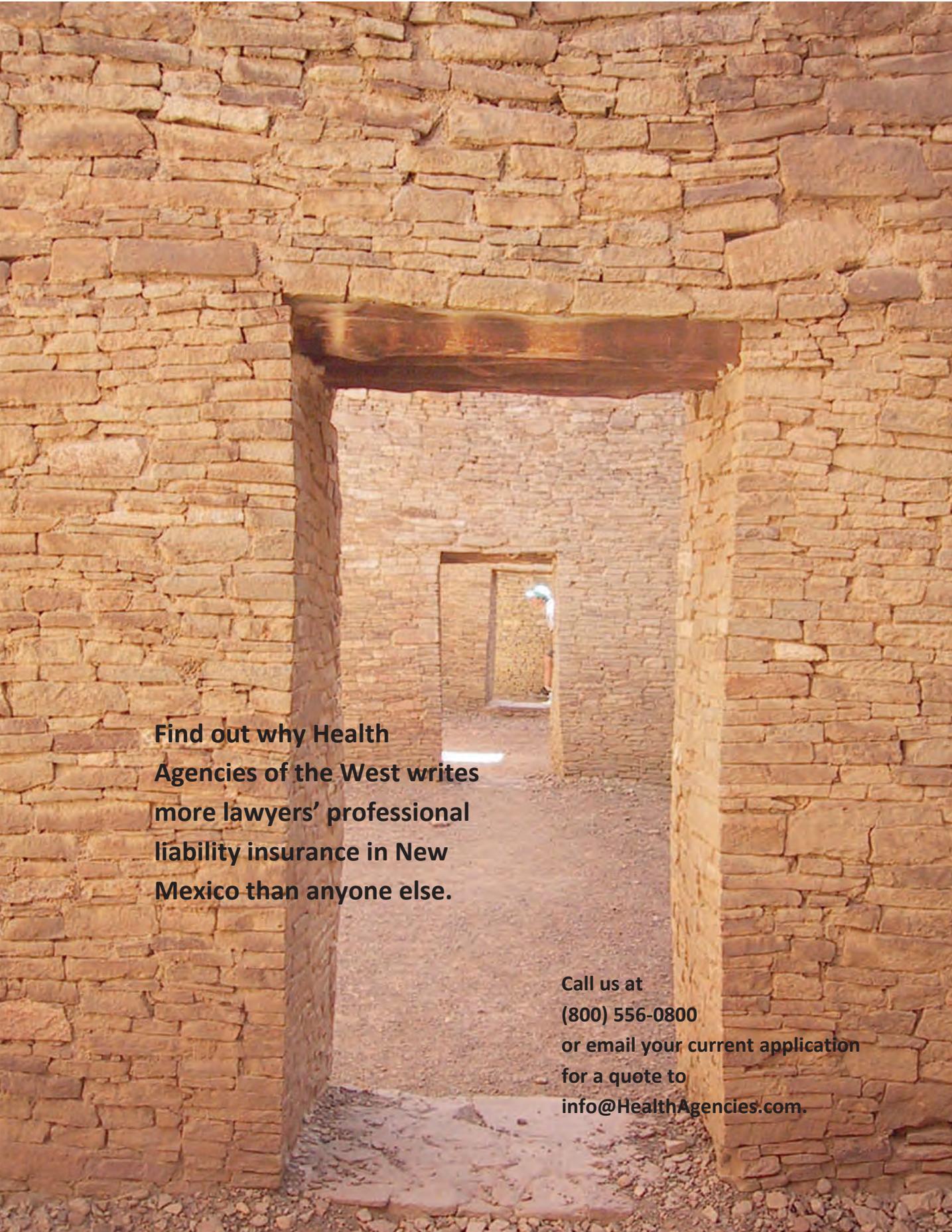
I know I sound frustrated. But I see many clients who simply cannot believe that, in many cases, the best we can hope for is a piece of paper, a judgment. Many of these people have lost everything because of their lawyer's behavior. Without insurance, they get to look forward to judgments, a payment plan over many years, and bankruptcy, either the lawyer's or their own.

There are certainly lawyers who appear not be able to afford insurance coverage, but malpractice insurance is simply part of the cost for the privilege of representing people. There are plenty of insurance companies offering competitive rates. We need lawyers to understand that it is part of their responsibility to make the call.

About the Author

Daymon Ely is a sole practitioner in Albuquerque whose practice focuses on representing plaintiffs in legal malpractice cases.

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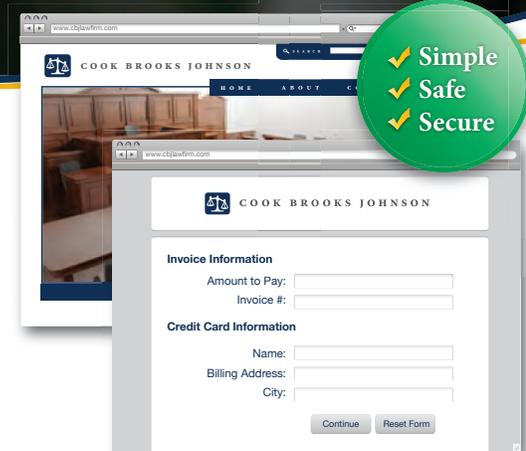
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