Legal Malpractice Potpourri

Monday, December 4, 2017

STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

CLE Information

STATE BAR of NEW MEXICO
BAR FOUNDATION
CENTER FOR LEGAL EDUCATION

Overview

The Center for Legal Education (CLE) of the New Mexico State Bar Foundation is a self-sustaining, nonprofit entity dedicated to providing high quality, affordable, professional training and education programs to the legal community. Live credit options include live seminars, video webcasts, video replays and teleseminars. Self-study credit options include on-demand streaming videos from your computer and DVDs. CLE receives no subsidy from membership licensing fees.

CLE Credit Information

New Mexico

CLE will file New Mexico attorney CLE credits with the New Mexico Supreme Court MCLE Board within 30 days following programs. Credits for live programs and video replays are based on the attendee sign-in sheets at the registration desk. Credits for teleseminar and online courses—video webcasts and on-demand streaming videos—are based on phone call and website attendance reports accessed by staff. Certificates of attendance are not necessary. Credits for DVD courses must be filed by attendees.

Other States and Paralegal Division

CLE will provide certificates of attendance upon request. Attendees are responsible for forwarding certificates to the organizations to which they belong.

Center for Legal Education
New Mexico State Bar Foundation
P.O. Box 92860
Albuquerque, NM 87199-2860
505-797-6020 or 1-800-876-6227
cleonline@nmbar.org
www.nmbar.org

STATE BAR of NEW MEXICO
BAR FOUNDATION
CENTER FOR LEGAL EDUCATION

Purpose and Use of Materials

These materials reflect the opinions of the authors and/or the reference sources cited and are not necessarily the opinions of the Center for Legal Education (CLE) of the New Mexico State Bar Foundation (NMSBF), the State Bar of New Mexico (SBNM), or any Division, Committee or Section thereof. They were prepared to furnish the participants with a general discussion of certain specific types of legal issues and problems commonly incurred in connection with representing clients in matters related to the subject of these materials. The issues selected for comment, and the comment concerning the issues selected, are not intended to be all-inclusive in scope, nor a definitive expression of the substantive law of the subject matters.

The issues discussed herein are intended as illustrative of the types of issues which can arise in the course of representation and are not intended to address, nor do they address the broad range of substantive issues which could potentially arise in the scope of such representation.

The authors/speakers suggest that careful independent consideration, to include a review of more exhaustive reference sources, be undertaken in representation of a client regarding this subject, and therefore the practitioner should not solely rely upon these materials presented herein.

No representation or warranty is made concerning the application of the legal or other principles discussed by CLE instructors or authors to any specific fact situation, nor is any prediction made concerning how any particular judge, or other official, will interpret or apply such principles. The proper interpretation or application of these materials is a matter for the considered judgment of the individual practitioner, and therefore CLE, NMSBF and SBNM disclaim all liability.

Disclaimer

Publications of the Center for Legal Education of the NMSBF and the SBNM are designed to provide accurate and current information with regard to the subject matter covered as of the time each publication is printed and distributed. They are intended to help attorneys and other professionals maintain their professional competence. Publications are sold with the understanding that CLE, NMSBF and SBNM are not engaged in rendering legal, accounting, or other professional advice. If legal advice or other expert assistance is required, the service of a competent professional should be sought. Attorneys using CLE, NMSBF and SBNM publications in dealing with specific legal matters should also research the original source of authority cited in these publications.

Photo Release

The majority of CLE programs are videotaped for later showings and are webcast over the Internet. In addition, a State Bar photographer may take photos of participants. These photos are for NMSBF and SBNM use only and may appear in publications and on the website. Your attendance constitutes consent for videotaping, photographing and its subsequent usage.

Presenter Biographies

Legal Malpractice Potpourri

Presenter Biographies

Joshua A. Allison is a litigation attorney with the law firm of Sheehan & Sheehan, P.A., a New Mexico law firm that was established in 1954, where he is currently the Managing Director. He advises public and private entities on a wide range of issues, including corporate governance and dispute resolution. As a litigator, Allison's practice focuses on complex commercial and business litigation, with an emphasis in construction-related and contract disputes, partnership disputes, and insurance coverage issues. He also partners with Briggs Cheney in defending lawyers and other professionals. Allison graduated summa cum laude from the University of New Mexico School of Law (Order of the Coif) in 2008. Prior to joining Sheehan & Sheehan, he clerked for Chief Justice Edward L. Chávez of the New Mexico Supreme Court and was an associate with Snell & Wilmer L.L.P. in their Orange County, California office.

Briggs F. Cheney practices with Sheehan & Sheehan, P.A. His practice focuses on the representation of lawyers. He is recognized in Best Lawyers in America and Southwest Super Lawyers. Cheney has been active in local, state and national bar associations: the State Bar of New Mexico's Board of Bar Commissioners, president New Mexico Bar Foundation and Albuquerque Bar Association, the House of Delegates of the American Bar Association and the ABA's Standing Committee on Lawyer Professional Liability and the Supreme Court's Client Protection Commission, Code of Professional Conduct Committee and the Proactive Attorney Regulation Committee. Recognition: the Albuquerque Bar Association's Outstanding Lawyer of the Year, the State Bar of New Mexico Distinguished Bar Service Award and CLE Sandia Award, the University of New Mexico Alumni Association Zia Award and the ABA's Solo and Small Firm Division Making a Difference Through Service to the Profession Award.

Gerald G. Dixon is a shareholder at Dixon Scholl Carrillo PA, where he practices in the areas of 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. Dixon is Secretary-Treasurer of the New Mexico Bar Association and has been a member of the Professional Liability & Insurance Committee since 2001.

Maureen A. Sanders has been an attorney at Sanders & Westbrook, PC, for 20 years. Prior to starting the firm with Duff Westbrook, she was a professor at the UNM School of Law, civil division director at the Office of the New Mexico Attorney General, general counsel for the State Corporation Commission, a civil defense lawyer and a federal district court law clerk. Sanders has been a long time member of the State Bar Professional Liability Committee.

A QUICK STUDY IN PAC-MAN INSURANCE POLICIES AND HOW THEY IMPACT SETTLEMENT ANALYSIS

I. Basic Questions
   A. What is a Pac-Man insurance policy?
   B. How does a Pac-Man policy work?
   C. Why do insurance companies sell Pac-Man policies?
   D. Who is affected by a Pac-Man insurance policy?
   E. What are the ramifications of a Pac-Man policy?

II. Are There Any Restrictions on How Much the Limits of a Pac-Man Policy Can Be Diminished?
   A. Yes—*See* 13 NMAC 11.2.1
   B. But there are exceptions: *See* 13 NMAC 11.2.10

III. How Do Pac-Man Policies Impact Settlement Analysis?
   A. When must settlement be settlement be analyzed when the defendant is insured by a Pac-Man policy?
   B. What factors should be considered with a Pac-Man policy?
   C. How is settlement analyzed differently with a Pac-Man policy?
   D. Hypothetically speaking?

NOTES

"Do-it-yourself" Response to a Disciplinary Complaint? Maybe Not.

[By Briggs Cheney, *of counsel* Sheehan & Sheehan, P.A.]

U.S. mail is a rarity today, so when that envelope arrives with "DISCIPLINARY BOARD of the New Mexico Supreme Court" emblazoned in the left hand corner panic sets in. Sadly, many lawyers freeze and don't even open the envelope. For those who do, they find a form letter that says in many more words, "someone has filed a complaint against you, which is attached, and we would like your response before a specified date." That is all it says, but to the recipient lawyer it is as if The *Darth Vader of Discipline* was writing and they don't know what to do.

More later, but every lawyer should be grateful to receive a letter from the Disciplinary Board of the Supreme Court and not from some other legislatively created and executive appointed body.

The emotions which come with receiving the letter from the Disciplinary Counsel's Office are many: initial panic, anger against the complainant and the fear that a gunslinging-disciplinary counsel is intent on making another notch in his/her desk by taking the lawyer's license away. Not knowing what to do with all of these emotions and fears, the recipient lawyer shoves the letter and attached complaint back in the envelope, hiding it in the desk drawer hoping for calm.

Unaware that an extension of time to respond to a disciplinary complaint is routinely given, the lawyer will ignore it until the eve of the deadline having convinced him/her that the complaining party is dead wrong. Then, deciding that she/he will show that Disciplinary Board a thing or two and retrieving the letter

hidden in the desk drawer, the lawyer pens a response emptying onto paper all of those emotions in a desperate effort to clear his/her name of all the accused sins.

There are times when the lawyer can effectively respond, *pro se*, to a disciplinary complaint, but more times than not, that *pro se* response will draw a letter back from the disciplinary counsel with a series of questions. I call this the *twenty question game* which provides a good moment to digress and talk about the disciplinary process and the Disciplinary Counsel Office.

The legal profession is by statute governed exclusively by the Supreme Court. *Section 36-2-1 NMSA* and *Article VI, N.M. Const.* Hence, "The Disciplinary Board of the New Mexico Supreme Court." Our profession is *self-regulating* which means that every person, no matter how right or wrong in their complaint, must have the ability, a right, to register a complaint about a lawyer. And, that complaint should be investigated thoroughly. If that does not occur, then our profession should lose its right to be *self-regulating*. The alternative would be regulation by an agency or board or panel appointed through some legislative process or by the executive branch of the state.

The Supreme Court takes its responsibility very seriously and its Disciplinary Counsel Office takes seriously the Court's mandate; and I emphasize *seriously*. The disciplinary counsel thoroughly investigates every complaint and under the Rules of Professional Conduct, a respondent lawyer (your *title* when a disciplinary complaint is filed) has virtually no objection to the disciplinary counsel's inquiry. More about this in a moment in terms of a lawyer's response to the disciplinary complaint and why a "do-it-yourself" response may not be the best idea.

Your response to the foregoing may be, "see, they are gunslingers and they are after my license and another notch on their desk." This could not be farther from the truth. There is no denying that the disciplinary counsel will use its every tool to investigate a complaint and if a lawyer has run amuck and violated the Rules of Professional Conduct, that violation will be addressed. At the same time, disciplinary counsel will use their broad tools/powers to determine if a complaint lacks merit. The vast majority of disciplinary complaints are dismissed at the complaint/response stage which is the perfect *segue* to the message of this article - get some kind of help at the response stage.

It is important to remember that many professional liability insurance policies provide some form of coverage for responding to disciplinary complaints. The coverage varies and generally the coverage is what I call "reimbursement" coverage. The insured lawyer can select their own lawyer and pay the lawyer for services provided in defending the disciplinary complaint. The coverage is usually capped at some limit; $2,500 and sometimes as high as $10,000 or $25,000. The insured lawyer provides the company with the lawyer's bills and evidence of payment and that is reimbursed. This is not always the case and coverage does vary, but there is often financial help.

Many lawyers don't want to use this coverage for fear it will impact their rates or renewal of their coverage. Not only is that not a rationale reaction, but most policies require that the insured lawyer provide the company with notice of a disciplinary complaint. But even more important and beyond the scope of this article, by advising the company, the insured lawyer may be also providing notice of a possible or threatened claim triggering coverage under that policy even if the client files a legal malpractice action long after that claims-made policy has expired.

The best strategy in responding to a disciplinary complaint is a detailed, chronological response supported by all documents available. Already mentioned is the fact that vast majority of disciplinary complaints are dismissed. If it is your disciplinary complaint, you want it dismissed as soon as possible and that happens only if you provide the Disciplinary Counsel with a thorough and complete response to the complaint – even if it seems like that it is not necessary.

There are a couple of reasons for a complete response even when less might seem appropriate. First, an inadequate response will trigger that *twenty questions game* mentioned above. Our Disciplinary Counsel Office takes its job seriously and if you don't provide them with what they need, they will ask for it. Sometimes, not providing "everything" creates unnecessary concern or question in the Disciplinary Counsel's mind and you don't need that.

The second reason for going overboard with your first response is that a complainant has the right to have the Disciplinary Board review a dismissal of a disciplinary complaint. This is not an appellate review, but rather a review to make sure the Disciplinary Counsel has done a complete investigation. Providing everything in your initial response generally closes the door on reopening an investigation.

Finally, getting help and giving your retained lawyer everything will allow that lawyer to make an assessment as to the merits of the disciplinary complaint. If a disciplinary complaint has merit – the lawyer has made a mistake – the time to address that mistake and how to address it with the Disciplinary Counsel is at that stage.

I tell lawyers who retain me to represent them in the disciplinary arena that if they have violated the Rules of Professional Conduct, I will not help them try

and *skate* out from or around an ethical violation. I won't be their lawyer. I will help them figure out what went wrong and how it should be addressed and how I can help that lawyer address the problem which leads to my last thought.

The Disciplinary Counsel is not *Darth Vader* and they are not gunslingers looking to get your license. They are folks who care tremendously about this profession and who take seriously the Supreme Court's mandate found in so many cases – the purpose of lawyer discipline is not to punish, but to protect the public. Disciplinary Counsel take that mandate seriously and they will work with any lawyer to help make them a better lawyer. There is so much that can be accomplished through Consents to Discipline to help the lawyer be a better lawyer, but generally you need help to get that help.

So, when you get the envelope from the *Disciplinary Board of the New Mexico Supreme Court*, call a colleague and get some help.

NOTES

NOTES

RECENT DEVELOPMENTS

LEGAL MALPRACTICE POTPOURRI

MAUREEN A. SANDERS

December 4, 2017

In re Chaves, 2017-NMSC-012

In re Gallegos, 2017-NMSC-012

The Supreme Court held that two district attorneys violated N.M. R. Ann. 16-404(A) and 16-501(C) because N.M. Stat. Ann. §36-2-11(A) does not provide authority for a prosecutor to unilaterally issue subpoenas prior to the commencement of a judicial action. The Court determined that the relevant statutes and N.M. R.Ann. 1-045 require a Court's acquiescence to the issuance of a subpoena which necessarily means a judicial action exists. The Court also held that the supervising attorney knowingly ratified the issuance of the subpoenas and that mistake of law did not protect him from culpability.

A few additional takeaways:

1. Absence of a prohibition does not equal permission.
2. Prosecutors bear significant responsibility in the administration of the law.
3. The duty of fairness extends to all parties to judicial actions.

In re Venie, 2017-NMSC-018

The attorney was permanently disbarred from the practice of law after the Court reviewed complaints related to his representation of three different clients. The attorney was disciplined for: (1) counseling his client to bribe witnesses; (2) offering to deliver the bribery payment to the witnesses; (3) unnecessarily revealing confidential communications from the client in a fee dispute case; (4) making material misrepresentations to tribunals and the Disciplinary Board; and

(4) converting money for his own use that was provided to him by a client's parents for the sole purpose of posting a bond for the client.

Some takeaways:

1. Criminal defense attorneys are permitted to put the State to its burden of proof and do not share in the State's duty to present the truth in a criminal proceeding but they cannot knowingly introduce misrepresentations to a tribunal. .

2. Truth is not a matter of convenience.

Castillo v. Arrieta, 2016-NMCA-040

A former client's legal malpractice claim against his attorneys can be found to be within the scope of an arbitration clause in an attorney's fee agreement. However, if an attorney is going to require his client to waive the right to a jury trial for a future malpractice dispute, the waiver had to be made knowingly with the client's informed consent. For the purpose of obtaining informed consent adequate communication will include: disclosure of the facts and circumstances, any explanation reasonably necessary to inform the client of the material advantages and disadvantages of the proposed course of conduct and a discussion of other options. At a minimum, the attorney needs to tell the client that arbitration "will constitute a waiver of important rights, including, the right to a jury trial, potentially the right to broad discovery, and the right to an appeal on the merits."

Christopherson v. St. Vincent Hospital, 2016-NMCA-097

The Court of Appeals determined that the district court" did not err in ordering a third partial trial when it found that defense counsel's questioning, comments, and behavior

transgressed the grounds of professional duty and constituted prejudicial misconduct." A new trial is warranted if the district court determines that counsel's misconduct was improper and was "reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case.", citing *Apodaca v. U.S. Fid.& Guar. Co., 1967-NMSC-250. ¶ 8.*

Marquez v. Larrabee, 2016-NMCA-087

The Court of Appeals concluded that the district court abused its discretion in denying defendants' motion to set aside a default judgment. The Court agreed that the conduct of defendants' attorney may have warranted the entry of a default judgment as a sanction, but the district court did not make findings of fact as to defendants' own diligence in pursuing their defense and as to defendants' personal acquiescence in their attorney's conduct. The Court included a discussion of the two approaches in federal court related to when, if ever, gross attorney negligence can justify reopening of a judgment under Rule 1-060(B). The minority approach is that gross attorney conduct never justifies reopening of a judgment. The majority of federal circuit courts of appeal have held that a showing of gross negligence by an attorney can be a basis to set aside a judgment. The Court of Appeals remanded to the district court for an evidentiary hearing into Defendants' complicity, if any, in their attorney's intransigence and obstruction of the discovery process.

From the Lawyers Professional Liability and Insurance Committee

Good Signs to Look for When Choosing a Professional Liability Insurance Company

Introduction: You Bought It! You Better Read It!

Purchasing or renewing professional liability insurance can be a tedious task at best. Research is performed. Telephone calls are made to friends for advice and copious cups of coffee are consumed while slogging through boilerplate language and technical jargon.

In an effort to provide a bit of relief, members of the Lawyer's Professional Liability Committee put their collective heads together to come up with a list of 17 good signs to look for.* They reflect trends and issues in professional liability insurance that the Committee has encountered and/or addressed over the last several years. In an effort to ensure this information is disseminated to the members in a clear and concise way that is both practical and convenient, the Committee would like to introduce its new monthly tip column "Good Signs to Look for When Choosing a Professional Liability Insurance Company." The Column, originally published in the Bar Bulletin on a monthly basis, highlights the Committee's best practices list along with a brief explanation of each.

Every lawyer's insurance needs are different and the Committee's list of tips is by no means exhaustive; nor is the column a substitute for independent research. However, the Committee hopes that both the list and the column will provide food-for-thought when it comes time to pour another cup of coffee and begin the tedious task of purchasing or renewing your professional liability policy.

**This list is provided to members of the State Bar of New Mexico for use when evaluating potential professional malpractice insurers and policies. This list is meant for use as a guideline only. It is not exhaustive and is not a substitute for independent research. Before purchasing a professional malpractice insurance policy, please carefully read the policy and all accompanying documentation; evaluate their contents for accuracy, currency, relevance, and completeness; and, if necessary, obtain professional advice regarding the policy and the contents thereof.*

1. No action has been taken against the company by the New Mexico Office of the Superintendent of Insurance in the last five years;
2. There has been no nonrenewal on the basis of potential claims only;
3. Coverage for disciplinary matters in an amount of at least $5,000 and including coverage for events occurring pre-Specification of Charges (the insured lawyer wants disciplinary coverage which will pay for representation in responding to a disciplinary complaint before Specification of Charges are filed);
4. There is a free tail policy after three years with the company for retiring attorneys;
5. Defense-within-limits policies will not erode more than half of the coverage amount;
6. If the policy is a defense-within-limits policy, the company will provide a separate letter/summary of coverage explaining the terms of the defense-within-limits coverage;
7. Company provides access to an independent risk advisor;
8. In the last five years, the company has no bad faith judgments entered against it in New Mexico;
9. Company has at least three different firms on its defense panel;
10. Company offers coverage for firms with one to six attorneys;
11. Company offers coverage for class action suits, as well as claims arising from estate planning and intellectual property matters;
12. Company holds an "Excellent (A or A-)" or better rating from AM Best;
13. Contact with a live representative is available;
14. The retroactive date and coverage includes all periods of time during which the insured was continuously covered under a prior malpractice insurance policy;
15. Policy provides coverage for pre-claim subpoenas and depositions;
16. Policy provides innocent insured coverage; and
17. Policy provides a broad definition of "Legal Services" to include mediation, arbitration, guardian ad litem, and personal representative services provided by the attorney.

No Action Has Been Taken Against the Company by the New Mexico Superintendent of Insurance in the Last Five Years

The New Mexico Office of the Superintendent of Insurance is tasked with ensuring that insurance companies, agents, adjusters, third-party administrators and other insurance industry staff operating in the state of New Mexico comply with the New Mexico Insurance Code. In addition, the OSI's Consumer Assistance Bureau accepts complaints by the insured against their insurance company regarding "policy applications, binding of policies, claim handling, and other matters involving insurance." See www.osi.state.nm.us/ConsumerAssistance/index.aspx.

Pursuant to statute, the OSI has the authority to, among other things, conduct examinations and investigations of insurance matters to determine whether a violation of the Insurance Code has occurred. See N.M.S.A. § 59A-2-8. Actions taken by the OSI against insurance companies, agents, adjusters and third-party administrators are a matter of public record.

Recent actions can be located on the OSI's website at: www.osi.state.nm.us/MiscPages/osilegal.aspx. For actions taken earlier than those listed on the OSI website, such information is available via a request pursuant to the Inspection of Public Records Act.

So, what happens if the OSI has taken action against your potential or current insurance company? That's up to you. As each attorney's insurance needs are different, how much weight is ultimately given to an action taken by the OSI is solely within the discretion of the potential insured.

Our sign to look for "No Action Taken Against the Company by the New Mexico Superintendent of Insurance in the Last Five Years" is a suggestion—not a hard-and-fast rule for evaluating and choosing an insurance company. If you have options when choosing a professional liability carrier, do your research and make sure you are comfortable with your choice.

No Renewal on the Bases of Potential Claims Only

The standard definition of "claim" in virtually all Lawyer's Professional Liability/Legal Malpractice insurance policies is "a demand for money or services." In other words, to constitute an actual claim against an insured lawyer under the policy, the claimant (typically a client or former client) must have actually made demand upon the lawyer to pay money to compensate for damages the client allegedly suffered as a result of alleged legal malpractice.

Once such a demand has been received by the lawyer, he or she is required under policy to report that as a claim in order to trigger coverage under the policy. Failing to report such a claim during the policy period typically constitutes a waiver of coverage for that claim. In addition, most LPL policies provide for the reporting of "potential claims." These are typically defined in the policy as situations that could potentially give rise to a "claim," but that do not meet the policy definition of an actual claim.

An example would be a communication from the client or former client accusing the lawyer of having made an error or having committed malpractice, but making no demand for the lawyer to actually pay the client's alleged "damages." LPL policies typically allow the insured lawyer to report such a "potential" claim, which triggers coverage under the current policy for that matter should an actual claim as defined in the policy ever be made. Coverage is essentially "bound" for that matter under the current policy, assuming all other required policy conditions are met, once such a notice of "potential" claim has been given.

There are obvious advantages to the lawyer to "bind" coverage in this way for potential claims. Furthermore, the renewal application for an LPL policy typically asks whether the lawyer is aware of circumstances that could potentially give rise to a claim. Failure to identify such a potential claim on the renewal application can not only result in a waiver of coverage for the claim if it should ever eventuate, but could result in revocation of the policy for misrepresentation on the renewal application.

Thus, a lawyer who fails to report a potential claim to the insurer at the time the lawyer becomes aware of it, out of concern that doing so will cause his or her premium to increase, has actually accomplished nothing because of the requirement to report it upon renewal—and has missed the opportunity to bind coverage under the current policy.

Coverage for disciplinary matters in an amount of at least $5,000 and including coverage for events occurring pre-specification of charges.

Disciplinary coverage is like automatic windows and power locks—A bell and whistle you want to get when buying legal malpractice insurance.

Most insurance companies writing legal malpractice insurance in New Mexico offer a form of *disciplinary coverage*. It is separate and different from the coverage the policy offers for defense and indemnity for legal malpractice claims and can be described as *reimbursement coverage*. It comes in different variations, but generally it is capped coverage ($2,500, $5,000, $10,000) and the insured lawyer can select his/her own lawyer to represent them, they pay their lawyer and submit the lawyer's bill and evidence of payment and the company will reimburse up to the cap under the disciplinary coverage. The defense retention or deductible seldom applies to disciplinary coverage.

It is that simple, but there are a couple caveats:

1. Most policies, whether you opt for disciplinary coverage or not, require the insured to notify the company of any disciplinary complaints, so if you are like many lawyers who think, "if I don't tell the company, my rates won't go up," think again. First, you have to report and, second, by reporting you may trigger coverage under your policy should a legal malpractice claim flow from the disciplinary complaint.

2. Disciplinary coverages can differ. Some coverages only provide reimbursement after specification of charges have been filed. In this lawyer's opinion, this is short sighted on the company's part because a large majority of complaints are dismissed before formal charges are filed. Too often, lawyers who represent themselves responding to the complaint will unwittingly turn a meritless complaint into formal charges. Undoing the damage after specification of charges are filed is often not possible.

3. A less short-sighted variation is the disciplinary coverage which provides reimbursement only if no discipline results from the complaint. More directly, if the disciplinary complaint is dismissed, the company will reimburse the insured lawyer for legal fees. In this writer's opinion, this variation is acceptable. If the disciplinary complaint has merit, the insured lawyer will probably benefit from having independent counsel. Even if the insured lawyer ends up having to pay for disciplinary representation, odds are, having counsel will probably make a bad situation better.

4. Disciplinary coverage is an *added extra* which will not increase your premium dramatically but *is* worth it.

Free "Tail" Policy After Three Years with the Company for Retiring Attorneys

Insurance companies providing policies for professional liability coverage for lawyers typically offer such policies on a claims made policy. Under a claims made policy, the act or omission giving rise to a potential claim must have occurred subsequent to the retroactive date of the policy, and the claim must also be made and reported during the policy period, after the inception date and prior to the expiration date. Typically, extended reporting coverage is available as an endorsement for an additional premium for an extended period of time for claims to be reported after the expiration date of the policy.

Some situations that warrant a review of this type of additional coverage—and at the very least a call to the insurance company or agent to inquire about options—include:

- When a professional liability policy is cancelled or non-renewed
- A lawyer closes a solo practice
- A lawyer changes law firms
- A lawyer dies or becomes disabled
- When a lawyer retires from the practice of law

This extended reporting coverage, also known as "tail" coverage, can be purchased for an additional premium which is significant, usually some multiple of the annual premium for professional liability coverage. Most insurance companies allow for some limited time for extending reporting of claims beyond the expiration of the policy, typically for 30 or 60 days following the expiration. However, the extended "tail" coverage is often for periods of several years. For retiring attorneys, some insurance companies offer free "tail" coverage as long the attorney is entering into full retirement and has been insured with the company for a number of years, usually from three to five years. This is something that a retiring attorney should discuss with the insurance company or agent and review the potential for free or reduced cost "tail" coverage so that if a claim is made, the attorney is not without coverage or at risk for losing retirement savings.

Defense-within-limits policies will not erode more than half of the coverage amount.

A "defense-within-limits" policy contains a provision reducing the policy's applicable coverage by amounts paid by the insurer to defend the insured. Such provisions are also referred to as legal defense offset, shrinking limits, wasting coverage, cannibalizing limits, eroding or Pac-Man provisions. The New Mexico Public Regulation Commission has allowed such provisions to be placed in legal malpractice policies where the policy limit is at least $500,000. 13.11.2.9(B)(1)(h) NMAC.

In order for a defense-within-limits provision to be valid, the policy must not allow more than 50% of the policy limit to be eroded by defense costs. 13.11.2.10(A) NMAC. But that limitation may be omitted by the insurer if the policy allows the insured to select or consent to appointed defense counsel, participate in and assist in the direction of defense of the claim, and consent to a settlement. 13.11.2.10(C) NMAC. In other words, if the insurance policy allows significant participation by the insured attorney, the insurer may issue a policy allowing any amount of erosion of policy limits by defense costs. Depending on the policy and the claim, an insured may face a situation where he orshe has to choose between adequately defending a claim and maintaining enough of the policy limits to reach a settlement or protect his or her assets in the event of an adverse judgment.

The Lawyers Professional Liability and Insurance Committee recommends looking closely at a potential policy to determine whether it contains a legal defense offset provision and speaking with your agent or insurer to determine whether this is the best choice for you. If your chosen policy does allow for defense-within-limits, however, we recommend obtaining coverage where such wasting is limited to half of policy limits. Particularly if your policy provides for your significant participation in the defense of any claim, pay attention to any defense-within-limits provision. This could be important if you are sued and want to make sure you maintain enough coverage to pay or settle a claim while also adequately defending the suit.

If the policy is a defense-within-limits policy, the company will provide a separate letter/summary of coverage explaining the terms of the defense within-limits-coverage.

If an insurer intends to place a legal defense cost offset provision in your policy, the application must include such provision on its face in bold type. 13.11.2.11(A) NMAC. Further, any policy containing such a provision must contain a statement signed by the insured, in which the insured acknowledges the existence of the provision and its effect on coverage. 13.11.2.11(B), (C), and (D) NMAC specify what such signed statement must say. Nevertheless, the Lawyers Professional Liability and Insurance Committee recommends that you specifically ask your insurance agent or company whether any proposed or existing policy contains a legal defense offset provision. If so, look closely at the content of the provision and evaluate its potential effect.

Company provides access to an independent risk advisor.

Some professional liability insurance companies provide either access to a claims representative or other advisors to discuss pending issues and to provide assistance to their customers. If your insurance carrier provides this service, be sure to find out the level of experience of the people with whom you consult. Are they licensed attorneys? Have they handled claims against attorneys?

Whether or not your insurance company provides assistance to evaluate and advise you on a potential claim—or how to avoid a claim—the State Bar of New Mexico provides all New Mexico licensed attorneys with access to an independent risk advisor through the PALMS Hotline free of charge. New Mexico attorneys can call 1-800-326-8155 to speak with a licensed attorney about any practice or ethics questions. If the PALMS attorney cannot answer your question, they will provide information to you on how to get an answer to your question.

In the last five years, the company has no bad faith judgments entered against it in New Mexico.

"There is implied in every insurance policy a duty on the part of the insurance company to deal fairly with the policy holder." See UJI 13-1701. "Fair dealing means to act honestly and in good faith in the performance of the contract." Id.

There are many reasons an insurance company may be sued for bad faith. In the context of professional liability insurance, some of the most common bad faith claims may arise from disputes regarding an insured's alleged failure to report a claim; the insurer's improper failure to provide coverage for a malpractice claim; interference with insured's relationship with the insured's attorney; or failure to settle a claim within policy limits. When investigating potential professional liability insurance companies, a company's history of bad faith claims, and the reasons behind those claims, may be worth investigating.

As most attorneys are well-aware, not every claim has merit. Therefore, spending some time to dig a little deeper into a company's bad faith claims history may be beneficial. For example, does the company have a pattern of bad faith suits arising out of a failure to provide coverage due to allegations that the insured failed to report a potential claim? How are bad faith suits against the company resolved? Have any bad faith judgments been entered against the insurance company and, if so, how long ago?

Much like prepping a client for deposition, running the potential insurance company through nmcourts.gov or Pacer may avoid an ugly surprise later on.

So, what happens if the potential insurance company has a bad faith judgment or judgments or a history of bad faith claims? As each attorney's insurance needs are different, how much weight these claims and judgments are ultimately given is solely within the discretion of the potential insured. "No bad faith judgments against a company in the last five years" is a suggestion—not a hard-and-fast rule for evaluating and choosing an insurance company. If you have options when choosing a professional liability carrier, do your research, and be comfortable with your choice.

The insurance company has at least three different firms on its defense panel.

When searching for malpractice insurance, one important consideration is who will represent you if you get sued. If you get sued, your carrier has the duty to defend under the policy and in accordance with New Mexico law. Most insurance companies have one or more law firms or attorneys who are pre-selected to defend lawyers when suit is filed. Usually, these attorneys have experience in defending professional negligence malpractice claims, but not always. Many companies have three different attorneys or firms from New Mexico on their panel of attorneys.

When shopping for professional malpractice insurance you should consider whether you will have the option of hiring your own counsel or whether the company has the absolute right to decide who will represent you. When you are shopping for insurance, you can (and should) ask your broker what lawyers or law firms the insurance company regularly uses and what, if any, choice you would have in selecting your attorney in the event a claim is made against you. As with hiring any attorney, you should investigate to confirm the experience and expertise held by the panel counsel used by an insurance company.

Some insurance companies will allow you to select the attorney you want to represent you. If you are allowed to choose your attorney, the insurance company will likely require that the attorney have experience in the defense of malpractice cases. Even if you did not investigate this aspect of your policy when shopping for it, once you get sued, the carrier usually will take other considerations into account in assigning defense counsel. You should not be shy about voicing your concerns to get your insurance carrier to hire defense counsel of your choosing. For example, if the carrier assigns defense counsel whose firm may have an existing conflict because of other cases, personal conflicts, lack of expertise, etc., the carrier may be willing to assign different defense counsel.

Additionally, if you believe that defense counsel may not have the reputation or experience to handle a professional malpractice case, you should let the carrier know. Often times the carrier is more interested in holding down costs of defense than hiring top-notch trial attorneys who are experienced in the defense of legal malpractice cases. You and your insurance carrier have a joint interest in keeping defense costs down but you should not do so at the expense of hiring well-qualified defense counsel.

The company offers coverage for firms with one to six attorneys.

Several national studies concerning lawyers professional liability insurance have determined that the majority of law firms that are uninsured are sole proprietors or firms with fewer than six attorneys. And insurance companies seem to treat that class of firms differently.

Some insurance companies providing LPLI coverage provide a different application process for firms with fewer than six attorneys, and those applications may undergo a different underwriting process. In addition, smaller firms may have a more difficult time finding capital to purchase sufficient LPLI coverage than larger firms. Smaller firms should take into account, though, that if and when a claim is filed it may be difficult to raise sufficient money to pay a larger deductible.

Also, it may cost more on the front end, but obtaining a policy with larger limits may pay off in the long run. Talk to potential LPLI carriers and ask about how often and why that carrier may decide to non-renew a firm's policy. Obtaining an adequate policy that is likely to be continued from year-to-year is one way to plan for the longevity of your solo practice or small firm.

The company offers coverage for class action suits, as well as claims arising from estate planning and intellectual property matters.

Regardless of whether you or your firm are practicing in the areas of estate planning and intellectual property, it is worth noting when you purchase your policy whether the insurer offers coverage for these areas. When you apply for insurance, you will be asked to provide a list of practice areas. If you indicate that you or your firm practice in some specialized areas, such as class action practice, intellectual property and estate planning, you may be required to submit additional forms and information. If you fail to indicate that you practice in one of those areas, then you may be denied coverage later on if a claim arises related to your practice in one of those areas. But even if you do not regularly perform work in one of those specialized areas, it may be worth ensuring that your carrier offers coverage in those areas. You may be provided opportunities during your policy period to participate in work that implicates coverage in those areas. If that happens, you should immediately notify your carrier that you intend to perform that work, and inquire whether additional coverage may be necessary.

The company holds an "Excellent (A or A-)" or better rating from A.M. Best Company.

We have all heard advertising slogans like the "you are in good hands" and "like a good neighbor" regarding casualty insurers. The issue of financial stability is also an important factor to consider when purchasing professional liability insurance coverage. A number of us have witnessed the insolvency of professional liability carriers and it is a messy and drawn out process. It is particularly scary for professionals facing a malpractice claim during a period when the insolvency of the insurer is resolved.

To help avoid such eventualities, the State Bar and the LPLI Committee suggest you consider the financial strength of a potential professional liability insurer. To that end, we suggest your professional liability insurer holds an "Excellent (A or A-)" rating or better from A.M. Best.

What is A.M. Best?

According to the A.M. Best website, the A.M. Best Company reports, among other things, on the financial stability of insurers and the insurance industry. It is the oldest and most widely recognized provider of ratings, financial data and news with an exclusive insurance industry focus. A.M. Best rates more than 3,500 companies in over 80 countries worldwide. A.M. Best's Credit Ratings are recognized as a benchmark for assessing a rated organization's financial strength as well as the credit quality of its obligations.

What are A.M. Best ratings regarding insurance companies?

Their website also states, that A.M. Best's Financial Strength Rating ("FSR") is an opinion of an insurer's financial strength and ability to meet its ongoing insurance policy and contract obligations. An FSR is not assigned to a specific insurance policy or contract and does not address any other risk, such as an insurer's claims handling or payment policy or procedure. Below is A.M. Best's explanation its FSR rating scale.

Best's Financial Strength Rating (FSR) Scale

Rating Categories	Rating Symbols	Rating Notches*	Category Definitions
Superior	A+	A++	Assigned to insurance companies that have, in our opinion, a superior ability to meet their ongoing insurance obligations.
Excellent	A	A-	Assigned to insurance companies that have, in our opinion, an excellent ability to meet their ongoing insurance obligations.
Good	B+	B++	Assigned to insurance companies that have, in our opinion, a good ability to meet their ongoing insurance obligations.
Fair	B	B-	Assigned to insurance companies that have, in our opinion, a fair ability to meet their ongoing insurance obligations. Financial strength is vulnerable to adverse changes in underwriting and economic conditions.
Marginal	C+	C++	Assigned to insurance companies that have, in our opinion, a marginal ability to meet their ongoing insurance obligations. Financial strength is vulnerable to adverse changes in underwriting and economic conditions.
Weak	C	C-	Assigned to insurance companies that have, in our opinion, a weak ability to meet their ongoing insurance obligations. Financial strength is very vulnerable to adverse changes in underwriting and economic conditions.
Poor	D	-	Assigned to insurance companies that have, in our opinion, a poor ability to meet their ongoing insurance obligations. Financial strength is extremely vulnerable to adverse changes in underwriting and economic conditions.

**Each Best's Financial Strength Rating Category from "A+" to "C" includes a Rating Notch to reflect a gradation of financial strength within the category. A Rating Notch is expressed with either a second plus "+" or a minus "-".*

Contact with a live representative is available.

When you are shopping for insurance and once you have decided which insurance product you want, it is valuable to be able to speak with a representative of the company to answer your questions. While email is not a poor method to get questions answered, it should not be the only way that an insurance company will communicate and answer your questions.

As important as the method of communication is, whether responses to your questions are timely and accurate is equally as important. In any event, you should insist on being able to meet or talk with an adjustor or other trained claims person to respond to your questions about a potential or actual claim or, possibly, how to deal with a pending situation which could avoid a claim altogether.

The retroactive date and coverage includes all periods of time during which the insured was continuously covered under a prior malpractice insurance policy.

Lawyer's Professional Liability policies are now always "claims made" policies. A "claims made" policy covers the insured for all claims made and reported during the policy period, no matter when the alleged malpractice occurred. In contrast, an "occurrence" policy covers the insured for any claim, no matter when asserted, arising from alleged malpractice "occurring" within the policy period. If there was "occurrence" coverage in place, there is theoretically coverage for any alleged malpractice occurring during that policy period, forever. However, LPL "occurrence" coverage is simply not available.

Nevertheless, "claims made" coverage should theoretically protect an insured lawyer for any claim asserted while the "claims made" policy is in effect. There is a catch, however. Most LPL policies also have a "retroactive" or "prior acts" date, which excludes coverage for alleged malpractice occurring before the "retroactive" or "prior acts" date. For many lawyers, the "prior acts" date is not an issue. As long as a lawyer has been continuously insured throughout his or her career, the prior acts date will likely go back years, even to the date the lawyer started to practice law. However, if there has been a break in coverage—a period of even a few weeks or months in which the lawyer let his or her insurance lapse—the "prior acts" date on any new policy will likely be the date when insurance was reinstated. Anything occurring during or prior to the break in coverage will be excluded from coverage.

In addition, if a lawyer or law firm is "non-renewed" by an insurer, then even when coverage is obtained from a new carrier the "prior acts" date on the new policy could be the starting date for the new policy. In that circumstance, "claims made" coverage amounts to almost no coverage at all, at least at the beginning, because there is only coverage for alleged malpractice occurring since the new policy went into effect. Over time, as the "prior acts" date recedes into the past, the protection provided by the "claims made" policy increases, notwithstanding the "prior acts" date.

Every lawyer should read his or her LPL policy, especially the declarations page, to be sure the information is correct and the lawyer knows what coverage is in place, for whom, the policy period, etc. This review should include identifying the policy's "retroactive" date. It will likely be different for different lawyers insured under the policy. And especially when purchasing new coverage, either after a break in coverage or when changing insurers for whatever reason, the lawyer simply must determine the proposed "retroactive" date before purchasing the policy. Although there may be no ability to negotiate with the insurer for a better "retroactive" date, that possibility should be explored before agreeing to coverage that amounts, at least initially, to almost no coverage at all.

The Retroactive Date For Your LPL Policy

Lawyer's Professional Liability (LPL) policies are now always "claims made" policies. A "claims made" policy covers the insured for all claims made and reported during the policy period, no matter when the alleged malpractice occurred. In contrast, an "occurrence" policy covers the insured for any claim, no matter when asserted, arising from alleged malpractice "occurring" within the policy period. If there was "occurrence" coverage in place, there is theoretically coverage for any alleged malpractice occurring during that policy period, forever. However, LPL "occurrence" coverage is simply not available.

Nevertheless, "claims made" coverage should theoretically protect an insured lawyer for any claim asserted while the "claims made" policy is in effect. There is a catch, however. Most LPL policies also have a "retroactive" or "prior acts" date, which excludes coverage for alleged malpractice occurring before the "retroactive" or "prior acts" date. For many lawyers, the "prior acts" date is not an issue. As long as a lawyer has been continuously insured throughout his or her career, the prior acts date will likely go back years, even to the date the lawyer started to practice law. However, if there has been a break in coverage – a period of even a few weeks or months in which the lawyer let his or her insurance lapse - the "prior acts" date on any new policy will likely be the date when insurance was reinstated. Anything occurring during or prior to the break in coverage will be excluded from coverage.

In addition, if a lawyer or law firm is "non-renewed" by an insurer, then even when coverage is obtained from a new carrier the "prior acts" date on the new policy could be the starting date for the new policy. In that circumstance, "claims made" coverage amounts to almost no coverage at all, at least at the beginning, because there is only coverage for alleged malpractice occurring since the new policy went into effect. Over time, as the "prior acts" date recedes into the past, the protection provided by the "claims made" policy increases, notwithstanding the "prior acts" date.

Every lawyer should read his or her LPL policy, especially the Declarations page, to be sure the information is correct and the lawyer knows what coverage is in place, for whom, the policy period, etc. This review should include identifying the policy's "retroactive" date. It will likely be different for different lawyers insured under the policy. And especially when purchasing new coverage, either after a break in coverage or when changing insurers for whatever reason, the lawyer simply must determine the proposed "retroactive" date before purchasing the policy. Although there may be no ability to negotiate with the insurer for a better "retroactive" date, that possibility should be explored before agreeing to coverage that amounts, at least initially, to almost no coverage at all.

Policy Provides Coverage for Pre-claim Subpoenas and Depositions

It's not unusual for a lawyer to be subpoenaed for his or her deposition in a lawsuit in which the lawyer, the law firm, or the company employing the lawyer isn't a party. Lawyers also can receive subpoenas for documents in cases where the lawyer isn't a defendant. Sometimes these subpoenas are part of a genuine fact-finding mission and others they foreshadow a nascent malpractice claim. Whatever the motivation prompting the subpoena, the lawyer who is a third-party witness is faced with a host of confidentiality, privilege, and other issues that should prompt the lawyer's deliberate actions in response.

Consider contacting your carrier as one of those actions for a couple of very practical reasons.

- First, depending on the circumstances and the content of the subpoena, the receipt of a subpoena may clue you in to a potential claim against you. Most, if not all, policies obligate you to immediately give your carrier written notice if you become aware of facts that could reasonably be expected to be the basis of a claim against you. They also require the same disclosure when the policy is renewed. If a subpoena puts you on notice of a possible claim, you need to notify your carrier. Plus, by asking your carrier for assistance in responding to a subpoena, you may also trigger coverage for a potential claim under your existing policy.

- Second, and irrespective of whether you believe a claim against you may be forthcoming, many legal malpractice policies include some type of subpoena assistance coverage that is available to the lawyer for even if the lawyer is not a named defendant in the lawsuit. The details of this type of coverage vary, but they all require that the subpoena be related to the lawyer's provision of legal services. Some provide that the carrier will engage the lawyer for you and pay him/her directly without any deductible and in addition to the other policy limits. Others provide capped coverage of, say, $2,500 or $5,000 that will reimburse you for attorneys' fees and other expenses incurred in responding to the subpoena.

If your policy doesn't include subpoena assistance, check with your carrier to see if they offer it. Having a lawyer help negotiate the complex issues that can arise when you receive a subpoena relating to your work for a current or former client can be invaluable. Check your policy for this added perk.

Policy Provides Innocent Insured Coverage

Lawyers Professional Liability insurance policies—legal malpractice policies—typically exclude coverage for "Intentional Acts." These are claims arising from any dishonest, fraudulent, criminal or malicious act or omission or intentional wrongdoing by an insured. Many policies, however, include an exception to this exclusion so that coverage will be provided to an insured who did not personally commit the intentional wrongful act, and was unaware of it. Thus, if one of the lawyers in a law firm or law practice committed an "intentional act" giving rise to a claim that is excluded from coverage, other lawyers in the firm who did not personally commit the wrongful act and were unaware of it will still be covered under the policy. When purchasing LPL insurance coverage, you should insure that it includes "Innocent Insured" coverage.

Unfortunately, there is typically not "Innocent Insured" coverage where the issue is a failure to give timely notice of a claim, resulting in a denial of coverage under the policy. All current LPL policies are "claims made" policies. There is only coverage for claims made and reported during the policy period. If a claim is made (or circumstances that could give rise to a claim are learned) during a policy period, but that claim is not reported during that policy period, the insurer will likely deny the claim if reported during a subsequent policy period.

Thus, if a lawyer in a firm or law practice learns of a claim or circumstances that could give rise to a claim but hides that fact from the other lawyers in the firm or practice so that no one gives a timely notice of the claim to the insurer within that policy period, the insurer will likely deny coverage to the firm and all of its lawyers if the claim is reported under a subsequent policy. There is no "innocent insured" protection when it comes to failure to give timely notice of a claim.

Policy Provides a Broad Definition of "Legal Services" to Include Mediation, Arbitration, Guardian ad Litem and Personal Representative Services Provided by the Attorney.

We all know that legal malpractice insurance covers claims against us lawyers that allege we were negligent in the practice of law. But not all actions taken by lawyers in the course of providing legal advice may be covered by your policy.

All legal malpractice policies include a definition of "legal services," "professional services," or otherwise "covered services" that determines what actions on your part may constitute a covered claim. All policies include in this definition a lawyer's services performed in conjunction with an attorney-client relationship. Most also include services as a mediator, arbitrator, or other facilitator in an alternative dispute resolution process; and most also include services as an administrator, conservator, guardian, executor, personal representative, trustee, or other fiduciary capacity so long as the lawyer isn't a beneficiary of the trust or estate.

In addition to these definitions, legal malpractice policies also exclude from coverage some specific actions taken by the lawyer. For example, some exclude investment advice, certain types of title work, actions taken as a public official, and actions taken as a director or officer of an organization. The exclusions can run the gamut.

The point is this: at a minimum, you should make sure your policy's definition of legal services includes those services you and your colleagues regularly provide in the course of your practice, including any services as a mediator, arbitrator, guardian, trustee, etc. If the services provided aren't in your policy, talk to your carrier. In addition, before taking on any unusual work, take a tour through your policy to see whether the services you provide are covered. If they're not, you need to notify your client that you are uninsured for those services, and you may need to evaluate the scope of your representation.

View more information about the Professional Liability and Insurance Committee and about its recommendations online at:

www.nmbar.org > About Us > Committees Professional Liability and Insurance

NOTES