Professional Liability Insurance: What You Need to Know

December 30, 2015

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Presenter Biographies

Professional Liability Insurance: What You Need to Know

Presenter Biographies

Briggs Cheney has been of counsel since 1973 with Sheehan & Sheehan, P.A. He has been active in local, state and national bar associations, having served on the Board of Bar Commissioners, the Foundation of the State Bar of New Mexico and the Albuquerque Bar Association as past president. He has served three elected terms as New Mexico's delegate to the American Bar Association House of Delegates.

Gerald G. Dixon is a shareholder at Dixon, Scholl & Bailey PA, where he works in professional malpractice defense, commercial litigation and construction disputes. He was recognized by *Best Lawyers* in the area of malpractice defense each year since 2009 and was *2014 Lawyer of the Year* in the area of professional malpractice. Mr. Dixon is a member of the Board of Bar Commissioners.

***PAC MAN* Insurance - Be Careful or it will be "GAME OVER."**
If you are going to play, at least know the rules

Briggs Cheney, Esq.
Sheehan and Sheehan, P.C.
Albuquerque, New Mexico

C. Disclosure of professional liability insurance.

(1) If, at the time of the client's formal engagement of a lawyer, the lawyer does not have a professional liability insurance policy with limits of at least one-hundred thousand dollars ($100,000) per claim and three-hundred thousand dollars ($300,000) in the aggregate, the lawyer shall inform the client in writing using the form of notice prescribed by this rule. If during the course of representation, an insurance policy in effect at the time of the client's engagement of the lawyer lapses or is terminated, the lawyer shall provide notice to the client using the form prescribed by this rule.

(2) The form of notice and acknowledgment required under this Paragraph shall be:

NOTICE TO CLIENT

Pursuant to Rule 16-104(C) NMRA of the New Mexico Rules of Professional Conduct, I am required to notify you that ["I" or "this Firm"] [do not][does not][no longer] maintain[s] professional liability malpractice insurance of at least one-hundred thousand dollars ($100,000) per occurrence and three-hundred thousand dollars ($300,000) in the aggregate.

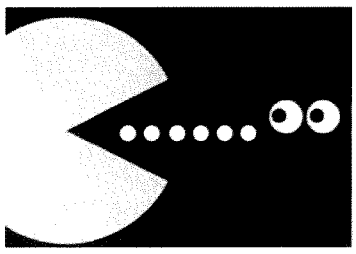
Attorney's signature

CLIENT ACKNOWLEDGMENT

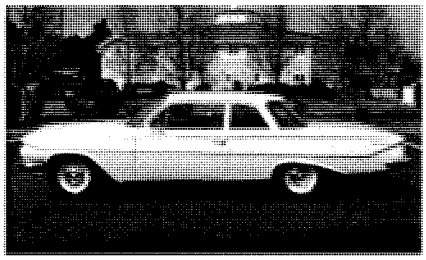
I acknowledge receipt of the notice required by Rule 16-104(C) NMRA of the New Mexico Rules of Professional Conduct that [insert attorney or firm's name] does not maintain professional liability malpractice insurance of at least one-hundred thousand dollars ($100,000) per occurrence and three-hundred thousand dollars ($300,000) in the aggregate.

Client's signature

You may have this - PacMan



Roll-up windows and manual locks



Here's the Rub - Vigilance

PAC MAN Insurance - Be Careful or it will be "GAME OVER." If you are going to play, at least know the rules

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A growing number of professional liability policies being written in New Mexico provide for *defense within limits coverage* (DWLC) - often referred to as *Pac-Man* policies or Pac-Man coverage. Like the 1980 arcade and later video game where *Pac-Man* would gobble up *pac dots*, an insured's indemnity limits are reduced (eaten up) by each dollar spent on the defense. A less polite way of describing DWLC would be a *ménage a trois*[1] consisting of the insured, the defense lawyer and the plaintiff/plaintiff's lawyer. It is fraught with conflicts,

[1] The author acknowledges that "ménage a trois" commonly refers to a domestic arrangement in which three people having sexual relations occupy the same household. This more accurately captures defense within limits insurance. However, for the more sensitive reader, ménage a trois is also a song by *Alcazar*, there is an album by that name by *Baby Bush* and is a soft and pleasing red wine, reportedly easy on the palate, made by the Trinchero Family Estate in St. Helena, California.

tensions, duties and obligations which often feel unnatural and wrong.

There are different varieties of DWLC - some allow for complete erosion of indemnity and some only allow erosion to a percentage of indemnity (e.g. fifty percent). New Mexico has an insurance regulation, 13 NMAC 11.2.1, which governs DWL policies, but it is not easy to apply and the insurance industry has found ways to remain in compliance and still issue eroding coverage. (13 NMAC 11.2.10 which provides as exceptions to the regulation by allowing the insured to select defense counsel and participate in the defense to include consent to settlement.)

There are many critics of DWLC but before exploring some of the reasons for that criticism, why is there Pac-Man

coverage? This writer's guess based on no real research is that DWLC provides the insurer with an insurance product which is price competitive and puts a cap on the risk. The simplicity of DWLC is semi-elegant in terms of its simplicity. When the company sells the policy, it knows the limits of its risk if a claim is filed; in theory, it will not payout more than the limits of the coverage, no matter the verdict or settlement or the cost of defense. In exchange for this certainty of risk, a company is able to offer the policy at a very competitive price which for the price conscious/sensitive lawyer (or the lawyer who is simply trying to satisfy Rule 16-104 (C) (1) and (2) NMSA and wants coverage at the best price), the "bargain" is a reason to buy.

Before one completely misinterprets this last thought about "bargain," being a bargain is not necessarily a bad thing. If cost is truly important and the decision for the lawyer comes

down to DWLC or no coverage at all, buying a Chevrolet Biscayne is not an irrational thing to do as long as the lawyer understands what is being purchased. Just like the Chevy Biscayne[i] where you didn't pay for the automatic windows and locks and other bells and whistles, when a claim is filed, the lawyer with Pac-Man coverage has to be more vigilant. Not an exhaustive list, but that vigilance should include:

1. If the assigned defense counsel does not provide you with its bills to the company, insist on getting them. It is just arithmetic, but monitoring how much is being spent on defense and what is left for indemnity is important.

2. The company will provide defense counsel, but it is often smart for the insured lawyer to hire an independent lawyer who can be involved. This lawyer's involvement will

depend on the claim, but if a verdict may exceed policy limits or if the calculus of defense costs will result in remaining limits to respond to a verdict or to get a case settled, having an independent lawyer who can make appropriate demands on defense counsel and the company can be critically important.

3. The earliest possible evaluation of the claim from the assigned defense counsel is very important. As we all know, evaluating a case is not easy and often cannot be done without investigation and discovery. Of course, that means the defense lawyer has to incur defense costs and that means - you can do the arithmetic. This is another place where an independent counsel can play a part by providing a less accurate "second opinion" or in appropriately encouraging defense counsel to provide as early of an initial case analysis as possible.

4. The lawyer is forced to be vigilant because he/she/it literally has a *defense* budget. Close your eyes and pretend you've been sued for legal malpractice and your former client is claiming $2 million in damages. In being vigilant, living within that *defense* budget you purchased with your policy, where do you cut corners to preserve your limits? Which depositions do you not take and which experts do you not retain?

It is not fair to condemn DWLC. It is an insurance product which serves a need, but the lawyer needs to respect its shortcomings.

When Pac-Man insurance is involved, it is not just the insured who has to be vigilant. Remember, it is a *ménage a tois*. Whether you are a plaintiff's lawyer or a defense lawyer, each has to pay attention to more than the keen causes of action or

nifty defenses - if you don't, it may be "Game Over" before the first deposition is taken. And, when it is *game over*, the *reset* or *new game* may be one or both of you – a legal malpractice action brought against you. Some thoughts:

- An excellent and exhaustive discussion of eroding limits coverage in the Montana Law Review; Gregory S. Munro, Defense Within Limits: The Conflicts of "Wasting" or "Cannibalizing" Insurance Policies , 62 Mont. L. Rev. 131 (2001). [http://scholarship.law.umt.edu/faculty/15/] Although somewhat dated, this law review is repeatedly cited by courts around the country.

- For the defense attorney, it is important to review an insured's insurance coverage at the very outset of the representation. If that is not possible, the defense lawyer

should send a retainer agreement to both the insured and the insurance company providing the defense which includes a provision along the following lines:

> I have not reviewed the firm's professional liability insurance policy with **[name of carrier/company]**. To the extent it provides defense within limits coverage, we must be advised because it is important to note that we view that as creating a potential conflict since the cost of defense (which includes payments to this firm for legal services rendered in defending **[individual lawyer's name]** and the firm) may reduce limits available for settlement or indemnification. If that is the case, then we feel we have heightened duties **to [lawyer's name]** and his firm and will insist on his approval of defense actions. While we will not insist on **[lawyer's name]** or the firm retaining independent counsel, we will recommend they do so. Independent counsel will relieve us of having to advise the firm as to the advisability of various defense recommendations, vis-a-vis, the effect it will have on the ultimate outcome of the

case and available limits for settlement or indemnity.

- For the plaintiff's attorney, it is not enough to do the requisite discovery, get a copy of the policy, look at the limits and then file it away. The coverage has to be studied and a request for any reservation of rights letters is prudent. To fail to discover DWLC may represent a breach of the plaintiff lawyer's duty to his client. But the duty or obligation to the plaintiff-client is to advise the client about the realities of DWLC and the fact that an aggressive prosecution of their claims may result in the coverage for any settlement or to respond to a judgment in the plaintiff's favor may be reduced for each dollar the defense lawyer is required to work defending the case. In other words, the plaintiff's lawyer needs to advise the

client, in writing, that early settlement and a reasonable attitude toward settlement is required.

Closing thought

I talked above about the elegant simplicity of a Pac-Man policy and the company's ability to know with certainty of the risk associated with the policy it sells. But there is at play here that old adage: "If it seems too good to be true, it probably is."

The *ménage a tois* can end up being a *ménage a quatre*. The company can be placed in a position of being forced into settling a case for more than it is worth just to avoid the risk of a claim for bad faith. Of course, a company cannot be placed in a position of bad faith merely by its insured simply making written demand that the company settle the case within policy limits. The niceties of that area of law are far beyond this

article, but all the moving parts involved in Pac-Man coverage can put a company in the uncomfortable position of not being able to rely on its risk being limited to the limits of its policy.

All it takes is a vigilant lawyer/insured who has retained a good independent counsel, a defense lawyer who struggles with the risk that the evaluation of liability may be eclipsed by defense costs because it is an expensive case to defend and try and an astute plaintiff's counsel who sends the perfect letter at the perfect time offering to settle for the remaining limits. Given that *perfect storm*, a company may have no choice but to settle the claim for far more than it believes the claim is worth.

There was nothing wrong with the Chevrolet Biscayne, but it had rollup windows and no other bells and whistles. DWLC

may be what fits the lawyer's needs and budget, but you have to roll up the windows.

[i] General Motors Chevrolet manufactured from 1958-72 the Biscayne which was the least expensive model in the Chevrolet full-size car range (except the 1958 only Chevrolet Delray). The absence of most exterior and fancy interior trimmings remained through the life of the series, as the slightly costlier Chevrolet Bel Air offered more interior and exterior trimmings at a price significantly lower than the mid-line Chevrolet Impala.

DENIAL IS A RIVER IN EGYPT

by Briggs Cheney

"Denial is a river in Egypt" doesn't make any sense, but then again, how law firms address alcoholism and substance abuse within their firms often does not make much sense either.

If you have suffered from alcoholism or substance abuse and spent any amount of time in recovery, you're familiar with the old phrase "DENIAL is not a river in Egypt." It's a cute phrase and for this recovering alcoholic, the first time or two I heard it, I laughed along with everyone else. But as the years have gone by the significance of denial in the disease process has become no laughing matter. But denial is not limited just to the suffering alcoholic or addict; it inflicts the family and friends of the addict - and with the suffering lawyer - his or her law firm. That is the focus of this article.

I have practiced law in New Mexico for 29 years. I have kidded folks from outside the Land of Enchantment, as we call it here, that "we're still waiting for *Gone With the Wind* to come to our local movie house." While I generally say that kiddingly, for purposes of these comments, it probably has far greater meaning. This article is not a warm and fuzzy article about the suffering lawyer. I can talk long and convincingly about the disease, but the intent here is *down and dirty*. I want to talk money. In New Mexico, when it comes to dollars and cents, we are waiting for *Gone With the Wind* to make it to the Land of Enchantment. The money invested in training and compensating a lawyer in New Mexico can probably be tripled, quadrupled and more in Los Angeles, New York, Denver, Houston, and the list goes on. The point being to have a suffering lawyer suffer very long, to a law firm means money. To have a suffering lawyer putting the firm at risk with clients, both from a business standpoint, not to mention legal malpractice, means money. But that is exactly what law firms do, in the name of DENIAL, they throw money away and, more

importantly, place their firm's clients at risk.

How does this happen? How can DENIAL have this grip on the law firm too? Probably for the same reasons why a spouse or family can end up enabling a suffering alcoholic or addict. For the family it is love; they don't want to think their family member suffers from this disease. For the law firm, it is friendship, collegiality, loyalty. And if it is not in the name of love in the family setting or friendship in the law firm setting, often it is ignorance. Ignorance of the disease or ignorance of what to do if the disease is appreciated. Raise your hands, "how many of us wants to rat on their fellow lawyer," "how many of us want to be responsible for a fellow lawyer losing their job at the firm when you know that the lawyer's child just started college," and "how many of us are even sure if our law firm pal is really an alcoholic or addict - maybe he/she has just had a rough six months, a rough case or whatever." If you are being honest, and letting DENIAL do its thing, you raised your hands.

I said this was a *down and dirty* article - here is what every law firm should consider doing and probably in this order:

- ***Mandatory Law Firm Awareness Programs*** - On an annual basis, require all firm employees to attend a program on alcoholism and substance abuse. This can be done at a firm lunch or at the end of a day or as part of an annual CLE of the firm. I strongly recommend a video vignette which has been produced by the State Bar of Pennsylvania' Lawyers Concerned for Lawyers Committee entitled *No Immunity*. (800/335-2572 or lclpa@epix.net)

- ***Encourage and educate lawyers and staff (more importantly staff) on what to do if they have a concern*** - The concerned lawyer or staff has to be able to express concern to someone. It would be great if there was someone within every firm where a concerned lawyer or staff member could go with concerns. But this only works if the employee feels that the concern will be kept

confidential. Beyond the firm, every state presently has an active Lawyer's Assistance Program, either voluntary or organized under the auspices of the State Bar. There is generally a confidential hot line where a concerned employee can call with concerns.

• ***The firm should develop a program to assist the suffering lawyer or staff member*** - All of this works only if the firm will recognize that alcoholism and substance abuse is a disease which can be treated. If the law firm employee believes that raising concern will put the suffering employees employment at risk, DENIAL will continue to live and breathe in your law firm. Addiction is a disease and can be treated, if it is not ignored. The ABA's Commission on Lawyer Assistance Programs (COLAP) has developed a Model Program which is a starting point. (800/238-2667 ext. 5359 or www:abanet.org/Code of Professional Responsibility/colap/home.html) I said this was *down and dirty* - view this just from the standpoint of money - put a pencil to the investment you have made in your professionals. If you want to throw that away, let DENIAL live and breathe in your law firm.

I don't expect these few words to make DENIAL really a river in Egypt, but I hope you will ask for help.

16-501. Responsibilities of partners, managers and supervisory lawyers.

A. Necessary measures. A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

B. Compliance with rules. A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

C. Responsibility for other lawyer's violations. A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

16-502. Responsibilities of a subordinate lawyer.

Statute text

A. Responsibility for own actions. A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

B. Arguable question of duty. A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Annotations

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

16-803. Reporting professional misconduct.

Statute text

A. Misconduct of other lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's

honesty, trustworthiness or fitness as a lawyer in other respects shall inform the New Mexico Disciplinary Board.

B. Misconduct of judges. A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the New Mexico Judicial Standards Commission.

C. Confidential information. This rule does not require disclosure of information otherwise protected by Rule 16-106 NMRA of the Rules of Professional Conduct, or as set forth in Paragraph E, information gained by a lawyer or a judge while participating in an approved lawyers assistance program.

D. Cooperation and assistance; required. A lawyer shall give full cooperation and assistance to the highest court of the state and to the disciplinary board, hearing committees and disciplinary counsel in discharging the lawyer's respective functions and duties with respect to discipline and disciplinary procedures.

E. Alcohol and substance abuse exception. The reporting requirements set forth in Paragraphs A and B of this rule do not apply to any communication concerning alcohol or substance abuse by a judge or lawyer that is:

(1) made for the purpose of reporting substance abuse or recommending, seeking or furthering the diagnosis, counseling or treatment of a judge or an attorney for alcohol or substance abuse; and

(2) made to, by or among members or representatives of the Lawyer's Assistance Committee of the State Bar, Alcoholics Anonymous, Narcotics Anonymous or other support group recognized by the Judicial Standards Commission or the Disciplinary Board; recognition of any additional support group by the Judicial Standards Commission or the Disciplinary Board shall be published in the Bar Bulletin.

This exception does not apply to information that is required by law to be reported, including information that must be reported under Paragraph F of this rule, or to disclosures or threats of future criminal acts or violations of these rules.

F. Judicial misconduct involving unlawful drugs; reporting requirement. Notwithstanding the provisions of Paragraph E, any incumbent judge who illegally sells, purchases, possesses, or uses drugs or any substance considered unlawful under the provisions of the Controlled Substances Act, shall be subject to discipline under the Code of Judicial Conduct.

Any lawyer who has specific objective and articulable facts or reasonable inferences that can be drawn from those facts, that a judge has engaged in such misconduct, shall report those facts to the New Mexico Judicial Standards Commission. Reports of such misconduct shall include the following information:

(1) name of person filing the report;

(2) address and telephone number where the person may be contacted;

(3) a detailed description of the alleged misconduct;

(4) dates of the alleged misconduct; and

(5) any supporting evidence or material that may be available to the reporting person.

The Judicial Standards Commission shall review and evaluate reports of such misconduct to determine if the report warrants further review or investigation.

History

[As amended, effective April 1, 1991; as amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

Sanders, **Bruin**, Coll & Worley, P.A. v. **McKay** Oil Corp., 123 N.M. 457, 943 P.2d 104 (N.M. 06/18/1997)

New Mexico Supreme Court

No. 23,479

123 N.M. 457, 943 P.2d 104, 1997.nm.1

June 18, 1997

SANDERS, **BRUIN**, COLL & WORLEY, P.A., PLAINTIFF, v. **MCKAY** OIL CORPORATION, **MCKAY** CHILDRENS TRUST, NEW MEXICO GAS MARKETING, INC., **MCKAY** LIVING TRUST, SANDERS PETROLEUM CORPORATION, **MCKAY** DRILLING PARTNERS, INC., PETRO GRANDE CORPORATION, AND TALENT ENERGY CORPORATION, DEFENDANTS-COUNTERCLAIMANTS-APPELLANTS, V. STEVEN P. FISHER, MICHAEL T. WORLEY, CHARLES H. COLL, RICHARD L. KRAFT, AND SANDERS, **BRUIN**, COLL & WORLEY, P.A., COUNTERDEFENDANTS-APPELLEES.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS. Jay G. Harris, District Judge.

Thomas J. Horan, Albuquerque, Nm, William G. Gilstrap, P.C., William G. Gilstrap, Albuquerque, Nm, for Appellants.

[8] Rodey, Dickason, Sloan, Akin & Robb, P.a., John M. Brant, R. Nelson Franse, Jeffrey M. Croasdell, Albuquerque, Nm, for Appellees.

Joseph F. Baca, Justice. WE Concur: Patricio M. Serna, Justice, Lynn PICKARD, Judge, NM Court of Appeals

The opinion of the court was delivered by: Baca

[11] BACA, Justice.

[12] {1} Upon certification from the Court of Appeals pursuant to NMSA 1978, Section 34-5-14 (Repl. Pamp. 1996), Roy L. **McKay** and his corporate entities (collectively referred to as "**McKay**") seek review of a district court order granting

summary judgment in favor of Appellees Fisher, Worley, Coll, and Kraft. This Court now considers whether the trial court properly granted the motion. We hold that the summary judgment motion should not have been granted, and therefore we reverse and remand the case to the trial court for hearing.

[13] I.

[14] {2} During the 1990's, Roy **McKay**, owner of **McKay** Oil Corporation, used the law firm of Sanders, **Bruin**, Coll & Worley, P.A. ("the firm") to represent him in a number of matters involving his corporate interests. The firm was organized as a professional corporation under the laws of New Mexico at all times relevant to this case. Prior to the events causing the current dispute, the firm was preparing to defend **McKay** against a multi-million dollar claim. One of the firm's attorneys, Damon Richards, acted as primary counsel for **McKay**, preparing for an arbitration which would be one of the first proceedings in the multi-million dollar claim.

[15] {3} Approximately six weeks before Richards was to represent **McKay** in the arbitration, four of the firm's five attorney-shareholders held a meeting and concluded that they would terminate **McKay** as a client and end all firm representation, including Richards' work in the forthcoming arbitration. Richards was the only attorney-shareholder not present at this meeting.

[16] {4} Pursuant to this decision, the firm sent **McKay** a letter notifying him of the termination. The letter cited Richards' alleged health concerns, his inability to serve as lead counsel, and the firm's inability to continue the representation as reasons warranting the termination. The letter was signed by the five attorney-shareholders of the firm, including Richards. The facts suggest that Richards did not agree with the termination, but he signed the letter under an alleged threat that he might be fired if he did not sign the letter.

[17] {5} Upon receipt of the letter, **McKay** sought and secured other counsel for the pending case. After his new counsel received an extension of the arbitration date, and after a lengthy trial, **McKay** was successful in his defense.

[18] {6} In August of 1994, the firm filed an action against **McKay** seeking collection of unpaid attorneys fees stemming from the work it allegedly had done in McKay's case prior to the termination. **McKay** then filed a counterclaim asserting that the firm and its individual shareholders wrongfully terminated representation of **McKay** and breached an employment contract entered into by the parties. **McKay** also alleged that these actions rose to the level of malpractice. He therefore sought recovery from both the firm as a corporation as well as from each of the individual attorneys.

[19] {7} After depositions of the principals were taken, Fisher, Worley, Coll, and Kraft jointly filed a Motion for Summary Judgment which was granted by the trial court. The court found that the termination of the relationship between the firm and **McKay** was

a corporate act for which the lawyers would not have individual liability. McKay's suit against the firm remains pending.

[20] {8} Timely notice of appeal was filed, and certification to this Court was sought by the Court of Appeals, asserting that the case presented issues of substantial public interest. Upon certification, we now review two primary issues: 1) whether attorneys can limit liability to clients while practicing within

a professional corporation and whether the conduct of the attorneys in this case is of the type that should be shielded by corporate status, and 2) whether the trial court erred in granting the firm's summary judgment motion on the basis that no grounds for personal liability on the part of the attorney-shareholders could be found.

[21] {9} We hold that, as a general matter, membership or shareholder status in a professional corporation does not shield an attorney from individual liability for his own mistakes or professional misdeeds. However, it remains unclear from the record whether the actions taken by the attorney-shareholders in this case rose to the level of a breach of duty of any type. Therefore, we reverse the trial court's grant of summary judgment, finding material issues of fact exist as to whether the attorney-shareholders should be personally liable for their actions regarding the representation of **McKay**.

[22] II.

[23] {10} Appellees contend that the termination of **McKay** should be characterized only as a "decision to terminate a business relationship," amenable to an action sounding in contract. We disagree. The termination of **McKay** necessarily involved a legal component substantially related to representation and cannot be classified merely as a business act.

[24] {11} In the immediate case, four of the five attorney-shareholders met and discussed the termination of **McKay**. In the end, all five signed the letter terminating the representation. The practical result of this action was that **McKay** was without legal representation six weeks before his legal proceedings were to begin. **McKay** was forced to seek and secure other counsel on very short notice. He was also in the difficult position of wondering whether a new attorney would have time to prepare his case and whether his interests would be adequately protected.

[25] {12} The significant regulation of the process of termination by the courts suggests that termination substantially affects legal representation. See Rule 16-116(B) NMRA 1997 (outlining the permissible parameters for attorney withdrawal from representation and stating that "a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client" and that "a lawyer shall take steps [in terminating] to the extent reasonably practicable to protect the client's interests...."). This seems intuitively correct since

termination necessarily means that a client will no longer have representation or might not enjoy the continuity of representation that might best address his claims.

[26] {13} Both decisions from this Court and from other jurisdictions demonstrate the impact of termination on representation and the substantial control the courts exercise over the process. Cf. In re Kelly, 119 N.M. 807, 808-09, 896 P.2d 487, 488-89 (1995) (holding that failure to protect client interests at termination was a factor warranting disbarment); In re Sparks, 108 N.M. 249, 251, 771 P.2d 182, 184 (1989) (holding that disorderly termination of attorney-client relationship, along with other factors in representation, warranted suspension from the practice of law); Karlsson & NG., P.C. v. Frank, 162 A.D.2d 269, 556 N.Y.S.2d 626 (App. Div. 1990) (discussing the need for specific act of termination in ending representation); State v. Cummings, 199 Wis. 2d 722, 546 N.W.2d 406, 416-18 (Wis. 1996) (setting court's conditions for withdrawal from the attorney-client relationship at issue in the case).

[27] {14} In addition to the courts' recognition of the effects of termination on representation, other cases demonstrate that termination or withdrawal, carried out negligently, can serve as a basis for malpractice claims. See Wood v. Parker, 901 S.W.2d 374, 379 (Tenn. Ct. App. 1995) (discussing a legal malpractice claim based on alleged negligent withdrawal); see also Kirsch v. Duryea, 21 Cal. 3d 303, 578 P.2d 935, 939, 146 Cal. Rptr. 218 (Cal. 1978) (en banc) (same).

[28] {15} While no New Mexico case specifically addresses negligent withdrawal/termination as a basis for malpractice, our holding in Leyba v. Whitley, 120 N.M. 768, 907 P.2d 172 (1995), supports a finding that attorney-client relationship termination is well within the scope of legal representation and subject

to malpractice claims. In Whitley, this Court indicated that attorneys could potentially be found liable for malpractice where they fail to act reasonably to ensure payment of verdict proceeds to the correct party. Id. at 778, 907 P.2d at 182. This clearly suggests that, as an aspect of representation, payment of proceeds implicates tort duties of care. We believe that the process of termination stands on equal, if not superior, footing with payment of proceeds in the scope of legal representation. Thus, when an attorney carries out, or participates in, the termination of an attorney-client relationship, the attorney is under a duty to act with reasonable care, in full consideration of the rights of the client.

[29] {16} Appellees contend that the Rules of Professional Conduct governing withdrawal cannot be used to launch a malpractice claim. We agree that the Rules of Professional Conduct cannot be used as a basis for civil liability. See Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A., 106 N.M. 757, 762, 750 P.2d 118, 123 (1988). However, such professional rules still provide guidance in ascertaining the extent of lawyers' professional obligations to their clients. See Parker, 901 S.W.2d at 379. Thus, while the rules governing withdrawal will not serve as a basis for civil liability, neither

should a malpractice claim be barred because its substance enters the realm of conduct covered under the Rules of Professional Conduct.

[30] {17} As the Appellees contend, we believe that a decision to end a contractual agreement establishing legal representation involves some business aspect and consideration of, inter alia, the well-being of the corporation and financial implications. We merely hold that such considerations will not erase the significance of decisions substantially affecting a party's legal representation. Such alleged breaches of duty by professionals may sound in tort as well as contract. See Whitley, 120 N.M. at 772, 907 P.2d at 176 (recognizing that claims for professional services negligently performed can be brought under contract, but noting that such claims generally lie in tort); see Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988) (classifying breaches of duty by professionals as being in the nature of tort claims).

[31] III.

[32] {18} Appellees contend that terminating **McKay** should be characterized only as the act of a corporate body and that no component of individual conduct or decision-making is relevant to this inquiry. We disagree. While terminating **McKay** might be considered an act of the corporation, the record contains evidence showing that each attorney-shareholder individually and substantially participated in the termination to the extent that each necessarily involved himself in the attorney-client relationship with **McKay**. Furthermore, we hold that professional corporate status was not intended to confer, nor does it confer, upon an attorney-shareholder a limitation on liability for the attorney's own improper behavior or malpractice, even in the context of corporate activities and decisions.

[33] {19} It might be argued that **McKay** retained each of the five attorney-shareholders when he retained the firm. See George v. Caton, 93 N.M. 370, 375, 600 P.2d 822, 827 (Ct. App. 1979). As such, each member of the firm arguably would be responsible for his own ethical and professional duties to **McKay**. However, we decline to rely on this application of Caton in this instance. Instead, we premise our decision upon the individual participation of each of the attorneys in the termination of **McKay**, and thus each attorney's involvement in the attorney-client relationship, as furnishing a basis for implicating the attorneys' ethical and professional duties to the client.

[34] {20} The attorney-shareholders in the immediate case personally and substantially participated in the termination of **McKay**. The facts indicate that aside from Richards' absence at the meeting and his alleged disagreement with the outcome, each attorney individually had the opportunity to consider the action, decide whether the action should be undertaken, and elect to sign his name to the termination letter. In sum, we think it is clear that each of the attorney-shareholders had substantial participation in the decision to terminate. See Grayson v. Jones, 101

Nev. 749, 710 P.2d 76, 77 (Nev. 1985) (holding that for plaintiff to sue members of professional legal association for malpractice, evidence must be presented that attorneys participated in representation); see also Krouner v. Koplovitz, 175 A.D.2d 531, 572 N.Y.S.2d 959, 962 (App. Div. 1991) (same).

[35] {21} The more crucial question is whether the attorney-shareholders should be shielded from personal liability for their participation in the termination. We conclude that they should not receive such protection in this instance.

[36] {22} Professional corporations were never intended to protect attorneys from their own misdeeds. The extent of intended protection afforded in this instance can be gleaned first by examining the origins of the professional corporation. Traditionally, attorneys were not permitted to incorporate their practice of law because many courts believed it was necessary to preserve to the client the benefits of a highly confidential relationship based on personal confidence, ability, and integrity. See In re Florida Bar, 133 So. 2d 554, 556 (Fla. 1961). Incorporation was seen as possibly detracting from the professional accountability of an attorney. Id. However, barring attorneys from incorporating had the unintended consequence of denying attorneys several significant tax, insurance, and business-related benefits. Id. at 555; see also State ex rel. Wise, Childs, and Rice Co. v. Basinger, 54 Ohio App. 3d 107, 561 N.E.2d 559, 561-62 (Ohio Ct. App. 1988). To address this problem, most jurisdictions eventually passed legislation to enable members of the bar to form professional corporations. See, e.g., NMSA 1978, §§ 53-6-1 to -14 (Repl. Pamp. 1983); In re Florida Bar, 133 So. 2d at 556.

[37] {23} As professional corporations became commonplace on the business and legal landscape, courts often disagreed about the shareholder or member liabilities for contractual and purely business obligations. See We' re Associates Co. v. Cohen, Stracher & Bloom, P.C., 103 A.D.2d 130, 478 N.Y.S.2d 670 (App. Div. 1984) (holding that shareholders of a professional corporation have the same insulation from liability as shareholders of other corporations with respect to obligations of a purely business and nonprofessional nature); but see South High Dev., Ltd. v. Weiner, Lippe & Cromley Co., L.P.A., 4 Ohio St. 3d 1, 445 N.E.2d 1106, 1108 (Ohio 1983) (per curiam) (finding that there is no necessity for limited liability as to the contractual obligations of a professional service corporation); see generally Eliot J. Katz, Annotation, Professional Corporation Stockholders' Nonmalpractice Liability, 50 A.L.R. 4th 1276 (1986).

[38] {24} However, throughout these disputes, the professional duties owed by those acting as professionals within a corporation did not change. NMSA 1978, Section 53-6-8 (Repl. Pamp. 1983) states:

[39] The Professional Corporation Act . . . does not modify the legal relationships, including confidential relationships, between a person performing professional services and the client or patient who receives such services; but the liability of shareholders shall be otherwise limited as provided in the Business Corporation Act . . . and otherwise as provided by law.

[40] The clear majority of jurisdictions construing such statutes and duties have held that professional corporations provide no protection from personal liability for an attorney's own malpractice or obligations individually incurred by a breach of duty. See In re Florida Bar, 133 So. 2d at 556-57; First Bank & Trust Co. v. Zagoria, 250 Ga. 844, 302 S.E.2d 674, 675 (Ga. 1983), overruled on other grounds, Henderson v. HSI Fin. Servs., Inc., 266 Ga. 844, 471 S.E.2d 885 (Ga. 1996); Schnapp, Hochberg & Sommers v. Nislow, 106 Misc. 2d 194, 431 N.Y.S.2d 324, 325-26 (Sup. Ct. 1980); Basinger, 561 N.E.2d at 562 .

[41] {25} In the case of In re Florida Bar, members of the Florida Bar requested approval by the courts of certain amendments to the Florida rules governing attorney ethics so that attorneys would be permitted to form professional corporations. In re Florida Bar, 133 So. 2d at 554. The court approved the amendments, but also made a seminal ruling regarding the continuing responsibilities of individual attorneys who choose to join such professional entities:

[42] The highly personal obligation of the lawyer to his client is in no way adversely affected. The individual practitioner, whether

a stockholder in a corporation or otherwise, will continue to be expected to abide by all of the Rules and Canons of professional ethics . . . . The corporate entity as a method of doing business will not be permitted to protect the unfaithful or the unethical.

[43] Id. at 556.

[44] {26} In Zagoria, the Supreme Court of Georgia reviewed the question of whether an attorney-shareholder in a professional corporation could be held personally liable for the professional misdeeds of another attorney in the corporation where the first attorney had no role in the alleged malpractice. Zagoria, 302 S.E.2d at 674. In its holding, the court concluded that the attorney-shareholder could be held personally liable for the acts of the second attorney. Id. at 675. While this holding was later overruled to the extent that it imposed liability on all attorney-shareholders for the malpractice of one, see Henderson, 471 S.E.2d at 886, Georgia still follows the rule that an attorney is liable for his own malpractice, see id.

[45] {27} We hold that shareholder or membership status within a professional corporation is not intended to confer upon an attorney protection from individual liability for the attorney's own negligence or personal breach of duty. As noted in the previous sections, the record indicates each of the attorney-shareholders in this case participated in a decision substantially affecting McKay's representation. We therefore conclude that each attorney's shareholder status in the professional corporation did not shield him from potential liability for alleged malpractice related to his own actions.

[46] {28} **McKay** contends that even if the facts in this case did not involve a professional corporation, general tort and corporate law principles support a finding that a suit for personal liability is permissible in this instance. See Lobato v. Pay Less Drug Stores, Inc., 261 F.2d 406, 408-09 (10th Cir. 1958) (finding that officer or agent status in corporation will not expose one to personal liability but that such status will not shield corporate actors from personal liability for wrongful acts in which they participate); Bourgeous v. Horizon Healthcare Corp., 117 N.M. 434, 437, 872 P.2d 852, 855 (1994) (holding that officers and employees of corporations can be held personally liable for intentional torts); Stinson v. Berry, N.M., , 943 P.2d 129, (Ct. App. 1997) [slip op. at 7-8] (holding that directors engaging in tortious conduct may be held liable even if they are acting within the scope of corporate duties); Smith v. Isaacs, 777 S.W.2d 912, 915 (Ky. 1989) (finding that an officer who personally participated in a tort was personally liable, even though the corporation might also be liable under respondeat superior).

[47] {29} We do not deem it necessary to address this contention since our holding allowing for a finding of personal liability in this case is premised upon the duties and expectations which are commensurate with the practice of law. See Caton, 93 N.M. 370, 600 P.2d 822. As noted earlier, the attorney-shareholders substantially affected the representation of **McKay** in carrying out the termination, and we believe that by doing so, each was required to individually assess his legal and professional obligations. Therefore, each was responsible for his personal role in the final decision.

[48] IV.

[49] {30} We believe that summary judgment in this particular case was improperly granted. When the material facts are not in dispute and only the legal effect of the undisputed facts remains to be decided, summary judgment is the proper Disposition of the issue. See Ruiz v. Garcia, 115 N.M. 269, 272, 850 P.2d 972, 975 (1993); see also, Koenig v. Perez, 104 N.M. 664, 666, 726 P.2d 341, 343 (1986). While the record indicates that each attorney was personally involved in the termination process in question, it remains unclear whether the actions taken by the attorney-shareholders in this case rose to the level of a breach of duty of any type. Thus, issues of material fact remain for determination in this instance.

[50] V.

[51] {31} We hold that the attorney-shareholders in the firm acted in the professional

capacity of an attorney by participating in the termination decision regarding **McKay**. In doing so, it was incumbent upon each attorney to consider the propriety of his individual actions, both in terms of its ethical implications and possible malpractice ramifications. While the professional corporation will provide limited protection for the misdeeds of fellow attorney-shareholders, it was not intended to shield an attorney from his own

mistakes. For these reasons, the grant of summary judgment is reversed and the case remanded.

[52] {32} IT IS SO ORDERED.

[53] JOSEPH F. BACA, Justice

[54] WE CONCUR:

[55] PATRICIO M. SERNA, Justice

[56] LYNN PICKARD, Judge,

[57] NM Court of Appeals
19970618

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"Do I, Or Don't I, Call My Professional Liability Insurance Company?"

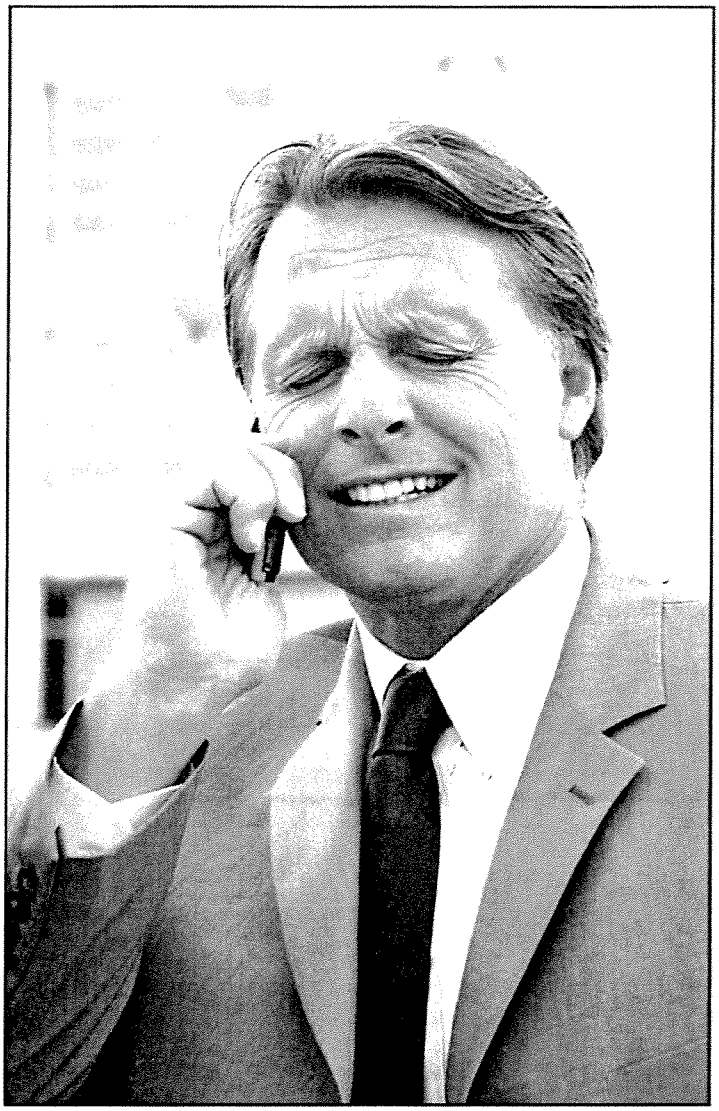
What Should the Lawyer Do?

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.



A lawyer's professional liability policy is an asset.

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.

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.

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

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 period[1] 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.

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