Ethical Puzzles: The Wrongful Death Act, Negligent Settlement Claims and the Search for the Silver Bullets

December 19, 2018

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Ethical Puzzles: The Wrongful Death Act, Negligent Settlement Claims and the Search for the Silver Bullets

3.0 EP

Presented by Maureen A. Sanders, John M. (Jack) Brant, Gerald G. (Jerry) Dixon, Briggs F. Cheney, and Bruce Evan Thompson

Wednesday, Dec. 19, 2018 • 9 a.m.-12:15 p.m.
State Bar Center, Albuquerque

$39 Non-member not seeking CLE credit
$130 Early bird fee (Registration must be received by Nov. 19)
$143 Lawyers Professional Liability and Insurance Committee, government and legal services attorneys, Young Lawyers and Paralegal Division members
$159 Standard Fee/Webcast Fee

Registration and payment for the program must be received prior to the program date. A $20 late fee will be incurred when registering the day of the program. This fee applies to live registrations only and does not apply to live webcasts.

Co-sponsor: Lawyers Professional Liability Insurance Committee

This CLE program will cover in detail the wrongful death act and negligent settlement claims from beginning to end.

8:30 a.m.	Registration and Continental Breakfast
9 a.m.	**Wrongful Death**
10:30 a.m.	Break
10:45 a.m.	**Negligent Settlement**
12:15 p.m.	Adjournment

Presenters Biographies

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. Jerry 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. She has been a long time member of the State Bar Professional Liability Committee.

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. He 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. Recognitions: 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 UNM Law School Distinguished Achievement 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.

John M. (Jack) Brant is a 1983 graduate of the UNM Law School. He clerked for the Honorable Howard C. Bratton, Chief Judge of the U.S. District Court in New Mexico. He practiced law for two years at the Crowell & Moring in Washington, D.C. He practiced for 20 years at the Rodey Law Firm where he served as Chair of the Litigation Department. He left Rodey to set up his own small firm in2009, and currently practices with Jeannie Hunt at Brant & Hunt, Attorneys. His practice for nearly 30 years has focused on lawyer professional liability litigation, attorney disciplinary representation and advising lawyers on a variety of ethics, risk management and law practice issues.

Bruce E. Thompson joined the firm in 2004, after serving as a judicial law clerk at the New Mexico Supreme Court. He focuses his practice primarily in the areas of personal injury and insurance litigation. Thompson is a regular speaker at NMTLA seminars on insurance law, evidence, government liability, and other aspects of personal injury litigation. He has also served as program chair for the NMTLA annual Tort Update CLE since 2011.

Thompson is proud to volunteer as counsel for Albuquerque CASA, Inc., which provides dedicated court appointed advocates to speak up for children who are the subject of abuse and neglect proceedings.

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Hypothetical Fact Pattern

- Mom and Dad are killed in an accident in New Mexico.
- Mom and Dad were never legally married but lived together in New Mexico.
- Mom and Dad had three children together.
- Before meeting Mom, Dad had a child out of wedlock in a state that recognizes common law marriage
- Mom and Dad's oldest kid comes to lawyer and wants to pursue a lawsuit.

STATE BAR OF NEW MEXICO
LAWYER PROFESSIONAL LIABILITY AND INSURANCE COMMITTEE

ETHICAL PUZZLES: THE WRONGFUL DEATH, NEGLIGENT SETTLEMENT CLAIMS AND THE SEARCH FOR THE SILVER BULLETS

December 19, 2018

Panel

Briggs Cheney
Sheehan & Sheehan, P.A.

Maureen Sanders
Sanders & Westbrook, P.C.

Jack Brant
Brant & Hunt, P.C.

Gerald Dixon
Dixon, Scholl Carrillo, P.A.

Bruce Thompson
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NEGLIGENT SETTLEMENT: EXPLANATION, COMMUNICATION, EXPLANATION

Introduction

At the 2018 Fall Conference of the American Bar Association's *Standing Committee on Lawyer Professional Liability*, a session was held on this topic. The materials for this session included a paper entitled, *Settle and Sue Again: Strategies and Snares* (Spring 2013 National Legal Malpractice Conference)[1].

Although five years old, the paper is excellent and is attached for your benefit. Using this paper as a touchstone, the goal of this presentation is to briefly revisit the risks for the lawyer which flow from the settlement of claims and to present some ideas, suggestions and tools to minimize those risks.

When it comes to the attorney-client relationship, it always seems to come down to communication between the lawyer and the client. In the title to this paper, we use the word "explanation" twice. Explanation is a form of communication, but with a little more personal touch. The very nature of settlement is inconsistent with why clients seek out lawyers to be their advocate - their knight in shining armor who will fight to the death on their behalf. Settlement is compromise, giving up positions, letting the other side win some. It is fact that most legal disputes resolve in settlement and because the client believes the lawyer is that "knight in shining armor", the lawyer needs to do more than just "communicate" that settlement is going to happen

[1] Panelists: John DeGroote, John DeGroote Services, LLC; Cynthia Fitzgerald, Hanover Insurance Company and Carol Payne, Estes Okon Thorne & Carr, PLLC.

– the lawyer needs to "explain" the process to the client and why compromise is in the client's best interests.

The Risk is Real

Legal malpractice claims for negligent settlement are on the rise and the reasons behind these claims abound: the client regrets the deal that has been made; the client believes he/she was forced to settle because the lawyer was negligent or unprepared or the issues were too complex for the lawyer; the lawyer was overwhelmed or outnumbered by the opposition; a negative ruling by the court; the client did not understand or agree with what was happening (the clients are just difficult clients or over-bearing mediator or coercive lawyer or acceleration of discussions or it all happened so fast); or post mediation events which the client did not see coming.

There is also the case that did not settle and the trial ends badly and the client blames the lawyer for not convincing him/her/it to settle – advising the client of the risks of going to trial. A related situation is where the lawyer is replaced by a new lawyer and the trial ends badly and "new attorney" blames first lawyer.

And just so transactional lawyers do not feel left out – the deal or transaction ends up in litigation and the transactional lawyer is blamed.

All of the above are discussed in the attached ABA/LPL paper in more detail and it is fair to say that there are occasions where the lawyer has not done his or her job and a legal malpractice claim is justified. However, so many claims are the result of the lawyer not communicating – not explaining – that settlement is the reality and preparing the client for that reality.

Communicating and Explaining

There is no silver bullet, but there are some things a lawyer can do to minimize the risk of such a claim or enhance the lawyer's defense against such claims.

The "what you should do but seldom happens or never seems possible but if you could" list

1. In the beginning of the representation. Explain to the client the realities of litigation and that most cases settle, and their case is probably no different. Explain that the court will likely order or compel the parties to mediate their case before a trial occurs. Consider including a paragraph(s) in your retention agreement or letter echoing or confirming what you discuss with the client verbally. *See* **Exhibit A**.

2. Don't oversell the case or what you can deliver as a lawyer. Explain the realities of litigation. Explain that every legal disagreement has another "side of the story" and the process will help the parties to sort out

whose story is the "best story" but often that is not clear and, in the end (at trial), a jury or judge will decide which story they like best and it may not be the client's story.

3. Don't wait until the end (the end being as you approach mediation and trial) that the client's "side of the story" has problems. As the representation proceeds, keep the client advised of what is going on – explain to the client the good and the bad. Don't wait until the eve of mediation to "break the bad news" about their case. Prepare the clients for what they will hear in mediation – the other side of the story.

4. Mediation will occur. Don't wait until the last minute to tell the client about mediation. The client should already have been told about mediation and the process (i.e. the first meeting, the lawyer's retainer agreement/letter – **Exhibit A**), but avoid letting the client know that "hey, client, you have to be at my office on Friday for your mediation." You do not want the client to feel like mediation is a last minute or rushed event.

5. The really hard part. This is the part that seldom happens, just because it seldom happens. The nature of practicing law seldom allows the lawyer to be this ahead of the game, but the following can make all the difference:

a. Draft mediation statement. Two weeks (this is an arbitrary time) prepare a draft mediation statement. Most mediators require a statement on "x date" and most lawyers get it to the mediator barely on time.

b. Send draft mediation statement to client. Send the draft mediation statement to the client along with a transmittal letter. *See* **Exhibit B**. This is another opportunity to explain the mediation process and what the client should anticipate.

c. Include a case evaluation and settlement range. This is the time to begin preparing the client's expectations. It also is the stepping stone for the meeting with the client.

d. Meeting with the client. Not the morning of the mediation, but a day or two before mediation, meet with the client. If the client has been provided with the draft mediation statement and the lawyer's evaluation, this is the time to discuss what is going to happen. The chance to explain to client that mediation is a dress rehearsal of their case with a mediator who is like the judge or a juror in the client's case and the opportunity to see what an independent person thinks of their case. It is the chance to explain to the client the mediator's style and

personality. Most importantly, it is the chance to manage the client's expectations and deal with any pushback the client has with the lawyer's evaluation.

e. HALT. "Hungry, Angry, Lonely, Tired." Monitor the client during the mediation. At the end of the day, you want the client's decision to settle to be based on the client making the decision to settle because the client believes it to be the best decision for him/her/it. If the client is tired, beaten down or pressured into settlement, that can be a recipe for "settlement remorse" and can result in blaming the lawyer for a settlement the client second guesses the next day.

6. Special Settlement Counsel. All cases should be "important cases" and certainly are important to every client, but some cases are different. For those cases, a lawyer may consider retaining another lawyer who, in advance of mediation, provides the client with a "second opinion" of sorts. This often occurs when a mock trial has occurred.

Concluding thoughts

Close your eyes and pretend it is the first day of the legal malpractice case filed against you by your former client claiming negligent settlement. As

your lawyer stands before the jury to make an opening statement (or closing argument) what would like your defense lawyer to be be able to tell the jury about your representation of your former client leading up to the client making the decision to settle his/her/its case?

Exhibit A

Possible paragraph to be include in a Retainer Agreement or Letter

Ninety-five (95%) percent of all legal disputes are resolved following mediation or following a dispute resolution process. It is likely that your legal matter you are retaining this law firm to handle will be settled. As part of the settlement process, the firm will provide you with its best legal advice and judgment to assist you in making a decision to settle your legal matter. However, any decision to compromise or settle will be your decision and not the firm's.

The nature of any settlement is compromise meaning you will agree to give up legal positions and possible recoveries in order to reach a resolution of the legal matter. You will not be happy and may later second-guess your decision. In agreeing to this Retainer Agreement/Letter, you are confirming that you understand that any settlement or compromise of your legal matter will be <u>your</u> decision to compromise and not the firm's decision and you agree to accept full responsibility for that decision.

Exhibit B

Transmittal letter accompanying Mediation Statement

Dear _____

The mediation in your case is set for [date]. I am sending a draft of the Mediation Statement the mediator requires we provide him/her in advance of the scheduled mediation. I want to explain the Mediation Statement and its purpose.

The Mediation Statement provides the mediator with a factual background of the case and it presents your side of the case in the best possible terms – all the reasons why we be believe you should prevail – win – and how much we believe you should recover.

It is important that you understand that the Mediation Statement paints the most favorable picture of your case. It does not include or take into consideration many of the factual and legal problems which detract from your case. During the course of the mediation, the mediator will confront you with these factual and legal weaknesses as part of convincing you to compromise your position in the case. We want you to be prepared for the mediator to be direct and blunt in his assessment of your case. This is the mediator's job and while we will continue to advocate your positions, we want you to understand

that the attached Mediation Statement does not necessarily represent how this case should be resolved or would be resolved should it go to trial. Nor does it fairly represent our analysis of your case.

Throughout this case, the firm has done its best to provide you with how the case has proceeded and changes in our evaluation of your case. As we go into mediation, we view a reasonable settlement range for you to consider to be [set out a range]. You may disagree with our settlement evaluation and range, but it is important for you to understand that mediation is a dress rehearsal for your lawsuit – an opportunity to have an uninterested third person – the mediator – to share with his/her reaction to your case.

[If at all possible, schedule a meeting with the client in advance of the mediation to discuss the process. In the last paragraph, consider suggesting the client call to make an appointment to meet.]

1-017. Parties plaintiff and defendant; capacity.

Statute text

A. **Real party in interest.** Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. Where it appears that an action, by reason of honest mistake, is not prosecuted in the name of the real party in interest, the court may allow a reasonable time for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

B. **Wrongful death actions; personal representative.** An action for wrongful death brought under Section 41-2-1 NMSA 1978 shall be brought by the personal representative appointed by the district court for that purpose under Section 41-2-3 NMSA 1978. A petition to appoint a personal representative may be brought before the wrongful death action is filed or with the wrongful death action itself.

C. **Capacity to sue or be sued.** The capacity of an individual, including those acting in a representative capacity, to sue or be sued shall be determined by the law of this state. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized, unless some statute of this state provides to the contrary.

D. **Infants or incompetent persons.** When an infant or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make any other order as it deems proper for the protection of the infant or incompetent person.

E. **Consumer debt claims.**

(1) Collection agencies may take assignments of claims in their own names as real parties in interest for the purpose of billing and collection and bringing suit in their own names; provided that no suit authorized by this section may be instituted on behalf of a collection agency in any court unless the collection agency appears by a licensed attorney-at-law; and further provided that the collection agency must plead specific facts in its initial pleading demonstrating that it is the real party in interest.

(2) In any consumer debt claim in which the party seeking relief alleges entitlement to enforce the debt but is not the original creditor, the party must file an affidavit establishing the chain of title or assignment of the debt from the original creditor to and including the party seeking relief. The affidavit must be based on personal knowledge, setting forth those facts as would be admissible in evidence, showing affirmatively that the affiant is competent to testify to the matters stated in the affidavit. An affidavit based on a review of the business records of the party or any other person or entity in the chain of title must establish from personal knowledge compliance with the requirements of Rule 11-803(6)(a)-(c) NMRA, or demonstrate reliance on an attached certification complying with Rule 11-902(11) or (12) NMRA. The business records must be attached to the affidavit or certification.

History

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 14-8300-010, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-031, effective for all cases pending or filed on or after July 1, 2017.]

Annotations

Committee commentary. —

2014 amendment

NMSA 1978, Section 41-2-3 provides that an action for wrongful death brought under NMSA 1978, Section 41-2-1 "shall be brought by and in the name of the personal representative of the deceased person." The Court of Appeals has ruled that the personal representative referenced in Section 41-2-3 is distinguishable from the personal representative of the estate of the deceased as defined in the Probate Code. *See In re Estate of Sumler*, 2003-NMCA-030, ¶ 8, 133 N.M. 319, 62 P.3d 776 ("[I]t is improper to equate a personal representative under the Wrongful Death Act with a personal representative as defined by the Probate Code."). To maintain the distinction between a traditional personal representative and one appointed to maintain a wrongful death action, Paragraph B now provides that only a personal

representative appointed by the district court may bring a wrongful death action. A personal representative as defined by the Probate Code may seek appointment from the district court under Section 41-2-3 as the personal representative for the purpose of filing and maintaining a wrongful death action under Section 41-2-1.

Paragraph B also provides that the person seeking to become the personal representative may petition the court for appointment either before the filing of the wrongful death action or in the wrongful death action itself. *See In re Estate of Sumler*, 2003-NMCA-030, ¶ 10 n.1 ("[W]e see no reason why a petition for appointment of a Section 41-2-3 personal representative may not be brought with the wrongful death action itself, assuming that all necessary parties are subject to joinder in the forum where the wrongful death action is brought." (internal citations omitted)). Failure to appoint a personal representative before the filing of a wrongful death action is not a jurisdictional defect and, under proper circumstances, may be accomplished after the action is filed. *See Chavez v. Regents of University of New Mexico*, 1985-NMSC-114, 103 N.M. 606, 711 P.2d 883.

2016 amendment

Paragraph E of this rule provides additional protections to consumers in consumer debt collection cases. *See* Comment to Rule 1-009 NMRA. Paragraph (E)(2)'s affidavit requirements derive from Rule 1-056(E) NMRA. A proper affidavit can support the introduction of business records. *See Nader v. Blair*, 549 F.3d 953, 963 (4th Cir. 2008) (stating that "employees who are familiar with the record-keeping practices of a business are qualified to speak from personal knowledge that particular documents are admissible business records, and affidavits sworn by such employees constitute appropriate summary judgment evidence."). In like manner, an affidavit from the "custodian or another qualified witness" or "a certification that complies with Rule 11-902(11) or (12) NMRA" that demonstrates compliance with Rule 11-803(6) NMRA suffice, if the business records accompany the affidavit or certification.

The business records exception allows the records themselves to be admissible but not simply statements about the purported contents of the records. *See State v. Cofer*, 2011-NMCA-085, ¶ 17, 150 N.M. 483, 261 P.3d 1115 (holding that, based on the plain language of Rule 11-803(F) NMRA (2007) (now Rule 11-803(6) NMRA), "it is clear that the business records exception requires some form of document that satisfies the rule's foundational elements to be offered and admitted into evidence and that testimony alone does not qualify under this exception to the hearsay rule," and concluding that "testimony regarding the contents of business records, unsupported by the records themselves, by one without personal knowledge of the facts constitutes inadmissible hearsay") (internal quotation marks and citation omitted); *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 33, 320 P.3d 1.

[Adopted by Supreme Court Order No. 14-8300-010, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-031, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 17-8300-022, effective for all cases pending or filed on or after December 31, 2017.]

COMPILER'S AMENDMENT NOTES

The 2017 amendment, approved by Supreme Court Order No. 17-8300-022, effective December 31, 2017, made technical changes to the committee commentary.

The 2016 amendment, approved by Supreme Court Order No. 16-8300-031, effective July 1, 2017, provided new procedures for consumer debt claims, made certain stylistic changes, and revised the committee commentary; in Paragraph B, after "wrongful death brought", deleted "pursuant to" and added "under"; in Paragraph D, after "shall make", deleted "such" and added "any"; in Paragraph E, in the heading, deleted "Collection agencies" and added "Consumer debt claims", added the subparagraph designation "(1)"; in Subparagraph E(1), after "licensed attorney-at-law", added "and further provided that the collection agency must plead specific facts in its initial pleading demonstrating that it is the real party in interest."; and added Subparagraph E(2).

The 2014 amendment, approved by Supreme Court Order No. 14-8300-010, effective December 31, 2014, required that wrongful death actions be brought by the personal representative appointed by the district court; and added Paragraph B.

The 1997 amendment, effective January 1, 1997, added Paragraph D and made gender neutral changes in Paragraphs A and C.

COMPILER'S ANNOTATIONS

Cross references. — For service of process on insane or incompetent person, *see* Section 38-1-12 NMSA 1978.

For suit by or against partners, *see* Section 38-4-5 NMSA 1978.

For suits by or against infants, *see* Sections 38-4-7 to 38-4-13 NMSA 1978.

For suits by or against incapacitated persons, *see* Sections 38-4-14 to 38-4-17 NMSA 1978.

For provision for appointment of guardian ad litem for insane spouse sued in divorce action, *see* Section 40-4-10

NMSA 1978.

For prosecution of ejectment suit, *see* Section 42-4-4 NMSA 1978.

For prosecution of quiet title suit by committee when there are numerous claimants, *see* Section 42-6-3 NMSA 1978.

For provisions of Probate Code relating to protection of persons under disability and their property, *see* Sections 45-5-101 to 45-5-436 NMSA 1978.

For right of certain unincorporated associations to sue or be sued, *see* Sections 53-10-5, 53-10-6 NMSA 1978.

For right of collection agencies to take assignments as real parties in interest, *see* Section 61-18A-26 NMSA 1978.

For capacity of parties in magistrate court, *see* Rule 2-401 NMRA.

Compiler's notes. — Paragraph A is deemed to have superseded 105-103 and 105-104, C.S. 1929, which were substantially the same.

Paragraph C is deemed to have superseded 105-202, C.S. 1929, relating to suits brought by infants' next friend, 105-205, C.S. 1929, relating to appointment of guardian for defendant, 85-302, C.S. 1929, relating to commencement and prosecution of suit against insane or incompetent person and 85-303, C.S. 1929, relating to appointment of guardian ad litem for insane or incompetent defendant.

I. GENERAL CONSIDERATION.

No standing based on economic injury. — Where plaintiffs alleged purely economic interests that would be harmed by a ban on cockfighting, including reduced gross receipts, loss of employees, and a threat to the viability of their businesses, plaintiffs had no standing to challenge the constitutionality of 30-18-1 NMSA 1978 because the constitution does not protect plaintiffs' right to engage in particular business activities so as to avoid economic loss. *New Mexico Gamefowl Assn., Inc. v. State ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67.

No standing based on spectator interest in cockfighting. — Where plaintiffs alleged past attendance at cockfights and that the ban on cockfighting would prevent them from future attendance at events plaintiffs considered to be an aspect of cultural expression, plaintiffs had no standing to challenge the constitutionality of 30-18-1 NMSA 1978 because there is no credible threat of prosecution related to mere attendance at cockfighting. *New Mexico Gamefowl Assn., Inc. v. State ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67.

No third party standing. — Where plaintiffs alleged past attendance at cockfights and that the ban on cockfighting would prevent them from future attendance at events plaintiffs considered to be an aspect of cultural expression and alleged that persons who intend to participate in cockfighting would be injured, but provided no reason why a person who has violated 30-18-1 NMSA 1978 cannot challenge the constitutionality of the statute, plaintiffs had no third-party standing to challenge the constitutionality of Section 30-18-1. *New Mexico Gamefowl Assn., Inc. v. State ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67.

Associational standing. — Where members of the plaintiff association owned and equipped cocks for the purpose of fighting; the purpose of the association was to keep cockfighting legal; and the association's remedy to have the ban on cockfighting declared unconstitutional addressed the injury claimed by the entire membership of the association, the association had associational standing to challenge the constitutionality of Section 30-18-1 NMSA 1978. *New Mexico Gamefowl Assn., Inc. v. State of N.M. ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67.

Standing doctrine is not derived from the state constitution and is not jurisdictional. *American Civil Liberties Union of N.M. v. City of Albuquerque*, 2008-NMSC-045, 144 N.M. 471, 188 P.3d 1222, *aff'g* 2007-NMCA-092, 142 N.M. 259, 164 P.3d 958.

Traditional standing jurisprudence affirmed. — The court will not depart from the traditional standing analysis that requires a showing of injury in fact, causation, and redressability. *American Civil Liberties Union of N.M. v. City of Albuquerque*, 2008-NMSC-045, 144 N.M. 471, 188 P.3d 1222, *aff'g* 2007-NMCA-092, 142 N.M. 259, 164 P.3d 958.

Law reviews. — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For note commenting on Safeco Ins. Co. of America v. United States Fid. & Guar. Co., 101 N.M. 148, 679 P.2d 816 (1984), see 16 N.M.L. Rev. 119 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments §§ 62, 181 to 185; 6 Am. Jur. 2d Associations and Clubs §§ 49, 53; 8 Am. Jur. 2d Automobiles and Highway Traffic §§ 1105, 1107 to 1109; 14 Am. Jur. 2d Carriers § 1135; 17A Am. Jur. 2d Contracts §§ 425, 464; 18 Am. Jur. 2d Cooperative Associations §§ 3, 53; 18B Am. Jur.

2d Corporations § 1288; 36 Am. Jur. 2d Fraternal Orders and Benefit Societies § 185; 41 Am. Jur. 2d Incompetent Persons §§ 115 to 121; 42 Am. Jur. 2d Infants §§ 8 to 13, 155; 59 Am. Jur. 2d Parties § 1 et seq.

Will, right of beneficiary to enforce contract between third persons to provide for him, 2 A.L.R. 1193, 33 A.L.R. 739, 73 A.L.R. 1395.

Enforceability by purchaser of business, of covenant of third person with his vendor not to engage in similar business, 4 A.L.R. 1078, 22 A.L.R. 754.

Eminent domain, wife or widow as necessary party to proceeding to condemn her husband's real property, 5 A.L.R. 1347, 101 A.L.R. 697.

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Right of next friend to compensation for services rendered to infant in the litigation, 9 A.L.R. 1537.

Divorce or separation, enforcement by third person as beneficiary of contract between husband and wife to prevent or end, 11 A.L.R. 287.

Who may maintain action to recover back excessive freight charge, 13 A.L.R. 289.

Right of assignee of aggrieved party to maintain action to recover excessive freight charges, 13 A.L.R. 298.

Necessity of appointment of guardian ad litem for minor who is a party in an action for divorce or annulment of marriage, 17 A.L.R. 900.

Shares of corporate stock as within statute enabling assignee to maintain action in his own name, 23 A.L.R. 1322.

Mortgagee or other lienholder as entitled to maintain action against third person for damage to property, 37 A.L.R. 1120.

Individual creditor's right to enforce corporate officer's liability for incurring excessive debts, 43 A.L.R. 1147.

Who may maintain action to recover multiple damages against tenant committing waste, 45 A.L.R. 774.

Right of third person to maintain action at law on sealed instrument, 47 A.L.R. 5, 170 A.L.R. 1299.

Right of one giving trust receipt to maintain action for purchase price against one to whom he sells, 49 A.L.R. 314, 87 A.L.R. 302, 101 A.L.R. 453, 168 A.L.R. 359.

Proper name in which to sue branch banks, 50 A.L.R. 1355, 136 A.L.R. 471.

Suit to recover dividends wrongfully paid, or to enforce liability of directors for wrongfully declaring them, 55 A.L.R. 8, 76 A.L.R. 885, 109 A.L.R. 1381.

Action on behalf of creditors to recover corporate dividends wrongfully paid, 55 A.L.R. 120, 76 A.L.R. 885, 109 A.L.R. 1381.

Suit to compel payment of dividends, 55 A.L.R. 140, 76 A.L.R. 885, 109 A.L.R. 1381.

Power of municipality to transfer or assign its right to enforce assessment or lien for local improvements, 55 A.L.R. 667.

Right of owner to sue on fire or marine policy taken out by bailee, warehouseman or carrier, 61 A.L.R. 720.

Who may enforce subscription to stock in corporation to be formed, 61 A.L.R. 1504.

Right of trustees to maintain suit to administer or enforce charitable trust, 62 A.L.R. 901, 124 A.L.R. 1237.

Duty of one learning of action instituted in his name without authority, 63 A.L.R. 1068.

Bondholder's right to maintain action against trustee for money received by trustee to discharge bond or coupon, 64 A.L.R. 1186.

Rendition of judgment against one not a formal party, who has assumed the defense, 65 A.L.R. 1134.

Reassembling jury after discharge, for purpose of amendment of verdict as to parties, 66 A.L.R. 549.

Right of bondholders to maintain action to prevent use by another corporation of corporate name, 66 A.L.R. 1030, 72 A.L.R.3d 8.

Parties in action for breach of contract as to devise or bequest of property as compensation for services, 69 A.L.R. 104, 106 A.L.R. 742.

Availability in action by third person for damages against public contractor, of provisions in contract as to care to be exercised or precautions to be taken for protection of third persons, 69 A.L.R. 522.

Right of undisclosed principal to recover against telegraph company because of delay or mistake, 72 A.L.R. 1198.

Who may recover indemnity granted by omnibus coverage clause in automobile liability insurance, 72 A.L.R. 1434, 106 A.L.R. 1251, 126 A.L.R. 544, 143 A.L.R. 1394.

Right of person furnishing material or labor to maintain action on contractor's bond to owner or public body, or on owner's bond to mortgagee, 77 A.L.R. 21, 118 A.L.R. 57.

Party plaintiff in action against partner, for profits earned subsequently to death or dissolution, 80 A.L.R. 12, 80 A.L.R. 92, 55 A.L.R.2d 1391.

Right of third person to enforce contract between others for his benefit, 81 A.L.R. 1271, 148 A.L.R. 359.

Inducing breach of contract, who may maintain action for, 84 A.L.R. 43, 84 A.L.R. 92, 26 A.L.R.2d 1227, 96 A.L.R.3d 1294, 44 A.L.R.4th 1078.

Corporation paying tax wrongfully exacted on shares of its stock as proper party to maintain action for its recovery, 84 A.L.R. 107.

Parties plaintiff in action against indemnity or liability insurer, by injured person, under statutory or policy provisions, 85 A.L.R. 20, 106 A.L.R. 516.

Who may petition for declaratory judgment, 87 A.L.R. 1243.

Taxpayer's right of action for sale of bonds of municipality at less than par, in violation of statute, 91 A.L.R. 7, 162 A.L.R. 396.

Proper party plaintiff in actions by reciprocal insurance association, or on behalf of it, 94 A.L.R. 851, 141 A.L.R. 765, 145 A.L.R. 1121.

Right of individual employee to sue for breach of collective labor agreement, 95 A.L.R. 41.

Who may enforce collective labor agreements, 95 A.L.R. 51.

Proper party defendant in action for refusal of depository to deliver instrument or property placed in escrow, notwithstanding performance of conditions of delivery, 95 A.L.R. 298.

Proper party plaintiff to action against tort-feasor for damages to insured property where insurer is entitled to subrogation to extent of loss paid by it, 96 A.L.R. 864, 157 A.L.R. 1242.

Who may bring action to purge registration lists, 96 A.L.R. 1047.

Right of creditors or stockholders of insolvent bank in charge of liquidating officer who refuses or fails to enforce liability of third persons to bank, to maintain action for that purpose, and conditions of such right, 97 A.L.R. 169, 116 A.L.R. 783.

Water user as necessary or proper party to litigation involving right of ditch or canal company or irrigation of drainage district from which he takes water, 100 A.L.R. 561.

Ward's right, after majority, to maintain action on contracts entered into by guardian on ward's behalf, 102 A.L.R. 269.

Insurance - right of third person to sue upon promise made by beneficiary to insured to pay proceeds to third person, 102 A.L.R. 594.

Removal of disability, statute providing that an insane person, minor or other person under disability may bring suit within specified time after removal of disability as affecting right to bring action before disability removed, 109 A.L.R. 954.

Heir or next of kin, standing to attack gift or conveyance made by ancestor in his lifetime, as affected by will by which he is disinherited in whole or part, 112 A.L.R. 1405.

Violation of statute relating to bucket-shops or bucket-shop transactions, as ground of action by customer or patron, 113 A.L.R. 853.

Who may maintain action against bank directors or officers for civil liability for damages resulting from false reports or statements, 114 A.L.R. 478.

Holders of mortgage or other lien upon an undivided interest in real property as a necessary or proper party to a suit for partition, 126 A.L.R. 414.

Unauthorized prosecution of suit in name of another as ground of action in tort, 146 A.L.R. 1125.

Right of vendee under executory contract to bring action against third person for damage to land, 151 A.L.R. 938.

Right of creditors to maintain action in interest of decedent's estate, 158 A.L.R. 729.

Massachusetts or business trust, 159 A.L.R. 219.

Necessary and proper parties in action growing out of delay in performance of timber contract, 164 A.L.R. 461.

Mortgage or lienholder as proper or necessary party to suit in respect of contract for sale of mortgaged property, 164 A.L.R. 1044.

Who may enforce insurance policy containing facility of payment clause, 166 A.L.R. 28.

Who may assert right of privacy, 168 A.L.R. 454, 11 A.L.R.3d 1296, 57 A.L.R.3d 16.

Parties to action to enforce contract for joint, mutual or reciprocal wills, 169 A.L.R. 53.

Dissolved corporation as indispensable party to stockholder's derivative action, 172 A.L.R. 691.

Validity, construction and application of restrictions on right of action by individual holder of series of corporate bonds or other obligations, 174 A.L.R. 435.

Representation of several claimants in action against carrier of public utility to recover overcharges, 1 A.L.R.2d 160.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 56 A.L.R.3d 1109, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Who may complain of underassessment or nonassessment of property for taxation, 5 A.L.R.2d 576, 9 A.L.R.4th 428.

Change in party after statute of limitations has run, 8 A.L.R.2d 6, 119 A.L.R. 1356.

Trust beneficiaries as necessary parties to action relating to trust or its property, 9 A.L.R.2d 10.

Right of third person not named in bond or other contract conditioned for support of, or services to, another, to recover thereon, 11 A.L.R.2d 1010.

Validity and enforceability of contract in consideration of naming child, 21 A.L.R.2d 1061.

Right of owner's employee injured by subcontractor to recovery against general contractor for breach of contract between the latter and the owner requiring contractor and subcontractors to carry insurance, 22 A.L.R.2d 647.

Necessary parties defendant to action to set aside conveyance in fraud of creditors, 24 A.L.R.2d 395.

Necessary parties defendant to suit to prevent or remove obstruction or interference with easement of way, 28 A.L.R.2d 409.

Who may enforce guaranty, 41 A.L.R.2d 1213.

Conflict of laws as to proper party plaintiff in contract action, 62 A.L.R.2d 486.

Amendment of pleadings with respect to parties or their capacity as ground for continuance, 67 A.L.R.2d 477.

Conditional vendor's or vendee's recovery against third person for damage to or destruction of property, 67 A.L.R.2d 582.

Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name, 71 A.L.R.2d 1247.

Guardian's capacity to sue or be sued outside state where appointed, 94 A.L.R.2d 162.

Proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where insured has paid part of loss, 13 A.L.R.3d 140.

Proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where loss is entirely covered by insurance, 13 A.L.R.3d 229.

Illegitimate child's right to enforce promise to support or provide for him, 20 A.L.R.3d 500.

Child's right of action against third person who causes parent to desert, or otherwise neglect his parental duty, 60 A.L.R.3d 924.

Right to private action under State Consumer Protection Act, 62 A.L.R.3d 169.

Bailor's right of direct action against bailee's theft insurer for loss of bailed property, 64 A.L.R.3d 1207.

Proper party plaintiff in action for injury to common areas of condominium development, 69 A.L.R.3d 1148.

Necessary or proper parties to suit or proceeding to establish private boundary line, 73 A.L.R.3d 948.

Right in absence of express statutory authorization, of one convicted of crime and imprisoned or paroled, to prosecute civil action, 74 A.L.R.3d 680.

Defamation of class or group as actionable by individual member, 52 A.L.R.4th 618.

Sexual child abuser's civil liability to child's parent, 54 A.L.R.4th 93.

Parent's right to recover for loss of consortium in connection with injury to child, 54 A.L.R.4th 112.

Right of putative father to visitation with child born out of wedlock, 58 A.L.R.5th 669.

What is "cause" justifying discharge from employment of returning serviceman reemployed under § 9 of the Military Selective Service Act of 1967 (50 U.S.C. Appendix § 459), 9 A.L.R. Fed. 225.

43 C.J.S. Infants §§ 223 to 225; 57 C.J.S. Mental Health § 254 et seq.; 67A C.J.S. Parties §§ 8 to 32, 41, 42, 88 to 111.

II. REAL PARTY IN INTEREST.

Effect of enumeration. — Enumeration in Subdivision (a) (see now Paragraph A) does not qualify but merely supplements the statement that the action shall be brought in the name of the real party in interest, and thus also makes those persons enumerated real parties in interest within the meaning of this rule. *Iriart v. Johnson*, 1965-NMSC-147, 75 N.M. 745, 411 P.2d 226.

Rules construed together. — This rule must be read with Rules 18(a), 19(a) and 23(b) (*see now* Rules 1-018, 1-019, and 1-023.1 NMRA). *Prager v. Prager*, 1969-NMSC-149, 80 N.M. 773, 461 P.2d 906.

New Mexico makes no distinction between necessary and indispensable parties; if a person's interests are necessarily affected by a judgment, such person is an indispensable party. *State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co.*, 1967-NMSC-197, 78 N.M. 359, 431 P.2d 737; *see also Sellman v. Haddock*, 1957-NMSC-037, 62 N.M. 391, 310 P.2d 1045.

Test for real party in interest. — Whether one is the real party in interest is to be determined by whether one is the owner of the right being enforced or is in a position to discharge the defendant from the liability being asserted in the suit. *State v. Barker*, 1947-NMSC-010, 51 N.M. 51, 178 P.2d 401; *Sellman v. Haddock*, 1957-NMSC-037, 62 N.M. 391, 310 P.2d 1045; *United States v. Bureau of Revenue*, 1961-NMSC-126, 69 N.M. 101, 364 P.2d 356; *Sturgeon v. Clark*, 1961-NMSC-125, 69 N.M. 132, 364 P.2d 757; *Hall v. Teal*, 1967-NMSC-111, 77 N.M. 780, 427 P.2d 662; *State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co.*, 1967-NMSC-197, 78 N.M. 359, 431 P.2d 737; *Jesko v. Stauffer Chem. Co.*, 1976-NMCA-117, 89 N.M. 786, 558 P.2d 55; *Edwards v. Mesch*, 1988-NMSC-085, 107 N.M. 704, 763 P.2d 1169; *Moody v. Stribling*, 1999-NMCA-094, 127 N.M. 630, 985 P.2d 1210, cert. denied, 127 N.M. 389, 981 P.2d 1207.

A real party in interest is determined by whether one is the owner of the right being enforced and is in a position to discharge the defendant from the liability being asserted in the suit. *L.R. Property Mgt., Inc. v. Grebe*, 1981-NMSC-035, 96 N.M. 22, 627 P.2d 864; *Mackey v. Burke*, 1984-NMCA-028, 102 N.M. 294, 694 P.2d 1359, *overruled on other grounds by Chavez v. Regents of Univ. of N.M.*, 1985-NMSC-114, 103 N.M. 606, 711 P.2d 883.

Invasion of private right prerequisite to suit. — There must be an invasion of some private right of the complaining party before he has standing to sue. *State ex rel. Overton v. New Mexico State Tax Comm'n*, 1969-NMSC-140, 81 N.M. 28, 462 P.2d 613.

Standing to challenge constitutionality of statute. — Public officer as such does not have such interest as would entitle him to question constitutionality of a statute so as to refuse to comply with its provisions; only a person whose rights have been adversely affected has right to attack constitutionality of an act of the legislature. *State ex rel. Overton v. New Mexico State Tax Comm'n*, 1969-NMSC-140, 81 N.M. 28, 462 P.2d 613.

Protection of property rights. — One possessing general property rights in a chattel or chose may qualify as a real party in interest in a suit or action essential to the protection of such rights, even if another likewise may qualify as a real party in interest in a suit or action relating to the same chattel or chose, if essential to the protection of a special property right therein. *Turner v. New Brunswick Fire Ins. Co.*, 1941-NMSC-014, 45 N.M. 126, 112 P.2d 511.

Organization possessing property for the benefit of others had standing. — Where Los Vigiles sought to establish an access easement to its property through defendants' property; Los Vigiles was not a land grant and failed to produce evidence linking Los Vigiles to a chain of title to the property; in 1951, the trustees of the Las Vegas Land Grant conveyed parcels of the land grant to a justice of the peace in trust as community property for specific uses by individuals residing within designated precincts; the office of the justice of peace was abolished by statute in 1966 and the precincts mentioned in the deed were defunct; Los Vigiles claimed that it succeeded the justice of the peace as the legal entity holding the property in trust; and Los Vigiles' evidence showed that it paid ad valoreum taxes on the property, had sixty members, had rules defining persons who could be members, and required members to pay membership fees, Los Vigiles had standing because it was reasonable to presume that Los Vigiles was a lawful successor of the original grantee of the property to hold the property for the benefit of the persons described in the 1951 deed. *Los Vigiles Land Grant v. Rebar Haygood Ranch, L.L.C.*, 2014-NMCA-017.

Party omitted by mistake. — The relation-back provision of Paragraph A applies to admit a new plaintiff when the failure to include such party as an original plaintiff was an honest mistake. *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, 127 N.M. 603, 985 P.2d 1183, cert. denied, 127 N.M. 391, 981 P.2d 1209.

Substitution of child as real party in interest. — Where it was held that human services department was without

standing to maintain action on behalf of twenty-year-old child, child could be substituted as real party in interest with no effect on his substantive rights, if, on remand, it was determined that the department's error was an honest mistake. *State ex rel. Salazar v. Roybal*, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167.

One who is not party to contract cannot maintain a suit upon it. *L.R. Property Mgt., Inc. v. Grebe*, 1981-NMSC-035, 96 N.M. 22, 627 P.2d 864.

Suit by payee of notes. — Where payee of promissory notes is in possession, he is entitled to sue thereon in his own name as a real party in interest, irrespective of ownership. *Spears v. Sutherland*, 1933-NMSC-042, 37 N.M. 356, 23 P.2d 622.

Suit on separate notes. — In suit on one of two separate promissory notes given by two persons in exchange for joint interest in oil and gas lease, maker of other note was neither a necessary nor a proper party to the action. *Good v. Harris*, 1966-NMSC-249, 77 N.M. 178, 420 P.2d 767.

Payee of draft. — One who holds a draft made payable to himself may maintain an action thereon in his own name, against the acceptor of such draft, even if he has no beneficial interest in the proceeds. *Merchants' Nat'l Bank v. Otero*, 1918-NMSC-080, 24 N.M. 598, 175 P. 781; *Eagle Mining & Imp. Co. v. Lund*, 1908-NMSC-014, 14 N.M. 417, 94 P. 949.

"Interested person" in decedent's estate. — If one has a property right in the estate of a decedent, he is an "interested person" under 45-1-201(A)(19) NMSA 1978; and if he qualifies as such, he also would constitute an owner of a right being enforced under the first prong of this rule. *Rienhardt v. Kelly*, 1996-NMCA-050, 121 N.M. 694, 917 P.2d 963.

Tenant and not creditors as party in interest. — In suit by tenant and his creditors against landlord for sums expended on behalf of landlord by tenant in repair of premises, tenant was real party in interest, even though he assigned his rights to proceeds to creditors. *Hall v. Teal*, 1967-NMSC-111, 77 N.M. 780, 427 P.2d 662.

Action by assignor. — Assignment for security leaves assignor the equitable and beneficial owner of the chose assigned, and he could maintain an action in his own name as the real party in interest under § 105-103, C.S. 1929. *Turner v. New Brunswick Fire Ins. Co.*, 1941-NMSC-014, 45 N.M. 126, 112 P.2d 511.

Assignee holding claim to account. — Assignee of an account who is the real and legal holder of the claim is real party in interest. *Prior v. Rio Grande Irrigation & Colonization Co.*, 1901-NMSC-005, 10 N.M. 711, 65 P. 171.

Equitable assignee. — Equitable assignee of a chose in action may bring an action in his own name to enforce his rights. *Barnett v. Wedgewood*, 1922-NMSC-068, 28 N.M. 312, 211 P. 601.

Party assigning interests after commencement. — Although Paragraph A of this rule controls where an interest has been transferred prior to commencement of an action, Rule 1-025(C) NMRA becomes the applicable provision where a party commences the action but subsequently transfers its interests by assignment. *Daniels Ins., Inc. v. Daon Corp.*, 1987-NMCA-110, 106 N.M. 328, 742 P.2d 540.

Assignment of interest before entry of judgment. — If a successful litigant assigned his interest after trial and announcement of decision, but before entry of judgment, judgment could be entered in name of litigant of record, and assignees did not need to be substituted as parties. *Dietz v. Hughes*, 1935-NMSC-055, 39 N.M. 349, 47 P.2d 417.

Right of insured to sue on policy. — After property of insured was burned and he assigned to his creditors as security for debts separate amounts of face of policy from money due or to become due from insurer, with power in assignees to collect amount assigned from insurer, insured alone had right to maintain a single action to recover full amount of policy, where such policy remained with him. *Turner v. New Brunswick Fire Ins. Co.*, 1941-NMSC-014, 45 N.M. 126, 112 P.2d 511.

Beneficiary of an insurance policy is the real party in interest, and a suit may be brought in his name against the sureties on an administrator's bond, to recover proceeds collected on policy. *Conway v. Carter*, 1902-NMSC-016, 11 N.M. 419, 68 P. 941.

Insured and insurer as necessary parties. — Where cause of action was based upon the alleged negligence on the part of defendant resulting in damage to the plaintiff's automobile, and plaintiff assigned an interest in the recovery of damages to the insurer, both plaintiff and the insurer were necessary parties to any action prosecuted for recovery on account of damage done to the plaintiff's automobile. *Sellman v. Haddock*, 1957-NMSC-037, 62 N.M. 391, 310 P.2d 1045; *Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp.*, 1963-NMSC-094, 72 N.M. 163, 381 P.2d 675.

Insurer necessary party plaintiff. — Insurer that has paid its insured for a loss, in whole or in part, is a necessary and indispensable party to an action to recover the amounts paid from a third party allegedly responsible therefor. *Torres v. Gamble*, 1966-NMSC-024, 75 N.M. 741, 410 P.2d 959.

Insurer real party in interest. — Where plaintiff insurance company paid entire loss for accident caused by person driving the insured's car with insured's permission after defendant (driver's insurer) denied coverage, and then sought reimbursement from defendant, plaintiff, with equitable subrogation rights, was a real party in interest; neither insured nor driver was. *State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co.*, 1967-NMSC-197, 78 N.M. 359, 431 P.2d 737.

Where plaintiff insurer indemnified and paid liquor wholesaler in full settlement and satisfaction of all liability under

bond on behalf of defendant, wholesaler was not indispensable party to litigation, since he had no interest which could be affected by judgment between parties; plaintiff, owner of right sought to be enforced, was real party in interest. *American Gen. Cos. v. Jaramillo*, 1975-NMCA-092, 88 N.M. 182, 538 P.2d 1204.

Joinder not to be disclosed to jury. — When subrogated insurers are required by this rule to be joined as parties and the case is to be tried before a jury, the fact of the insurer's joinder is not to be disclosed to the jury; if it is the insured who has been joined, the requirement shall be the same. *Safeco Ins. Co. of Am. v. United States Fid. & Guar. Co.*, 1984-NMSC-045, 101 N.M. 148, 679 P.2d 816.

Partner without interest in suit. — Partner who disclaimed any interest in automobile damaged in collision and admitted ownership in plaintiff, was no longer a necessary party to suit because he had no interest in outcome of the litigation. *Sturgeon v. Clark*, 1961-NMSC-125, 69 N.M. 132, 364 P.2d 757.

Corporation's interest not shown. — This rule requires that every action must be prosecuted in the name of the real party in interest; therefore, judgment on basis of oral agreement to which individual was party, in favor of plaintiff-corporation, was error, as there was no evidence adduced to prove corporation's interest or enforceable right. *Family Farm & N. 10 Riding Acad., Inc. v. Cain*, 1974-NMSC-001, 85 N.M. 770, 517 P.2d 905.

Individual not entitled to compensation for damages to corporation. — Plaintiff, majority shareholder in close corporation, could not be given award of compensatory damages when it was based on losses sustained by corporation, a separate entity. *London v. Bruskas*, 1958-NMSC-020, 64 N.M. 73, 324 P.2d 424.

Business corporation was properly joined as a defendant in derivative action, although it was the real party in interest, where plaintiffs' verified complaint, alleging that defendants controlled corporation and were guilty of fraudulent acts, that a deadlock existed and that defendants had refused to act and a demand that they bring suit would be futile, complied with requirements of Rule 23(b) (see now Rule 1-023.1 NMRA). *Prager v. Prager*, 1969-NMSC-149, 80 N.M. 773, 461 P.2d 906.

Community property. — Under former community property laws, where property was listed in wife's name but was determined to be community property of husband and wife, husband, as head of the community, was the real party in interest and the proper party to bring the action. *Overton v. Benton*, 1955-NMSC-109, 60 N.M. 348, 291 P.2d 636.

Suit to compel reduction in land valuation. — Under former law, board of county commissioners was not the real party in interest in mandamus proceeding to compel tax assessor to place a reduced valuation on lands; landowners were the proper parties. *Board of Comm'rs v. Hubbell*, 1923-NMSC-060, 28 N.M. 634, 216 P.2d 496.

County assessor had no duty to protect taxpayers or veterans against wrongful discrimination, and was not a proper party to represent other persons in action brought by attorney general for assessor in order to question constitutionality of certain statute. *State ex rel. Overton v. New Mexico State Tax Comm'n*, 1969-NMSC-140, 81 N.M. 28, 462 P.2d 613.

Right of conservancy district to sue. — When vested water right of owners of artesian water conservancy district is in question, be it definition, modification or adjudication of such rights, district has not only standing, but duty to participate in litigation affecting those rights. *State ex rel. Reynolds v. Lewis*, 1973-NMSC-035, 84 N.M. 768, 508 P.2d 577.

Injunction by conservancy district. — Artesian conservancy district was proper party plaintiff for maintaining suit to enjoin use of water from an unlawfully drilled well, even though the district as such did not own lands or water rights appurtenant thereto. *Pecos Valley Artesian Conservancy Dist. v. Peters*, 1945-NMSC-029, 50 N.M. 165, 173 P.2d 490.

Personal representative in wrongful death statute is real party in interest. *Mackey v. Burke*, 1984-NMCA-028, 102 N.M. 294, 694 P.2d 1359, overruled on other grounds *Chavez v. Regents of Univ. of N.M.*, 1985-NMSC-114, 103 N.M. 606, 711 P.2d 883.

Although action not barred by parents' failure to secure appointment as personal representatives. — Although 41-2-3 NMSA 1978 requires that every wrongful death action shall be brought by the personal representatives, an action for malpractice and wrongful death brought under the Tort Claims Act by the natural parents of a deceased girl within the limitation period was not barred because the parents failed to secure court appointment as personal representatives within the two-year limitation period of 41-4-15 NMSA 1978, due to the operation of Rules 1-015 NMRA (relation back of amendments) and Paragraph A of this rule. *Chavez v. Regents of Univ. of N.M.*, 1985-NMSC-114, 103 N.M. 606, 711 P.2d 883.

Substitution of decedent as real party in interest. — While a dead person cannot obtain relief, an action filed naming a dead person can remain viable with an allowable substitution of the real party in interest to pursue the claim even after the applicable statute of limitations period has run. *Martinez v. Segovia*, 2003-NMCA-023, 133 N.M. 240, 62 P.3d 331.

Legal fund not counsel's client. — In these days of prepaid insurance plans for hospital, medical, dental, as well as legal and innumerable other services, it would be as ludicrous to say that a legal fund is the counsel's client as to pretend that an insurance company that pays one's medical bills is the doctor's patient. *Speer v. Cimosz*, 1982-NMCA-029, 97

N.M. 602, 642 P.2d 205.

Bankruptcy trustee as real party in interest. — Where plaintiff did not schedule its legal malpractice and breach of contract claims against defendant in its Chapter 11 bankruptcy petition, or bring them to the attention of the trustee or the court, the claims were unscheduled property that became property of the trustee; as such, trustee, and not plaintiff, was the "real party in interest" with standing under this rule. *Edwards v. Franchini*, 1998-NMCA-128, 125 N.M. 734, 965 P.2d 318, cert. denied, 126 N.M. 107, 967 P.2d 447, and cert. denied, 526 U.S. 1124, 119 S. Ct. 1780, 143 L. Ed. 2d 808 (1999).

State not necessary party. — In action against former labor commissioner to prevent enforcement of allegedly illegal order by him in his official capacity, state was not a necessary party. *City of Albuquerque v. Burrell*, 1958-NMSC-070, 64 N.M. 204, 326 P.2d 1088.

Recovery on bond after election recount. — Where bond had been given in an election contest to obtain recount of votes, after insufficient error was shown to change result, the state was mere nominal obligee of the bond and not the real party in interest in action to recover mileage and fees due sheriff and election officials after recount. *State v. Barker*, 1947-NMSC-010, 51 N.M. 51, 178 P.2d 401.

Territory as trustee for university. — As the territory, in action to obtain title to land in private ownership for the use and benefit of the university, thereby created an express trust, it could maintain suit as trustee, without joining the board of regents of the university. *Territory v. Crary*, 1909-NMSC-024, 15 N.M. 213, 103 P. 986.

United States proper party to declaratory judgment suit. — Where United States advanced amount of former emergency school tax assessed, to corporation furnishing services and materials to it, which tax was paid by corporation under protest, United States had a financial interest and was proper party to seek a declaratory judgment that neither it nor corporation were subject to such tax. *United States v. Bureau of Revenue*, 1961-NMSC-126, 69 N.M. 101, 364 P.2d 356.

Trover brought by United States. — Action of trover by United States for cutting and appropriating trees from public lands would fail where such lands were not public, for plaintiff would not be real party in interest. *United States v. Saucier*, 1891-NMSC-008, 5 N.M. 569, 25 P. 791.

Time for raising absence of indispensable party. — Objection that an indispensable party was absent from the case may be made, if not before, in the supreme court. *Sellman v. Haddock*, 1957-NMSC-037, 62 N.M. 391, 310 P.2d 1045.

Lack of interest of one plaintiff not fatal. — Where there are two plaintiffs, and only one is the real party in interest, the entire action will not fail. *Hall v. Teal*, 1967-NMSC-111, 77 N.M. 780, 427 P.2d 662.

Motion to dismiss not abandoned. — Defendant did not abandon its motion to dismiss one of the plaintiffs as a party, on the basis that he had no financial interest in the litigation and was not a real party in interest, by taking an appeal before the trial court ruled on its motion, since issue was raised in its requested findings and conclusions; as issue was never decided by the trial court, the cause would be remanded. *Jesko v. Stauffer Chem. Co.*, 1976-NMCA-117, 89 N.M. 786, 558 P.2d 55.

III. CAPACITY TO SUE OR BE SUED.

As a general rule, spouses are permitted to sue each other for intentional torts. *Papatheofanis v. Allen*, 2010-NMCA-036, 148 N.M. 791, 242 P.3d 358, cert. granted, 2010-NMCERT-005, 148 N.M. 574, 240 P.3d 1048.

Claims for intentional torts between spouses. — Where, during the marriage of plaintiff and defendant, defendant induced plaintiff to convey a one-half interest in the family home, which was plaintiff's solely owned property, to defendant by representing to plaintiff that if plaintiff died, the parties' child would not have an interest in the home; defendant falsely commenced a domestic violence claim against plaintiff; defendant falsely reported to plaintiff's employer that plaintiff was misusing government property at plaintiff's workplace; without the knowledge or permission of plaintiff, defendant opened credit card accounts by forging plaintiff's name on application forms, leased a vehicle using plaintiff's information, and registered a patent in defendant's name using plaintiff's intellectual property; and defendant was an attorney and a mortgage loan officer, the jury verdict in plaintiff's action against defendant finding defendant liable for fraud, breach of fiduciary duty, malicious abuse of process, and defamation was supported by substantial evidence. *Papatheofanis v. Allen*, 2010-NMCA-036, 148 N.M. 791, 242 P.3d 358, cert. granted, 2010-NMCERT-005, 148 N.M. 574, 240 P.3d 1048.

Municipal corporation had capacity to seek injunction against former labor commissioner to prevent his insisting on city paying minimum wage rates promulgated by him under various construction contracts. *City of Albuquerque v. Burrell*, 1958-NMSC-070, 64 N.M. 204, 326 P.2d 1088.

Dissolved corporation subject to suit. — Defendant out-of-state corporation, although dissolved, was subject to suit and service of process. *Crawford v. Refiners Coop. Ass'n*, 1962-NMSC-131, 71 N.M. 1, 375 P.2d 212.

Absent a contractual or statutory provision, an insurance carrier cannot be sued directly and cannot be joined as a party defendant. *Chapman v. Farmers Ins. Group*, 1976-NMCA-128, 90 N.M. 18, 558 P.2d 1157, cert. denied, 90

N.M. 254, 561 P.2d 1347.

Unincorporated association. — Since an unincorporated association made up of veteran taxpayers was not a legal entity, its right to bring an action could only be permitted under Rule 23 (see now Rule 1-023 NMRA). *State ex rel. Overton v. New Mexico State Tax Comm'n*, 1969-NMSC-140, 81 N.M. 28, 462 P.2d 613.

Suit not maintainable. — Suit by Indian against another Indian for damages arising out of automobile collision in the pueblo in which they resided was not within jurisdiction of New Mexico court, where title to pueblo land was in the Indian tribe and had never been extinguished. *Valdez v. Johnson*, 1961-NMSC-089, 68 N.M. 476, 362 P.2d 1004.

IV. INFANTS OR INCOMPETENT PERSONS.

This rule permits parent to bring cause of action on behalf of minor child, but does not require it. *Jaramillo v. Heaton*, 2004-NMCA-123, 136 N.M. 498, 100 P.3d 204, cert. denied, 2004-NMCERT-010.

Subdivision (c) (see now Paragraph C) does not prevent minor from filing lawsuit; it merely provides alternatives. *Howie v. Stevens*, 1984-NMCA-052, 102 N.M. 300, 694 P.2d 1365.

The court has power, either inherent or express under Paragraph C, to appoint a guardian ad litem for a minor plaintiff, whether or not the child is "otherwise represented." When such an appointment is made, however, the duties of the guardian, since they are not defined by statute, will, if not specified by the court, remain unclear and may well vary from case to case. *Collins ex rel. Collins v. Tabet*, 1991-NMSC-013, 111 N.M. 391, 806 P.2d 40.

Attorney is required for infant not otherwise represented in an action, and it would be plain error for the court to proceed in the absence of counsel. *Wasson v. Wasson*, 1978-NMCA-092, 92 N.M. 162, 584 P.2d 713.

Protecting interests of principal in suit involving power of attorney. — Under circumstances wherein a party who has given a power of attorney is subsequently alleged to have become incompetent, and the agent under the power of attorney asserts legal claims which if successful will divest his principal of property, the trial court has a duty to inquire into the present status of the mental condition of the principal and, if necessary, appoint a guardian ad litem to protect and represent the present interests of the principal in the litigation. *Roybal v. Morris*, 1983-NMCA-101, 100 N.M. 305, 669 P.2d 1100.

Suit or defense on child's behalf not unauthorized law practice. — The provision of this rule allowing a child's representative to sue or defend on the child's behalf does not constitute an exception to the general prohibition against unauthorized practice of law. *Chisholm v. Rueckhaus*, 1997-NMCA-112, 124 N.M. 255, 948 P.2d 707, cert. denied, 124 N.M. 268, 949 P.2d 282.

Errors in guardian's appointment not jurisdictional. — In action brought to recover damages for personal injury sustained in collision, wherein husband of plaintiff was rendered incompetent, errors in plaintiff wife's appointment as his guardian did not go to jurisdiction of court, as the incompetent injured husband was the real party in interest; if attack on wife's right to sue as guardian of her husband had been made, court could have appointed next friend or guardian ad item to proceed with suit under Rule 17(c), Fed. R. Civ. P., which in all important respects is identical with this rule. *New Mexico Veterans' Serv. Comm'n v. United Van Lines*, 325 F.2d 548 (10th Cir. 1963).

Children's court's failure to appoint guardian not jurisdictional. — In a proceeding to terminate a minor mother's parental rights, failure of the children's court to appoint a guardian ad litem for the mother did not deprive the court of jurisdiction since the court appointed counsel to represent her pursuant to Paragraph C. *State ex rel. Children, Youth & Families Dep't v. Lilli L.*, 1996-NMCA-014, 121 N.M. 376, 911 P.2d 884.

Visitation challenged by child's parents. — When a petition for grandparent visitation is challenged by the child's parents, the trial court should consider whether it would be beneficial to appoint a guardian ad litem to represent the child in the face of conflicting family interests. *Lucero v. Hart*, 1995-NMCA-121, 120 N.M. 794, 907 P.2d 198.

Suit by minor against trustee not barred by laches. — Defense of laches is predicated upon the doctrine of estoppel, and a beneficiary of a trust who is under a legal incapacity such as infancy is not barred by laches from holding a trustee liable for a breach of trust so long as the incapacity continues. *Iriart v. Johnson*, 1965-NMSC-147, 75 N.M. 745, 411 P.2d 226.

Parent's standing to sue guardian on behalf of the child. — Parents may sue their child's guardian ad litem for injuries caused by the guardian to the child if the guardian acts as a private advocate or exceeds the scope of the guardian's appointment as an arm of the court. *Kimbrell v. Kimbrell*, 2013-NMCA-070, 306 P.3d 495, cert. granted, 2013-NMCERT-006.

Guardian ad litem liability for conspiracy. — Where, in a contentious divorce and child custody proceeding, plaintiff filed a tort action against defendant and the child's guardian ad litem alleging that they colluded to block telephone calls from the child to the child's siblings and plaintiff and defendant entered into a settlement agreement that released defendant from liability, although the action against defendant was moot, the action against the guardian was not moot because, as alleged conspirators, defendant and the guardian were jointly and severally liable. *Kimbrell v. Kimbrell*, 2013-NMCA-070, 306 P.3d 495, cert. granted, 2013-NMCERT-006.

Guardian ad litem exceeded scope of appointment. — Where, in a contentious divorce and child custody proceeding, plaintiff filed a tort action against the child's guardian ad litem alleging that the guardian published the child's medical records to the court, defendant and defendant's counsel; increased conflict between the parties by rejecting settlement offers; failed to correct defendant's behavior when defendant ignored the child; failed to report defendant's efforts to block contact between the child and the child's siblings; and colluded with defendant to block telephone calls from the child to the child's siblings, the guardian was immune from suit for all of the guardian's acts except for the alleged act of colluding with defendant to block the child's telephone calls, which would exceed the scope of the guardian's appointment. *Kimbrell v. Kimbrell*, 2013-NMCA-070, 306 P.3d 495, cert. granted, 2013-NMCERT-006.

Guardian immune from liability. — A guardian ad litem, appointed in connection with court approval of a settlement involving a minor, is absolutely immune from liability for his or her actions taken pursuant to the appointment, provided that the appointment contemplates investigation on behalf of the court into the fairness and reasonableness of the settlement in its effect on the minor. *Collins ex rel. Collins v. Tabet*, 1991-NMSC-013, 111 N.M. 391, 806 P.2d 40.

Guardian not entitled to quasi-judicial immunity. — An attorney who is privately retained as a guardian ad litem to advocate approval of a settlement in an action by the child to recover damages is not entitled to quasi-judicial immunity. *Collins ex rel. Collins v. Tabet*, 1991-NMSC-013, 111 N.M. 391, 806 P.2d 40.

Guardian not immune from liability. — If the appointment of a guardian ad litem does not contemplate actions on behalf of the court but instead representation of the minor as an advocate, or if the guardian departs from the scope of appointment as a functionary of the court and instead assumes the role of a private advocate for the child's position, then the guardian is not immune and may be held liable under ordinary principles of malpractice. *Collins ex rel. Collins v. Tabet*, 1991-NMSC-013, 111 N.M. 391, 806 P.2d 40.

1-105. Notice to statutory beneficiaries in wrongful death cases.

Statute text

A. **Scope.** This rule pertains to statutory beneficiaries of wrongful death estates as they are defined in Section 41-2-3 NMSA 1978 of the Wrongful Death Act, Sections 41-2-1 to -4 NMSA 1978.

B. **Required notice; timing.** Upon entry of an order appointing a personal representative under the Wrongful Death Act, the personal representative shall provide notice under Rule 1-004 NMRA to all known or reasonably ascertainable statutory beneficiaries of the information set forth in Paragraph C of this rule.

C. **Contents of notice.** The notice required by this rule shall contain the following information:

(1) the name of the personal representative of the estate and the name, address, telephone number, and email address of the personal representative's lawyer;

(2) a statement that the personal representative understands the legal requirement that the personal representative must act only in the best interests of all statutory beneficiaries of the decedent's estate;

(3) instruction to the statutory beneficiaries that they shall provide the personal representative or the personal representative's lawyer with current contact information so that they may be notified of matters in the pending action;

(4) a statement that all statutory beneficiaries will be timely notified of any and all trial settings, dismissals, settlements, and verdicts obtained on behalf of the decedent's estate;

(5) a statement that all statutory beneficiaries will be specifically advised of any proposed distribution of proceeds under the Wrongful Death Act prior to any distribution of the proceeds; and

(6) a statement that, prior to the distribution of any proceeds of a wrongful death estate, if any controversy exists or arises concerning distribution that requires a court hearing, all statutory beneficiaries will be notified of the hearing and will be entitled to attend.

D. **Subsequent notices.** Notifications provided to statutory beneficiaries after the initial notice required by Paragraph B shall comply with Rule 1-005 NMRA.

History

[Adopted by Supreme Court Order No. 17-8300-027, effective December 31, 2017.]

Annotations

Committee commentary. —

The Wrongful Death Act, NMSA 1978, §§ 41-2-1 to -4, creates statutory rights for the estate of a deceased person at civil law that are not governed by the Uniform Probate Code. The Court of Appeals has ruled that the personal representative referenced in Section 41-2-3 is distinguishable from the personal representative of the estate of the deceased as defined in the Probate Code. *See In re Estate of Sumler*, 2003-NMCA-030, ¶ 8, 133 N.M. 319, 62 P.3d 776 ("[I]t is improper to equate a personal representative under the Wrongful Death Act with a personal representative as defined by the Probate Code."). *See also* Rule 1-017(B) NMRA (providing that a wrongful death action may only be brought by a personal representative appointed by the district court for that purpose).

Notice to known and reasonably ascertainable statutory beneficiaries is to be made under Rule 1-004 NMRA. When the statutory beneficiaries are known to the personal representative, service shall be made in compliance with Paragraph F (Process; personal service upon an individual) or Paragraph I (Process; service upon minor, incompetent person, guardian, or fiduciary) if possible. When Rule 1-004(F) or (I) NMRA service cannot be made on a known statutory beneficiary, the personal representative shall petition the court under Rule 1-004(J) NMRA for an order providing an alternative method of service.

There may be occasions where a potential statutory beneficiary is not known to the personal representative but could be identified with reasonable effort. For example, the deceased may have no living spouse or living child but potentially may have living grandchildren who would be statutory beneficiaries, *see* NMSA 1978, Section 41-2-3(C), but whose existence or identity are not known to the personal representative. The personal representative must make reasonable efforts to learn of the existence and identity of such grandchildren, and those whose identity are learned must be given notice under Rule 1-004(F), (I), or (J) NMRA.

In rare cases, there may be statutory beneficiaries who are not known to the personal representative and whose identities are not reasonably ascertainable. Paragraph B of this rule does not compel the personal representative to provide some form of notice to such beneficiaries. *Compare* NMSA 1978, Section 45-1-401(A)(3) (requiring publication notice of hearings to persons having an interest in any hearing whose "address or identity . . . is not known and cannot be ascertained with reasonable diligence"). The mere theoretical possibility that such beneficiaries might exist does not justify the burden and cost of imposing a mandatory publication notice requirement on the personal representative. If the personal representative concludes that such beneficiaries might exist, the personal representative may petition the court under Rule 1-004(J) NMRA to fashion a form of notice, such as publication, to provide them with notice.

Rule 1-105(C)(3) NMRA requires statutory beneficiaries to keep the personal representative apprised of current contact

information. Non-compliance may result in the failure of the statutory beneficiary to receive notice of the information set forth in Paragraphs (C)(4), (C)(5), and (C)(6), but shall not constitute a waiver of rights granted by the Wrongful Death Act. *See* NMSA 1978, §§ 41-2-3, -4.

[Adopted by Supreme Court Order No. 17-8300-027, effective December 31, 2017.]

SETTLE AND SUE AGAIN: STRATEGIES AND SNARES

SPRING 2013 NATIONAL LEGAL MALPRACTICE CONFERENCE AMERICAN BAR ASSOCIATION

Panelists

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I. Categories of Claims

A. Openly disgruntled ex-clients or current clients regretting deals they've made

1. Settlement wasn't fair a/k/a buyer's remorse:

   Glenna v. Sullivan, 245 N.W.2d 869, 872 (Minn. 1976) (affirming a directed verdict in favor of the defendant attorney, and rejecting claim of legal malpractice, stating "[t]o allow a client who becomes dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded them more than the settlement is unprecedented."); *Muhammad v. Strasburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa. 1991) (barring as a matter of public policy legal malpractice claims by former clients who became dissatisfied with the amount obtained through a settlement agreement to which they agreed).

2. Emotionally charged cases – *e.g.*, divorce (suggestion: get out while you can; document conduct)

   Gere v. Louis, 209 N.J. 486 (N.J. 2012) (reversing the trial court's summary judgment in favor of the lawyers, and holding that the former client could sue her lawyers for malpractice related to her matrimonial settlement agreement); *but see Puder v. Buechel*, 874 A.2d 534 (N.J. 2005) (barring plaintiff from suing her former lawyer based on the plaintiff's acceptance of a second settlement agreement, which the plaintiff deemed "fair and reasonable," thereby effectively eliminating any damages associated with the prior lawyer's allegedly defective settlement agreement)

3. Overselling value and/or defenses: don't create unrealistic client expectations

B. Forced to settle because attorney incompetent or unprepared

Goff v. Justice, 120 S.W.3d 716, 723 (Ky. Ct. App. 2002) (holding that settlement by plaintiffs did not preclude a finding of damages in a legal malpractice action when their prior attorney's negligence had resulted in court orders limiting the presentation of expert testimony in a medical malpractice action); *Kirk v. Watts*, 62 S.W.3d 37, 44-45 (Ky. Ct. App. 2001) (holding that settlement by plaintiff did not preclude a finding of damages in a legal malpractice action when their prior attorney's negligence resulted in the lost opportunity for the client to maintain the case in her own name rather than by her trustee in bankruptcy); *Thomas v. Bethea*, 718 A.2d 1187, 1192 (Md. 1998) (a client who settles his claim upon recommendation of counsel is not necessarily precluded from filing a legal malpractice claim based on the attorney's negligent advice to settle); *Meyer v. Wagner*, 709 N.E.2d 784, 787 (Mass. 1991) (where a client establishes that his lawyer was negligent in advising about a settlement and the failure resulted in loss or damage to the client, the client is entitled to recover even if the settlement received judicial approval); *Collins v. Perrine*, 778 P.2d 912, 915 (N.M. Ct. App. 1989) (attorney committed malpractice by settling the case without conducting proper discovery; the jury determined that, absent the negligence, the settlement would have been greater or a larger jury verdict could have been obtained).

1. Complexity of litigation or issues

2. "Outnumbered" plaintiff v. defense counsel

3. Negative order issued by court

C. Client claims he did not understand or did not agree with what was happening

1. Difficult clients

2. Overbearing mediator or coercive lawyer

   Boone v. Bender, 74 A.D.3d 1111 (N.Y. App. Div. 2010) (rejecting former client's malpractice action against her divorce lawyers based on allegations that the lawyers compromise their level of advocacy and coerced her into a settlement based on the client's open-court stipulation regarding her satisfaction with the settlement and the lawyer's representation).

3. Acceleration of discussions – "It all happened so fast...."

4. Lack of communication – "I didn't understand what was happening...."

   McKay v. Owens, 937 P.2d 1222, 1228-29 (Idaho 1997) (client was precluded from pursuing a legal malpractice action based on lawyer's alleged settlement of her case without her consent, because she voluntarily

accepted a settlement in the underlying case with knowledge of the alleged malpractice).

D. Post-Mediation Events the Client Did Not See Coming

1. Taxability of recovery

2. Enforcement and/or collection process under settlement agreement

3. Attorneys' fees charged to client

4. Release language – Either too much or not enough

5. Trial resulted in less than what was offered in earlier settlement discussions. Client blames lawyer for failing to predict negative outcome of trial.

Leder v. Spiegel, 872 N.E.2d 1194 (N.Y. 2007) (rejecting client's legal malpractice claim, where client alleged that the attorney's failure to anticipate the court's negative evidentiary rulings at trial led the client to reject a pre-trial settlement offer).

E. Lawyer becomes a target

1. Lawyer-client relationship breaks down, and a new lawyer takes over, who is critical of former lawyer's performance, resulting in a legal malpractice claim against the former lawyer.

2. When a transactional lawyer's work results in litigation (for example, probate lawyer drafts a will that is later involved in litigation), clients often settle litigation, and sue the lawyer for damages allegedly caused by the lawyer's work.

II. How to Avoid or Minimize Potential for Settle and Sue Claim

A. Prepare your client for mediation or other settlement negotiations.

1. Explain the process in writing. *See* **Exhibit B,** Form Pre-Mediation Letter.

2. Explain the pros and cons of the case as it stands, preferably in writing, so the client has a clear understanding of the case.

3. Meet with the client well in advance of the mediation, face-to-face if possible, and send a follow-up letter detailing key portions of the conversation.

4. Make sure you understand your client's goals and expectations for mediation and settlement.

5. Review with the client a standard release document before the mediation, and give the client the opportunity to ask questions.

6. Provide a resume of the mediator's qualifications, your experience with him or her, and why you believe this mediator is the right choice. If possible, get the client's approval of the mediator.

7. *See* **Exhibit C** for Top Ten Ways to Avoid Settle-and-Sue Cases.

B. Prepare the case for mediation or settlement:

1. Written exchange of mediation materials

   a. Last-minute or hurried mediations seem to invite post-settlement claims.

   b. Verbal only presentations

   c. If you got it – show it

   d. If the other side has it – know it

2. Know what your client's settlement range is. Hurried decisions to accept an offer often lead to "buyer's remorse" or second-guessing.

3. Try to anticipate the unexpected.

4. Take steps to avoid post-mediation breakdown of proposed settlement. Understand what terms your client must have in a potential settlement agreement, and make sure those items are discussed with opposing party before leaving mediation.

5. Recognize your role: distinguish between legal advice and business advice.

C. Understand potential post-settlement pitfalls and surprises.

1. Is there a potential for taxable income or other tax consequences?

2. How and when will collection be accomplished, who will handle that?

3. Discuss fees and expenses, and how they will be handled.

4. If a structured settlement is possible, discuss the benefits and disadvantages of a structured settlement.

III. What To Do When Problems Arise?

A. Document events before and during mediation so you can avoid allegations that "I told you I thought I was getting screwed" or "You said this is the best I could do."

B. Immediately notify your insurance carrier regarding any mistakes or problems. The carrier may be able to engage in "claim repair" to help avoid an undesirable settlement and an unhappy client.

C. Let new counsel take over.

Filbin v. Fitzgerald, 211 Cal. App. 4th 154 (Cal. 2012) (after hiring new counsel and settling their case, the clients sued their former attorney, claiming that the settlement was insufficient; claim was rejected by the court, which noted that the decision to settle was made with new counsel, without any input from the defendant attorney).

D. Have the client get independent advice from another lawyer, consider using special settlement counsel.

IV. Strategies for Defending a Settle-and-Sue Lawsuit

A. Know the law governing your jurisdiction.

Jurisdictions vary regarding whether, and under what circumstances, a client can pursue a malpractice claim after a settlement. In general, settlements that were proximately caused by a lawyer's negligence typically will not bar a subsequent legal malpractice claim. In contrast, a client's unhappiness with a settlement, with no link to any wrongful acts or omissions by the lawyer, can preclude a legal malpractice claim based on that settlement. *See* **Exhibit A,** State Law Survey on Effect of Settlement on Legal Malpractice Claim.

B. Does Rule of Evidence 408 bar the admission of a settlement agreement in a legal malpractice action?

In some jurisdictions, a settlement from a prior action cannot be used to establish legal malpractice. *See, e.g., McDevitt v. Guenter*, 522 F. Supp. 2d 1272, 1286 (D. Haw. 2007) (after discussing the law in other jurisdictions, holding that Rule 408 bars the admission of and reliance upon the legal malpractice plaintiff's divorce settlement to calculate damages in a legal malpractice action against his lawyer)

C. Settle-and-Sue cases often turned on the causation analysis.

1. Litigation Malpractice: malpractice plaintiffs must prove either (1) that a better result could have been attained through trial, applying the standard case-within-a-case analysis; or (2) that a better settlement could have been negotiated and collected.

Young v. Gum, 649 S.E.2d 469, 473 (N.C. App. Ct. 2007) (citing *Rorrer v. Cooke*, 329 S.E.2d 355, 369 (N.C. 1985)) (case-within-a-case causation standard applies when a client alleges that an attorney's negligence caused the client to settle a claim to the client's detriment, and such a claim requires proof that the original claim was valid, that the claim would have resulted in a judgment in the client's favor in excess of the amount the client received in settlement and that the judgment would have been collectible).

Thomas v. Bethea, 718 A.2d 1187, 1192 (Md. 1998) (citing *Prande v. Bell,* 660 A.2d 1055 1065 (Md. Ct. Spe. App. 1995) (a legal malpractice plaintiff must specifically allege that "the attorney's recommendation in regard to the settlement was one that no reasonable attorney, having undertaken a reasonable investigation into the facts and law as would be appropriate under the circumstances, and with knowledge of the same facts, would have made."). This case contains a lengthy discussion of case law of other jurisdictions, as well as the evidence required to prove damages related to a claim for negligent recommendation of settlement.

2. Transactional Malpractice: Plaintiffs must prove they would have achieved a better outcome with another lawyer.

   a. Proximate Cause: Cause in fact + foreseeability. Don't lose sight of the cause-in-fact requirement. If the plaintiff's desired outcome never would have occurred for reasons unrelated to the lawyer's work, then even if the lawyer breached the standard of care, the malpractice claim should fail for lack of causation.

   b. Prove that the other party to the transaction or the settlement would have agreed to alternative offers.

      Thomas v. Bethea, 718 A.2d 1187, 1192 (Md. 1998) (acknowledging the difficulty of proving what alternative settlement could have been obtained from the former adversary, stating "[a]bsent some compelling circumstances, the settling adversary in the underlying case is not likely to admit that, had the lawyer held out, it would have offered substantially more in settlement that was, in fact, offered, and evidence from other persons, either as to settlement value or as to the actual prospect of a better settlement, has been regarded as speculative.").

      Harrison v. Taft, Stattinius & Hollister, LLP, 381 Fed. Appx. 432 (5th Cir. 2010) (affirming summary judgment in favor of law firm for alleged transactional malpractice because there was no evidence proving that the other party to the underlying transaction would have agreed to the additional terms the malpractice plaintiff claimed should have been included in the agreement).

3. Expert Testimony: can a plaintiff rely on expert testimony to fill the gaps in factual testimony?

Given the difficulty in proving either the case within a case or that a better settlement could have been achieved, some plaintiffs turn to expert testimony to fill gaps in factual testimony. As noted in *Thomas v. Bethea,* "evidence from other persons, either as to settlement value or as to the actual prospect of a better settlement, has been regarded as speculative." 718 A.2d 1187, 1192 (Md. 1998). Courts in other jurisdictions are reaching similar results. *See also Akin Gump Strauss Hauer & Feld, LLP v. Nat'l Dev. & Res. Corp.*, 299 S.W.3d 106, 112 (Tex. 2009)(stating in dicta that even if the underlying litigation settled, to show causation in negligence claim against lawyers, client must prove that if the underlying case were tried and the client had been represented by reasonably prudent attorneys, the judgment rendered would have been more favorable than the settlement obtained by the allegedly negligent lawyers); *Cooper v. Harris*, 329 S.W.3d 898, 902-04 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (holding that expert testimony supplied by the plaintiff was insufficient to create a fact question); *Taylor v. Alonso, Cersonsky & Garcia, P.C.*, ___ S.W.3d ___, No. 01-11-00078-CV, 2012 WL 3773041, *6-7 (Tex. App.—Houston [1st Dist.] August 30, 2012, no pet.) (holding that expert's testimony concerning the effect a defensive theory would have had in the underlying trial and its effect on the settlement value of the case was conclusory);

D. Judicial estoppel often bars a subsequent legal malpractice action.

1. A legal malpractice plaintiff's representations to the court in the underlying action may be sufficient to judicially estop a subsequent attack on the settlement of the underlying matter.

2. While this argument could apply in any case, it is often seen in malpractice cases arising out of divorce proceedings, because the settlement is often approved by the court after a hearing.

Vogel v. Touhey, 828 A.2d 268, 282-92 (Md. App. 2003) (containing lengthy discussion of the application of judicial estoppel in challenge to prior divorce settlement)

Viking Corp. v. Van Dyke, No. 290063, 2011 WL 1262143, at *2-4 (Mich. Ct. App. April 5, 2011) (settlement of the underlying patent case barred legal malpractice action where the client's participation in the negotiations and review of the settlement documents resulted in the application of an estoppel defense)

Exhibit A

SETTLE AND SUE AGAIN: STRATEGIES AND SNARES

SPRING 2013 NATIONAL LEGAL MALPRACTICE CONFERENCE AMERICAN BAR ASSOCIATION

Panelists

John DeGroote, John DeGroote Services, LLC
Cynthia Fitzgerald, Hanover Insurance Company
Carol Payne, Estes Okon Thorne & Carr PLLC

1. Settlement in general does not bar malpractice action:

California: *Thompson v. Halvonik*, 36 Cal. App. 4th 657, 663-64 (1995) (to prevail on a claim against former counsel for failing to obtain a particular outcome and settlement, a plaintiff must show that the former attorney committed an error or omission causing a settlement for less than the actual or fair value of the case); *Jalali v. Root*, 109 Cal App. 4th 1768, 1773-74 (2003) (plaintiff failed to prove that she would have recovered more from the underlying litigation absent her attorney's advice, which caused her to accept the settlement offer); *Marshak v. Balesteros*, 72 Cal. App. 4th 1514, 1518 (1999) (plaintiff failed to prove that his wife would have accepted a lower marital settlement or that a trial judge would have ordered a more favorable division of assets)

Colorado: *White v. Jungbauer*, 128 P.3d 263 (Colo. App. 2005) (rejecting *Muhammad v. Strasburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa. 1991), which barred as a matter of public policy legal malpractice claims against lawyers after the lawyer's client settles the underlying case)

Connecticut: *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 646 A.2d 195, 199 (Conn. 1994) (settlement of the underlying action does not automatically bar a claim for malpractice)

Georgia: *Freeman v. Pittman*, 469 S.E.2d 543, 545 (Ga. Ct. App. 1996) (the loss of a beneficial settlement position is a cognizable form of damages in a legal malpractice case)

Illinois: A plaintiff may still prove causation even if he settled the underlying case. *Webb v. Damisch*, 842 N.E.2d 140, 149 (Ill. App. Ct. 2005); *Glass v. Pitler*, 657 N.E.2d 1075, 1079-80 (Ill. App. Ct. 1995); *Brooks v. Brennan*, 625 N.E. 2d 1188, 1195 (Ill. App. Ct. 1994); *McCarthy v. Pedersen 7 Houpt*, 621 N.E.2d 97, 101 (Ill. App. Ct. 1993)

Iowa: Settlement of underlying action does not automatically bar malpractice claim. *Whitaker v. State*, 382 N.W.2d 112, 115-16 (Iowa 1986); *Benton v. Nelsen*, 502 N.W.2d 288, 291-92 (Iowa Ct. App. 1993)

Kentucky: A plaintiff's settlement of the underlying case does not automatically bar a subsequent lawsuit against the underlying attorney for legal malpractice. *E.g. Goff v.*

Justice, 120 S.W.3d 716, 723 (Ky. Ct. App. 2002) (holding that settlement by plaintiffs did not preclude a finding of damages in a legal malpractice action when their prior attorney's negligence had resulted in court orders limiting the presentation of expert testimony in a medical malpractice action); *Kirk v. Watts*, 62 S.W.3d 37, 44-45 (Ky. Ct. App. 2001) (holding that settlement by plaintiff did not preclude a finding of damages in a legal malpractice action when their prior attorney's negligence resulted in the lost opportunity for the client to maintain the case in her own name rather than by her trustee in bankruptcy); *Scott v. Koch*, Civil Action No. 5:07-373-JMH, 2008 WL 2977371, at *5 (E.D. Ky. Aug. 1, 2008) (applying Kentucky law) ("Voluntariness is the key factor, so it is only where an attorney's wrongful actions effectively 'force' a plaintiff to settle for an amount less than what the case was actually worth that [a legal malpractice] action may proceed.")

Maryland: *Thomas v. Bethea*, 718 A.2d 1187, 1192 (Md. 1998) (citing *Prande v. Bell*, 660 A.2d 1055 1065 (Md. Ct. Spe. App. 1995) (a legal malpractice plaintiff must specifically allege that "the attorney's recommendation in regard to the settlement was one that no reasonable attorney, having undertaken a reasonable investigation into the facts and law as would be appropriate under the circumstances, and with knowledge of the same facts, would have made.")

Massachusetts: *Meyer v. Wagner*, 709 N.E.2d 783, 787 (Mass. 1991) (where a client establishes that his lawyer was negligent in advising about a settlement and that the failure resulted in damage to the client, the client is entitled to recover even if the settlement received judicial approval)

Michigan: *Lowman v. Karp*, 476 N.W.2d 428, 430 (Mich. Ct. App. 1991); *Espinoza v. Thomas*, 472 N.W.2d 16, 23 (Mich. Ct. App. 1991) (finding that a mediation award did not necessarily bar plaintiff's malpractice claim); *Laetham Equipment Co. v. Currie Kendall, PLC*, No. 293116, 2011 WL 118802 (Mich. Court of Appeals January 13, 2011) (holding that a settlement agreement in the underlying litigation did not release legal malpractice claims against the lawyer representing a party to the settlement agreement based on the interpretation of the settlement agreement and release)

Minnesota: *First Bank of Minn. v. Olson*, 557 N.W.2d 621, 624 (Minn. Ct. App. 1997) (A client's settlement of a claim does not necessarily preclude that client from later arguing that its settlement was required by the attorney's negligence)

Nebraska: *McWhirt v. Heavey*, 550 N.W.2d 327 (Neb. 1996) (declining to adopt a rule precluding malpractice claims after settlement, which would insulate attorneys from liability in settled cases) (following *Grayson v. Wolfsey, Rosen & Kweskin*, 646 A.2d 195 (Conn. 1994)); *Wolski v. Wandel*, 746 N.W.2d 143 (Neb. 2008)

Nevada: *Malabon v. Garcia*, 898 P.2d 107, 109 (Nev. 1995) (entry of a settlement does not preclude a client from maintaining a legal malpractice action and the standard of proof to be applied is simple negligence, even if the client approved and consummated the settlement)

New Hampshire: *Witte v. Desmarais*, 614 A.2d 116, 121 (N.H. 1992) (citing 1 RONALD E. MALLEN & JEFFREY M. SMITH LEGAL MALPRACTICE § 16.3, at 894-95 (3d ed. 1989))

New Jersey: *Gere v. Louis*, 209 N.J. 486 (N.J. 2012) (reversing the trial court's summary judgment in favor of the lawyers, and holding that the former client could sue her lawyers for malpractice related to her matrimonial settlement agreement); *Guido v. Duane Morris, LLP*, 995 A.2d 844, 853 (N.J. 2010) (holding that "unless the malpractice plaintiff is to be equitably estopped from prosecuting his or her malpractice claim, the existence of a prior settlement is not a bar to the prosecution of a legal malpractice claim arising from such settlement."); *but see Puder v. Buechel*, 874 A.2d 534 (N.J. 2005) (barring plaintiff from suing her former lawyer based on the plaintiff's acceptance of a second settlement agreement, which the plaintiff deemed "fair and reasonable," thereby effectively eliminating any damages associated with the prior lawyer's allegedly defective settlement agreement)

New Mexico: *Collins v. Perrine*, 778 P.2d 912, 915 (N.M. Ct. App. 1989) (attorney committed malpractice by settling the case without conducting proper discovery; the jury determined that, absent the negligence, the settlement would have been greater or a larger jury verdict could have been obtained)

New York: *Skinner v. Stone, Raskin & Israel,* 724 F.2d 264, 265-66 (2d Cir. 1983) (settlement of underlying action does not preclude a malpractice action, where the attorney's neglect increased litigation expenses and compelled the client to settle on terms offered); *Katz v. Herzfeld & Rubin, P.C.*, 853 N.Y.S.2d 104, 105 (App. Div. 2d 2008) (a plaintiff who settled in underlying personal injury action was not prevented from asserting a legal malpractice claim alleging that the claim was worth more than was obtained through settlement)

North Carolina: *Young v. Gum*, 649 S.E.2d 469, 473 (N.C. App. Ct. 2007) (citing *Rorrer v. Cooke*, 329 S.E.2d 355, 369 (N.C. 1985)) (case-within-a-case causation standard applies when a client alleges that an attorney's negligence caused the client to settle a claim to the client's detriment, and such a claim requires proof that the original claim was valid, that the claim would have resulted in a judgment in the client's favor in excess of the amount the client received in settlement and that the judgment would have been collectible).

Ohio: Settlement of the underlying action does not always operate as a waiver of a malpractice claim. *Schneiderm, Smeltz, Ranney & Lanfond, P.L.L. v. Kedia*, 796 N.E.2d 553, 556 (Ohio Ct. App. 2003) (quoting *DePugh v. Sladoje*, 111 Ohio App. 3d 675, 686 (Ohio Ct. App. 1996)); *E.B.P., Inc. v. Cozza & Steuer*, 119 Ohio App. 3d 177, 182 (Ohio Ct. App. 1997)

Pennsylvania: *McMahon v. Shea,* 547 P.A. 124 (1997) (holding that a client could sue his lawyer for legal malpractice based on the lawyer's failure to properly advise the client as to the possible consequences of entering into a settlement agreement); *General*

Nutrition Corp. v. Gardere Wynne Sewell, LLP, No. 2:08-CV-831, 2008 WL 4411951 (W.D. Pa. Sept. 23, 2008) (distinguishing the *Muhammad* case, noting that the client clearly alleged that the client was forced to settle the case from a weak position due to the lawyer's negligence); *see also Muhammad v. Strasburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa. 1991) (barring as a matter of public policy legal malpractice claims by former clients who became dissatisfied with the amount obtained through a settlement agreement to which they agreed)

South Carolina: *Hall v. Fedor*, 561 S.E.2d 654, 657 (S.C. Ct. App. 2002) (the legal-malpractice plaintiff must prove that he "most probably" would have recovered a greater settlement but for the alleged malpractice)

Tennessee: *Parnell v. Ivy*, 158 S.W.3d 924, 925 (Tenn. Ct. App. 2004) (because the damages sought in a legal malpractice claim are separate from those sought in the underlying suit, a client's settlement in the underlying suit does not bar the client from bringing a legal malpractice claim against his former attorney)

Texas: *Heath v. Herron*, 732 S.W.2d 748, 750 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (when a client is unable to make an informed decision to settle with a full and clear understanding of the facts, issues and remedies essential to make an intelligent choice, then the settlement of a claim will not bar a later malpractice action); *Taylor v. Alonso, Cersonsky & Garcia PC*, ____ S.W.3d ___, 2012 WL 3773041 (Tex. App.—Houston [1st Dist.] August 30, 2012) (after settling a lawsuit, the client sued his former lawyers for malpractice and breached fiduciary duty)

Utah: *Crestwood Cove Apartments Bus. Trust v. Turner*, 164 P.3d 1247, 1254 (Utah 2007) (even where a client has settled the underlying case, courts and juries are capable of determining whether it was attorney malpractice or some other factor that caused the client's damages through traditional causation principles)

Virginia: A client's acceptance of settlement in a suit does not necessarily bar a subsequent legal malpractice claim against the attorney. *Hiss v. Friedberg*, 112 S.E.2d 871, 875 (Va. 1960); *Katzenerger v. Bryan*, 141 S.E.2d 671, 675-76 (Va. 1965); *Adelman v. Kernbach*, 55 Va. Cir. 439, 442 (Va. Cir. Ct. 2000).

West Virginia: *Sells v. Thomas*, 640 S.E.2d 199, 204 (W. Va. 2006) (an attorney may be liable for malpractice if the attorney settles the case without his client's consent, and the settlement denied the client the opportunity to present evidence of the claim's value to a jury for a fair adjudication of the case)

Wisconsin: A client can recover damages for legal malpractice where the client is forced to settle the underlying lawsuit, although Wisconsin courts will employ a "substantial factor" test to determine whether the former client's original reason for settlement was based on the attorney's alleged malpractice. *Estate of Campbell v. Chaney*, 485 N.W.2d 421, 425 (Wis. Ct. App. 1992) (citing *Pfeifer v. Standard Gateway Theater, Inc.*, 55 N.W.2d 29, 32-33 (Wis. 1952))

2. **Client Barred From Pursuing Legal Malpractice Claim If The Underlying Settlement Was Entered Voluntarily And Knowingly**

Idaho: *McKay v. Owens*, 937 P.2d 1222, 1228-29 (Idaho 1997) (client was precluded from pursuing a legal malpractice action based on lawyer's settlement of her case without her consent because she voluntarily accepted a settlement in the underlying case with knowledge of the all relevant facts, with knowledge of the purported malpractice)

Michigan: *Avolio v. Hogan*, No. 287684, 2009 WL 3757437, at *3-4 (Mich. Ct. App. Nov. 10 2009) (the settlement of the underlying litigation may bar a subsequent legal malpractice action if the client claims that he did not understand what was being released in the underlying case, but the language of the settlement agreement was clearly, unambiguously, and expansively worded); *Kauer v. Clark*, No. 175138, 1996 WL 33324098, at *2-3 (Mich. Ct. App. July 9, 1996) (settlement of prior case may bar legal malpractice action if the client chooses to settle the underlying case to avoid the risks and uncertainties of a trial); *Viking Corp. v. Van Dyke*, No. 290063, 2011 WL 1262143, at *2-4 *(Mich. Ct. App. April 5, 2011) (settlement of prior case may bar legal malpractice action if the client's participation in and review of the settlement documents resulted in the application of an estoppel defense)

Pennsylvania: *Muhammad v. Strasburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa. 1991) (barring as a matter of public policy legal malpractice claims by former clients who became dissatisfied with the amount obtained through a settlement agreement to which they agreed)

Minnesota: "To allow a client who becomes dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded them more than the settlement is unprecedented." *Glenna v. Sullivan*, 245 N.W.2d 869, 872 (Minn. 1976) (affirming a directed verdict in favor of the defendant attorney, and rejecting claim of legal malpractice)

New Jersey: New Jersey courts have recognized generally that, where the parties to litigation have reached a settlement, one "should not be permitted to settle a case for less than it is worth . . . and then seek to recoup the difference in a malpractice action against [the] attorney." *Puder v. Buechel*, 874 A.2d 534, 540 (N.J. 2005) (quoting Lerner *v. Laufer*, 819 A.2d 471, 482 (N.J. Super Ct. App. Div. 2003)).

EXHIBIT B

Dear Client:

Mediation is an opportunity for individuals with a dispute to meet and through the efforts of an independent mediator reach an agreed upon settlement of their disputes. Mediation often results in a settlement. However, any settlement is purely voluntary and the mediation process does not require you to settle.

You have authorized me to schedule a mediation of your lawsuit and all claims associated with that lawsuit. We have agreed to use _____ as a mediator. Our mediator is very experienced and will guide the discussions throughout the mediation process. *Tell your client about your mediator*

Insert: Give an explanation of the mediation process within your jurisdiction.

Samples: Prior to mediation each side will exchange written materials. These materials will be provided to the mediator for review prior to the mediation date. I will detail the strengths of our case, as will the defense. As we have discussed the mediator, during private discussions with each side, may voice an opinion on not only the strengths, but the weaknesses of each parties' case. The mediator however does not disclose any conversations he has with either side, unless that side authorizes him to reveal the discussion. The mediation will begin with opening statements, after which each party will be provided a conference room. We will have privacy for discussion and review of any offers or demands, as well as discussions with the mediator. The mediator will provide each side with the other parties demands and offers, we will engage in a series of counter offers and demands, until we reach a figure that all parties agree is reasonable. I will throughout the day provide you with my opinion as to any offers or demands made. You will ultimately have the final decision on a settlement.

Please remember that your interests are always first and foremost. Please remember the following: First, you do not have to settle your case at mediation, if you do not feel it is fair or reasonable, then you cannot be forced into a settlement. Second, you should ask me any and all questions you have about any offers that are made during the day. Third, if you want to call a friend or advisor during the course of the mediation, you may and should do so. Fourth, I will make recommendations to you in response to any offers made by the opposing party, you are always at liberty to accept or reject any offer made. Fifth, the mediator may express opinions about the liability issues, damages and/or offers made. We will discuss any comments made by the mediator that you want clarified or explained.

The goal of mediation is to reach a settlement that you understand and are willing to accept. Mediation is not intended to force you into a settlement and you should let me know immediately if you feel that you are being compelled into a settlement you do not understand or accept.

Our mediation is scheduled for _____ at the offices of _____. You should feel free to contact me prior to the mediation with any concerns or questions that you have. I look forward to seeing you on _____.

Yours truly,

Attorney

EXHIBIT C

SETTLE AND SUE AGAIN: STRATEGIES AND SNARES

Top 10 Ways to Avoid Settle-and-Sue Cases

SPRING 2013 NATIONAL LEGAL MALPRACTICE CONFERENCE AMERICAN BAR ASSOCIATION

Panelists

John DeGroote, John DeGroote Services, LLC
Cynthia Fitzgerald, Hanover Insurance Company
Carol Payne, Estes Okon Thorne & Carr PLLC

1. Understand and manage clients' expectations

2. Explain the process, orally and in writing, even with sophisticated clients.

3. Share background information and resources about the mediator's personality, style and approach, and know *before* the mediation whether the mediator has any special rules.

4. Explain the tripartite relationship if an insurance adjuster is involved.

5. "Bad cases don't age well." Full disclosure and discussion of the good, the bad, and your understanding of case value; eliminate the element of surprise as to adverse legal or factual developments before mediation.

6. Avoid "off the cuff" remarks during the day.

7. Note time of offers and demands and time spent in discussion with client.

8. Carefully monitor your clients' fatigue and hunger levels as the day progresses.

9. If client elects new counsel just prior to mediation, document, document, document and take the high road in file transition.

10. Consider the use of Special Settlement Counsel where appropriate.

NOTES