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State Bar of New Mexico Lawyers Professional Liability and Insurance Committee
and the State Bar of New Mexico Ethics Advisory Committee

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Responding to Incivility

By William D. Slease

For many years the legal profession has struggled with the issue of attorneys acting in an unprofessional or uncivil manner. We have all heard of, or been subjected to, obvious acts of incivility: an opposing lawyer engaged in name-calling; depositions or meetings devolving into shouting matches; the exchange of vitriolic emails focused on personal rather than professional issues.

Many attorneys have also experienced the more insidious form of incivility, so-called “strategic incivility” in which a lawyer uses questionable means designed to gain an upper hand such as:

- refusing to agree to reasonable extensions when doing so will not otherwise prejudice the client;
- asking marginally relevant and highly inflammatory questions during a deposition or trial;
- scheduling matters without seeking input from the other side as to availability and refusing to reschedule when a conflict develops;
- providing general citations to entire cases or deposition transcripts rather than pinpoint cites in pleadings thereby requiring the opposing counsel to search the entire case or transcript.

Regrettably, the examples are plentiful and the frequent focus of education and writings on the topic.

While acknowledging the issue is a good first step, too often the discussion stops with the stories recounting the scandalous acts of attorneys. Less attention is given to strategies for dealing with and reducing unprofessional conduct. What follows are suggestions for dealing with incivility. This list is not, by any means, intended to be exhaustive and each of us must decide how to conduct ourselves as professionals and how to respond when faced with uncivil or unprofessional conduct by others.

Looking to Others

Seeking Discipline or Sanctions: On occasion, when a lawyer experiences incivility, they turn to regulators and seek discipline against the bad actor. If the conduct takes place in litigation, the



lawyer may seek sanctions from the court in addition to or instead of seeking discipline. While both strategies can prove effective, they are often criticized as having limited value.

When regulators can prove that an offending lawyer used means that had no substantial purpose other than to embarrass, delay, or burden a third person, or engaged in a persistent pattern of egregious, unprofessional, uncivil conduct, discipline may be warranted. *See, e.g., In re Ortiz, 2013-NMSC-027.* However, not all acts of incivility or unprofessionalism constitute a violation of the Rules of Professional Conduct. For example, if a lawyer refuses to agree to a reasonable request for extension, that refusal standing alone does not typically implicate the Rules of Professional Conduct. Indeed, much of the conduct labelled as unprofessional or uncivil is beyond the reach of regulation.

Similarly, the ability of a judge to impose sanctions for unprofessional conduct can be fairly limited. Of course, when an attorney’s conduct constitutes a clear violation of a court rule or order, judges may impose sanctions to address the offending conduct. But whether the attorney has violated a court rule, whether the conduct constitutes contempt and requires greater procedural protections, whether the judge will appear to be

Disciplinary Board of the New Mexico Supreme Court

The New Mexico Supreme Court has the inherent power and duty to prescribe the qualifications that shall be required for admission to practice law; to admit persons to practice law; to prescribe standards of conduct for lawyers; and to determine the grounds for and to discipline lawyers for misconduct. The Supreme Court also has the authority to define the practice of law and to prohibit the unauthorized practice of law within the State of New Mexico. Pursuant to its authority and jurisdiction, the Court has established the New Mexico Disciplinary Board and the rules and procedures regarding the investigation of alleged unethical conduct and the unauthorized practice of law. The procedures are designed to provide a thorough and objective review of the complained of conduct and to resolve the matter in a way that is fair to those involved. Daily operations of the Board and investigations and prosecution of allegations of attorney misconduct and the unauthorized practice of law are performed by the Office of Disciplinary Counsel. For more information, visit www.nmdisboard.org.

favoring one side over the other, and whether the court wants its docket bogged down in issues that are collateral to the litigation all complicate the calculus of whether a court can or should impose sanctions.

Education: While the prospect of reactive sanctions may have some effect on remedying incivility, many regulators are increasingly turning to proactive initiatives, including education, to address incivility. For example, every person now seeking a license to practice law in New Mexico is required to take a two-hour course on civility and professionalism. The topic is likewise frequently included in the daylong ethics seminar known as “Ethicspalooza” offered by the Office of Disciplinary Counsel. The courses attempt to identify the issues attendant to uncivil and unprofessional conduct and offer suggestions on dealing with such behavior.

While external consequences for uncivil conduct can be effective and must be employed in appropriate circumstances, and while education on the topic can prospectively attempt to eradicate such conduct before it takes root, perhaps an equally or, some might argue, more effective strategy for dealing with incivility, is by turning one’s focus inward.

Looking to Self

Assume the Best: When confronted with a sharp word, an unpleasant email, a personal attack from another person, we often assume the worst about that person, immediately labelling them as uncivil, unprofessional, or worse. Frequently we allow that label to carry forward and inform every subsequent encounter, forgetting that the other person may have simply been having a bad day, was experiencing some type of crisis in their life completely unrelated to the encounter, or simply made a mistake. While not suggesting bad behavior be excused, starting with the assumption that the other person’s behavior was the unusual, rather than the usual, forgiving the occasional intemperate moment, and expecting future interactions to be more professional, may help diffuse the spiral of incivility. Additionally, when you assume the best in others, consider it repayment for the times that you were given the benefit of the doubt when you had an intemperate moment or acted out of character.

Rise Above: Admittedly there are some who, no matter how often we give them the benefit of the doubt, will behave in an unprofessional, boorish manner. We could engage them by mirroring the behavior and assuring that our future encounters with one another will be fraught with stress, hostility and vitriol, or we can choose to disengage and model civil, professional behavior. As a good friend often reminds me, you cannot control how someone else acts, but you can control how you react and how you respond. By demonstrating patience and professionalism throughout, you become part of the solution rather than exacerbating the problem.

Meet-Eat-Confer: It’s hard to be unpleasant with a person when they are sitting across from you, sharing a meal or a cup of coffee. By meeting in person to discuss a matter, counsel for

both sides can candidly focus on what is really at issue in a case. Moreover, an in-person meeting obviates the unintended tone that can be read into an email or letter, and allows attorneys to know each other as individuals rather than simply advocates for the opposing party. Retired New Mexico Supreme Court Justice Edward L. Chavez refers to this as “meet, eat and confer.” I’ve been told other judges use a similar technique to foster civility in the relationship between opposing attorneys, including one judge who occasionally requires lawyers who seem to be having difficulty with one another to meet over lunch, not talk about their case, and report back to the judge with one thing learned about the other lawyer that is unrelated to the practice of law. One doesn’t need a judge to order a meeting with an opposing attorney. Simply picking up the phone at the inception of a matter, introducing one’s self, and offering to meet, can accomplish the same thing.

Own It: We all have moments we regret; where our words or actions in the moment do not reflect our true professionalism. We often attribute these moments to the demands of clients, the pressures of practice, the pace of our lives, or a crisis in our lives. While all those things, and more, can lead to unprofessional, uncivil conduct, what is important in those moments is to take responsibility for our actions or words, make amends with those affected by our behavior, identify and learn from the cause, and recommit to professionalism. When we truly accept responsibility and commit to improvement, rather than viewing our actions as justified or fearing we will look weak if we accept responsibility, we can serve as a model for improving civility.

Why Do Something?

Incivility takes a toll. Ultimately, we cannot simply accept it as part of the practice of law or follow the advice often given to newer members of the Bar to “just get a thicker skin.” The cost of unprofessional behavior falls on clients whose cases are delayed and who pay more to resolve disputes in formal pleadings rather than by reasonable and reasoned agreement; on courts whose dockets are cluttered with collateral disputes that fail to advance the merits; and on the profession which continues to be observed with varying degrees of amusement and disgust by the legal consuming public. But probably the greatest cost is to lawyers themselves. A 2015 study conducted by Hazelden-Betty Ford, published in 2016, involving lawyer well-being revealed that as a profession, lawyers are much more likely to qualify as problem drinkers and struggle with some level of depression, anxiety, and stress, as compared to the general population. Is this all attributed to sharp practices and uncivil behavior? Of course not, but the practice of law is undeniably stressful. When our interactions with each other become less about the legal issues and more about the personalities, it invariably takes a toll on our well-being. ■

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THE TOP TEN

Reasons Lawyers Get Sued

By Jack Brant

On the old David Letterman Show, Dave had a funny bit at the beginning of each show where he would do “Dave’s Top Ten.” The topic could be anything from politics, to sports, to popular culture. He would start with number ten and progress to number one, which was the best or worst or most outrageous of whatever the topic was for that night.

In a more serious vein, here is our estimation of the Top Ten Reasons Lawyers Get Sued. There are undoubtedly other reasons that could be included on this list. The order is not based on statistics or empirical data. It is just a set of risk management/ risk avoidance tips for lawyers. Here, then, is our take on the top ten reasons why lawyers get sued.

NUMBER 10: “Assisting” with a Case

This is one example of failing to identify who you represent and who you do not. It arises primarily from agreeing to help out a fellow lawyer – covering a hearing for a friend, jumping into a case on short notice when a fellow lawyer is in a pinch, assisting with research or briefing. Any situation where the client is aware of your involvement, however limited you believe it to be, can give rise to a belief by the client that you are also his or her lawyer – especially after the fact, if things go wrong. And you may indeed have become the client’s lawyer by becoming involved. Even though there must be an agreement between the lawyer and the client to create a lawyer-client relationship, the agreement can be express or implied. Nothing formal is required, nor is the payment of a fee required to create a lawyer-client relationship. If you give the client the impression that you are assisting in the representation and that you are involved in protecting the client’s interests, you are probably the client’s lawyer just as much as the “main” lawyer that you thought you were only helping out as a favor.

Furthermore, beware of representations that other lawyers may have made to their clients about your involvement. For example, if you share offices with other individual lawyers, have

an agreement that no one will ever represent to a client that the lawyer in the next office or down the hall will help out with the case if necessary. A list of names on the door or on the sign out front could give the impression that you are all working together. Listing yourself “Of Counsel” on another lawyer’s letterhead can get you sued by the other lawyer’s client. Indeed, any situation in which a claim can be made of ostensible partnership or partnership-by-estoppel can give rise to such exposure.

NUMBER 9: Serving as “Local Counsel”

There is no such thing as a “limited” representation of a client absent an express written agreement between the lawyer and client limiting the lawyer’s role. Absent such an express agreement, every lawyer representing the client is fully responsible for everything that occurs in the representation. It is not a defense to contend, “That was the other lawyer’s responsibility, not mine.”

On the “Defense” side, there is risk in agreeing to serve as “local counsel” unless you insist on the right to be involved in all aspects of the case and you follow through by actually *being* involved in all aspects of the case. You should review everything even though the out-of-state counsel may draft the documents, have final say on strategy, and stand up in court. Make a record of any disagreements or issues you may have, and if necessary be prepared to withdraw from the representation if you believe that the client’s interests are not being protected or an ethical line is being crossed.

The same rules apply on the “Plaintiff” side. If you agree to be co-counsel on a case, regardless how you and the other lawyer have agreed to divide up the work, you are both fully responsible to the client for everything. Where you have been brought in by another lawyer, remember: the other lawyer is not your “client;” the client is your client. Beware of the situation where only the other lawyer has contact with the client. You need to know what the client is being told and what the client is telling the other lawyer.

State Bar of New Mexico Lawyers Professional Liability and Insurance Committee

The work of the Lawyers Professional Liability and Insurance Committee includes: Review of Mandatory Disclosure Rule 16-104(C); Analyze insurance reporting data; Monitor action on insurance disclosure; Improve the dissemination of information regarding insurance related issues, especially for newly admitted lawyers; Conduct presentations on insurance related issues; Provide authors and speakers to section meetings, and other State Bar functions. This article does not necessarily represent the opinion of the Committee as a whole. For more information about the Committee, visit www.nmbar.org.

NUMBER 8: Failure to Screen Clients

It is often hard to spot a problem client when they first come to see you about representation. Also, we might be inclined to overlook things as we all want and need the work. However, there are some common danger signs that should raise a red flag about whether you truly want to represent this person:

- multiple prior lawyers
- looking for a second opinion
- unrealistic expectations
- extreme anger or emotion
- a desire for revenge
- insistence on the use of Rambo tactics
- a story that sounds fishy or does not add up
- an offer to lie or manufacture evidence

You should also screen your existing clients for signs of trouble in the representation:

- failure to pay the fee
- changed circumstances in the client's business or personal life
- signs of unhappiness with your work

NUMBER 7: Practicing Outside Your Area

The practice of law has become more and more specialized. Although there are still lawyers who engage very successfully in the general practice of law, the majority of lawyers limit their practice to a particular field, topic, or area. Because of this, it is actually quite rare for lawyers to make a clear mistake of law or procedure when practicing in their area of specialization.

However, real mistakes occur when lawyers venture out of their area of specialization. For example, there was a time when every lawyer was expected to be able to draft a will. Today, however, the area of wills, trusts and estates is extremely complex and fraught with danger for any lawyer who decides to “dabble” in it. The same is true in such areas as real estate, criminal law, domestic relations, and any heavily regulated field. Do not be tempted to “help out” an existing client in an area in which you do not regularly practice. Refer the client to a lawyer with expertise in that area and avoid the risk of committing malpractice.

The same is true geographically. State laws and rules of procedure are not all the same, and there are traps and pitfalls for any lawyer who decides to represent a client in another state or jurisdiction where the lawyer does not regularly practice. At a minimum, associate with a lawyer who does practice regularly in that jurisdiction.

NUMBER 6: Failure to Keep Client Apprised/ Failure to Document

Good risk management starts with good client relations. Yet it is surprising how little attention some lawyers pay to this simple rule of thumb. Lawyers who fail to return phone calls,

who miss appointments with clients, who notify clients at the last minute of hearings and deadlines, who fail to keep clients apprised about their case, are in danger of being sued or receiving a disciplinary complaint.

Good risk management, not to mention standards of professionalism, demand that you be courteous to your clients. Be kind. Be friendly. Tell them regularly what is going on in their case. Answer their questions honestly. Copy your clients on everything. If you are serving as insurance defense counsel, this means copying not only the claims professional but the actual client/insured.

Good risk management also dictates that you write confirming letters or emails, or memos to the file, as to every significant decision in the representation. Make a written record in the file of all instructions to or from the client, all significant advice to the client, warnings, options and choices to be made. **DO NOT** count on the fact that you and the client are “working closely,” that the client is deeply involved in the representation, that the client is sophisticated, that “we are on the same page.” If things go badly, regardless of the client's level of sophistication or involvement, you may be surprised to hear the client say: “You are the lawyer and I relied on you for everything.” Be on the safe side and put it all in writing, in the file.



NUMBER 5: Failure to Define the Scope of the Representation

While mistakes may be rare when lawyers are paying full attention, mistakes – primarily omissions – are common

where the scope of the representation is not clear. This can result in situations wherein the lawyer does not think a matter is his or her responsibility, but the client does. For example, lawyer may represent the plaintiff in a personal injury case but does not pursue a workers compensation claim; or vice versa – the lawyer is handling a workers comp claim but does nothing with regard to a possible personal injury claim. Such situations can arise in a variety of representations where the client may have more than one legal issue.

There is also risk where the lawyer thought the representation was over, but the client did not. Some new issue may arise that is not dealt with properly; the client blames the lawyer, but the lawyer had no idea that further representation was expected. Avoid the risk by using termination letters when you believe the representation is over.

Another fairly common risk-producing situation is the “unknown client.” This is an unrepresented person who is involved in a transaction or situation in which the lawyer represents one of the parties. This unrepresented person may be “aligned” with the lawyer's client, giving rise to a belief that the lawyer is protecting that other person's interest as well. The

lawyer may be completely unaware of this expectation. The solution is to look around in every transaction and situation for unrepresented parties, and consider communicating, in writing: "I am not your lawyer. I am not protecting your interests."

There is risk in drafting documents for non-clients as part of a transaction, or representing to a non-client that he or she will be "taken care of." The situation also arises in "scrivener" situations where the client comes to the lawyer with a third party, tells the lawyer that some deal has been worked out, and asks the lawyer to draw up the papers. In both such situations, the lawyer believes he or she is representing only the client, but the non-client believes that the lawyer is also protecting his or her interests.

NUMBER 4 : Not Treating a Representation as "Real" Work

There is risk in "helping out" a family member or friend. Often, the lawyer does not view it as a "real" representation, does not give it the thought, care and attention that the lawyer gives to "real" cases, and mistakes and omissions can occur. There is also risk in doing a favor for an existing client on an unrelated matter – for example, a transactional lawyer agreeing to represent the client's child in a scrape with the law. These situations combine two problems: working outside your area, and not treating the newer matter as "real" legal work. The same risk can even attach in giving gratuitous legal advice at a cocktail party or social gathering.

Any work that arises outside your normal intake process or that you are not being paid for should raise a red flag. Helping someone out and doing free legal work is great. Just remember that you are every bit as much a lawyer representing a client in those situations as with your normal, paid legal work. You have the same duties of diligence, care and competence.



NUMBER 3: Conflicts of Interest

Conflicts of interest can take a variety of forms, some easily recognizable, some not as much. We all recognize that it is a conflict of interest to be adverse to an existing client or to a former client in a related matter. It may be harder to recognize where the

lawyer's interests are potentially adverse to the client's or where the interests of two existing clients may be adverse.

Start with this rule: it is *always* risky to do business with an existing client. A lawyer is virtually begging for a conflict of interest lawsuit by loaning money to, borrowing money from, or getting into a business deal with a client.

A lawyer should never agree to provide legal services to both sides of a dispute or transaction. Do not agree to "draw up the papers" no matter how hard they try to convince you that

everything has been worked out. This is true regarding divorces, contracts, business deals, and any other such situation. Beware also where the party on the other side is unrepresented and your client asks you to "draw up the papers." You may believe you are simply representing your client but the unrepresented party may see it differently.

Lawyers should also be cognizant of "positional" conflicts between existing clients – arguing one side of a proposition for one client and the opposite side for another client. Lawyers, especially at larger firms, should screen transactions and lawsuits carefully to be sure that clients of the firm, especially institutional clients, do not have interests at stake that are different from the interests of the client you are actually representing in the matter. If so, *both* clients may claim that you had a conflict of interest.

NUMBER 2 Suing a Client for Fees

Suing a client for fees is almost guaranteed to bring a counterclaim for legal malpractice. The only good risk management advice is to "keep current." Both at the beginning and throughout the relationship, the amount that you are charging and your expectations regarding payment must be absolutely clear, and you must be vigilant in enforcing that agreement. If you are on an hourly basis, you should bill regularly. You should not wait until the end of the representation to bill for your services. Do not allow the client to get behind on payment without addressing the issue immediately--and repeatedly if necessary. Failure to pay is often a sign that the client is not happy with the representation. Be prepared to withdraw from the representation rather than allowing the situation to worsen. **DO NOT** under any circumstances stop work on the representation as a way to pressure the client to pay. Your duties of diligence and competence continue so long as you continue to be the client's lawyer, regardless whether the client is behind in paying your fees.

If you do end up withdrawing from the representation, consider filing an attorney's charging lien. Charging liens are well-recognized under New Mexico law and courts will enforce them.

Relatedly, do not change your fee agreement with a client during the representation without insisting to the client that the new agreement be reviewed by independent counsel. It is a conflict of interest for the lawyer to increase his or her fee once the representation has commenced, given the ongoing fiduciary duty owed to the client. If you are representing an institutional client or being paid by an insurer, an hourly rate increase is probably safe so long as the client or insurer agrees to it.

NUMBER ONE: Missed Statute of Limitations

Missed statutes of limitations are a constant source of legal malpractice claims. Here are some pointers to try to avoid them:

Continued on page 10.

Some Financial Aspects *of the* Lawyer-Client Relationship



Robert Valdez, Nathaniel Chakares and James Reist are members of the **Ethics Advisory Committee of the State Bar of New Mexico**. This collection of short articles does not necessarily represent the opinion of the Committee as a whole and represent short overviews of ethical issues that can arise in the areas of financial assistance to a client, certain financing arrangements that are appearing, and charging liens. If you have a specific question or issue for which an advisory opinion from the Committee would be helpful, please submit your request in writing to ethics@nmbar.org.

Some Ethical Limits on Financing a Client's Costs and Expenses in New Mexico

By Robert E. Valdez

New Mexico's rules regarding provision of financial assistance to clients are more limited compared to certain other jurisdictions, including Texas. Rule 16-108(E) of the New Mexico Rules of Professional Conduct provides:

E. Financial assistance. A lawyer shall *not* provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance *court costs and expenses of litigation*, the repayment of which may be contingent on the outcome of the matter; and,
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Rule 16-108(E), NMRA (emphasis added).¹ This rule prohibits a lawyer from paying "reasonable and necessary medical and living expenses." See *Rubio v. BNSF Railway Co.*, 548 F. Supp. 1220, 1224 (D.N.M. 2008) ("Rule 16-108 prohibits lawyers from subsidizing lawsuits by directly giving or lending money to a client or by guaranteeing third-party loans to the client"). This is in stark contrast to the Texas rule that allows lawyers to pay for such expenses.²

New Mexico's prohibition is based upon the ABA Model Rule³ and is the majority rule. See *id.* at 1225, citing, *State ex rel. Oklahoma Bar Ass'n v. Smolen*, 17 P.3d 456, 459-60 (Okla. 2000) (noting that only eight states "explicitly allow lawyers to advance or guarantee loans to clients for living expenses"). Under New Mexico's rule, a lawyer may only advance:

- Court costs; and
- Expenses of litigation including "the expenses of medical examination and the costs of obtaining and presenting evidence." See Rule 16-108 NMRA, cmt. 10.

The consequence of violating the rule is significant. In *Rubio*, Texas lawyers, admitted to practice in New Mexico federal court *pro hac vice* co-signed their client's bank loan for some \$86,000 for "client expenses." Consequently, the court revoked the Texas attorneys' permission to appear *pro hac vice* in New Mexico, resulting in the attorneys being disqualified from the case. See *id.* at 1226-27. Even though the Texas lawyers argued that the New Mexico prohibition on financial assistance, "is quite frankly, surprising to a Texas lawyer," the court had no difficulty observing, "[t]here is no doubt that [the Texas lawyers] have violated [the New Mexico] rule. They admit that they co-signed for the loan and that the money was sent directly to [the plaintiff]." *Id.* at 1223-24. ■

Endnotes

¹ New Mexico allows lawyers to issue a "letter of protection" to a health care provider in order to obtain medical services for the client. See *In re Moore*, 2000-NMSC-019.

² The Texas rule provides, in pertinent part: (d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that: (1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. Tex. Disciplinary Rules of Prof'l Conduct 1.08(d)(1)(emphasis added).

³ See Model Rules of Prof'l Conduct 1.8(e)(2002).

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Five Ethical Considerations When Considering Third-Party Fee Financing

By A. Nathaniel Chakeres

The high cost of legal services is a significant barrier, hindering claimants from being able to access the justice system when they have a civil claim. A new trend by third party finance companies is to encourage lawyers to offer their clients third party financing in exchange for a payment equal to a fraction of the lawyer's fee (for example, 10%). While these arrangements may allow some clients to obtain legal representation that would otherwise be out of reach, they raise issues with regarding the Rules of Professional Conduct. Before engaging in such a financing scheme, at least five questions should be considered:

- **Is Third Party Financing Impermissible Fee-Splitting?**

The threshold question is whether such a third party financing arrangement constitutes impermissible fee-splitting with a non-lawyer in violation of Rule 16-504(A) NMRA. That determination may depend on the specific nature of each financial product. The pivotal question is whether there is a risk that the third-party has the potential to influence the lawyer's independent judgment in the handling of the client's case.

- **Are Fees Reasonable and Handled Properly?**

The overall dollar amount paid by the client, including the fee paid to the lawyer and the amount paid to the financing company, must be reasonable. Rule 16-105(A) NMRA contains a list of factors for lawyers to consider in ensuring that a fee is reasonable. In addition, when fees are paid in advance, the fees must be segregated into an appropriate trust account until earned. Rule 16-115(C) NMRA. The detailed terms regarding the refund of advance payments made to the lawyer by the third party financier on the client's behalf should be clarified in writing by the lawyer and financing company before any money is exchanged. See Rules 16-105 cmt. 5, 16-115(D) NMRA.

- **Are Rule 16-108(A) Requirements Met?**

All business transactions with a client, excluding "ordinary fee arrangements" (governed by Rule 16-105) are subject to Rule 16-108(A) NMRA. Rule 16-108 (A) requires that the terms of the transaction are fair and reasonable, that the client is advised in writing of desirability of independent legal advice on the transaction, and that the client provides informed, signed consent in writing. Since the lawyer generally facilitates, and benefits from, third party financing arrangements, the financing arrangement is not an "ordinary fee agreement." Accordingly, the lawyer must follow the requirements of Rule 16-108(A).

- **Is a Conflict of Interest Being Created?**

The lawyer should take care to avoid a conflict of interest between the third party financing company and the client. The lawyer should make it clear to the client that the lawyer's representation does not encompass setting up the third party financing arrangement, nor is the lawyer recommending or vouching for a particular financing company. A conflict is created when the third party financing arrangement includes recourse against the lawyer when a client fails to fully repay the third party loan.

- **Are Client Confidences Protected?**

Rule 16-106 NMRA prohibits the disclosure of information "related to the representation" of the client. This prohibition is broader than the attorney-client privilege or attorney work product protection. The Rule includes information related to a client's finances and whether a client has received a financial recovery. Even if the financing arrangement requires that the lawyer disclose information about the client to the financing company, the lawyer is prohibited from doing so unless the client provides informed consent, preferably in writing. ■

Nathaniel Chakeres practices with the New Mexico Interstate Stream Commission. He is a member of the State Bar Ethics Advisory Committee.

Two Ethical Considerations Regarding Charging Liens

By James T. Reist

Attorney charging liens are a permissible way to protect a lawyer's right to obtain payment from a client. New Mexico has four requirements when imposing an attorney charging lien:

1. "[A] valid contract, express or implied, between attorney and client," (though the contract "need not 'explicitly assert a lien'");
2. A judgment or fund that resulted from the lawyer's service;
3. The lawyer must have given "clear and unequivocal notice" of the intention to assert a lien, and notice must be given to the "appropriate parties;"¹ and
4. The lien must be timely — notice of the lien must be given "before the proceeds of the judgment have been distributed."

Sowder v. Sowder, 1999-NMCA-058, ¶¶ 10-14, 127 N.M. 114. In addition, the charging liens are "designed to protect the value of the attorney's services from dishonest clients, not to assert all claims the attorney may have against the client." *Computer One, Inc. v. Grisham & Lawless*, 2008-NMSC-38, ¶16, 144 N.M. 424.

The Basis for a Charging Lien Must be Reasonable

Since a charging lien is based upon the value of the lawyer's services, the fee that creates the financial basis for the lien must be reasonable. *N. Pueblos Enters. v. Montgomery*, 1982-NMSC-057, ¶ 9, 98 N.M. 47 ("Because a court exercises its equitable powers in enforcing an attorney's charging lien, it

may inquire into the reasonableness of the asserted fee for purposes of enforcing the lien”); *See also* Rule 16-105 NMRA. The nonexclusive list of factors set out in Rule 16-105 NMRA are helpful in determining the reasonableness of the fee and, correspondingly, the enforceability of a charging lien. *See id.* Some of the factors set out in Rule 16-105 include time and labor required; novelty and difficulty of the questions involved; skill needed to perform the legal service properly; the likelihood (if apparent to the client) that the lawyer’s engagement for the particular matter will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; time limitations; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer(s) performing the services; and, whether the fee is fixed or contingent.

Charging Lien May Only Attach to Client’s Property

Assuming all four elements of a valid charging lien are met, a charging lien is only permitted on a client’s funds or property,

and not against the private funds of third parties. *In re Venie*, 2017-NMSC-018, ¶¶36 and 39, 395 P.3d 516 (“a charging lien ... only applies to funds recovered [for the client] by the attorney’s aid ... and not the private funds of a third party”). A lawyer’s exercise of dominion and control over property or funds of a third party based upon a claim of charging (or retaining) lien violates the lawyer’s obligation of safekeeping property of the client or third parties. *See id.*; *see also* Rule 16-115(A) and (E) NMRA. ■

Endnotes

¹ “Appropriate parties” include opposing party, opposing counsel, and the client. *Id.*, ¶12.

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The Top Ten Reasons Lawyers Get Sued

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They are often the result of calendaring the wrong statute of limitations. A common example is that claims against government entities under the New Mexico Tort Claims Act have a shorter statute of limitations than generic personal injury claims. Think through what limitations period applies as part of your initial evaluation. Do not simply assume that there is a three-year statute of limitations.

The lawyer should take personal responsibility to 1) evaluate the governing statute of limitations; 2) evaluate the filing deadline for this particular claim; and 3) ensure that the deadline is calendared properly. Lawyers often leave these tasks to staff; however, this is important legal work that the lawyer should attend to personally. Excuses such as “I was waiting to file until I got authority from the client,” or “I was waiting for the retainer check,” will not save you. If an attorney-client relationship has been established, the lawyer has an absolute duty to protect the client’s interests. Filing a claim by the applicable deadline is one of the most important duties a

lawyer has in the representation. So file the claim, and work out the details later, including declining or withdrawing from the representation if necessary.

If you do miss the filing deadline, all is not lost. In most such situations, the client must prove in the legal malpractice case that the claim was meritorious. If that is not in question, then be thankful that you are covered by legal malpractice insurance. And if you do not have legal malpractice insurance, you should. It’s a dangerous world out there. ■

Before opening his own practice, Jack Brant was a director in the Albuquerque office of Rodey, Dickason, Sloan, Akin & Robb, P.A. He practices in the areas of attorney and accountant professional liability, legal ethics and disciplinary consulting and representation, insurance coverage and bad faith litigation, law firm joinder and break ups, law practice management, attorney fee disputes and general civil litigation.

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