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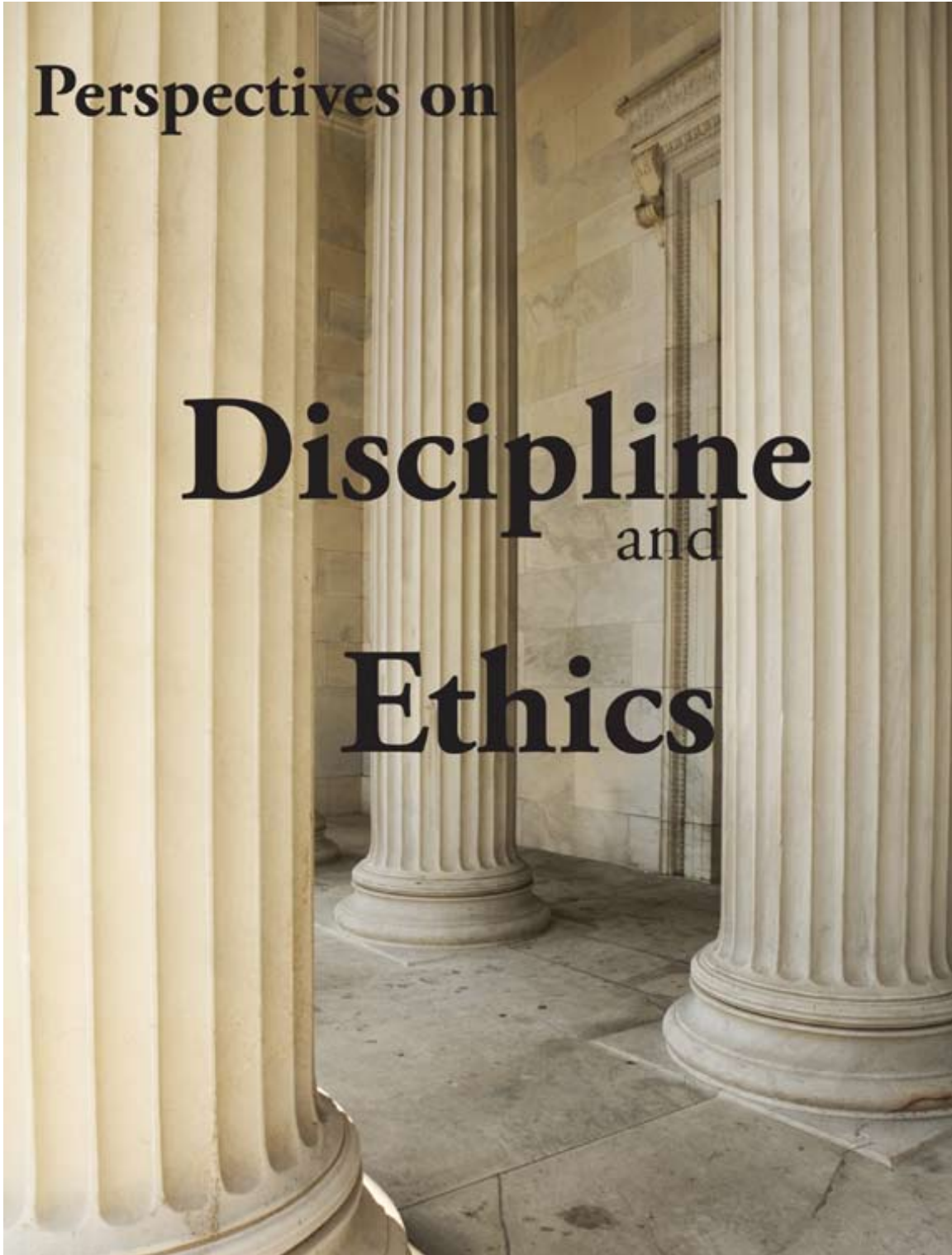
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Perspectives on

Discipline
and

Ethics



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In Celebration of Our Profession

By Peter H. Pierotti

It is time to celebrate our profession. The New Mexico Supreme Court is currently in the process of adopting new *Rules of Professional Conduct for Lawyers*. Proposed revisions to more than 50 rules were advertised for public comment in the June 15, 2007, *Bar Bulletin Special Issue*.

Why Celebrate?

The *Rules* are much more than requirements necessary to maintain a law license. They provide an outline for the *practice* of law—how to effectively represent your client, maintain a law business, and interact with your employees, other lawyers, witnesses, the courts, the public, and the profession. The concepts in the *Rules* are applied daily by all lawyers. The *Rules* show our dedication to self-regulation of our profession, and service to the legal community.

First, we should celebrate what it means to be a lawyer in the United States. The *Preamble of the Rules of Professional Conduct* proclaims that a lawyer “is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Lawyers are vital to the preservation of society.

We should celebrate the fact that our profession is uniquely self-governing. Our profession shares an intimate relationship with the processes of government and law enforcement. While government regulation of other professions typically emanates from the legislature, regulation of the legal profession emanates from within the legal system through the courts.

We should celebrate the privileges and responsibilities of self-regulation. If we abdicate our responsibility as lawyers, we risk our ability to regulate ourselves. Paragraph 11 of the *Preamble* to the proposed revisions perhaps states it best:

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

With the above celebratory concepts in mind, we can readily appreciate a comprehensive revision to our *Rules of Professional Conduct*. This article discusses the history behind the revisions and highlights some of more significant proposed changes.

History of Revisions to the Rules of Professional Conduct

In 1997, the American Bar Association announced its “Ethics 2000” initiative to revise the *Model Rules of Professional Conduct for Lawyers*. The ABA's previous *Model Rules*, first promulgated in 1983, were adopted in large part by almost all state jurisdictions, including New Mexico. Since then, the interpretation and application of the *Model Rules* have been significantly developed by case law, ethical opinions produced by the ABA and individual state authorities, and



the American Law Institute's 2000 publication of the *Restatement (Third) of the Law Governing Lawyers*. The goal of the Ethics 2000 initiative was to revise the *Model Rules* to correspond to the developed body of law.

The ABA completed the Ethics 2000 revisions and adopted corresponding amendments to the *Model Rules* in 2002 and 2003. According to the ABA, 34 states and the District of Columbia have adopted revisions based on the new *Model Rules*.¹

Until June of this year, New Mexico was one of only eight states yet to issue a report. The New Mexico Supreme Court Code of Professional Conduct Committee issued proposed revisions based on the Ethics 2000 amendments to the ABA *Model Rules*. The public comment period ended on July 16, 2007.²

Similarities between the New Mexico Rules and ABA Model Rules

The New Mexico Supreme Court has adopted the general format of the ABA *Model Rules*.³ The rules are codified in New Mexico with a different, but corresponding, numbering system. For example, Model Rule 1.1 corresponds to New Mexico Rule 16-101; Model Rule 1.15 corresponds to New Mexico Rule 16-115; Model Rule 8.3 corresponds to New Mexico Rule 16-803.

As indicated above, the new rules and accompanying commentary clarify the former *Model Rules* upon which the current New Mexico rules are based. Even though the new rules have not yet been adopted in New Mexico, valuable insights can be gained by reviewing the modified text and additional commentary contained in the new *Model Rules* and proposed New Mexico revisions. Indeed, the New Mexico Supreme Court has already cited to the text of the new ABA *Model Rule Commentary* for guidance in disciplinary matters.⁴

New Rules

Three rules proposed for adoption from the ABA *Model Rules* are new to New Mexico:

• **Rule 16-118**, “Duties to Prospective Client,” outlines confidentiality and disqualification issues which arise from communications with prospective clients.

• **Rule 16-204**, “Lawyer Serving as Third-Party Neutral,” describes the duties of lawyers who serve as mediators, arbitrators, or evaluators who assist third parties in the resolution of disputes.

• **Rule 16-507**, “Responsibilities Regarding Law-Related Practice,” addresses services that may be performed in conjunction with and are related to the provision of legal services, but are not prohibited as unauthorized practice of law when provided by non-lawyers.

Excluded Rules

Some of the new *Model Rules* conspicuously have not been recommended for adoption in New Mexico:

• **Model Rule 6.5**, “Nonprofit and Court-Annexed Limited Legal-Service Programs,”

provides an exception to conflict and disqualification rules for lawyers who provide short-term limited legal services under the auspices of a nonprofit organization or court.

• **Model Rule 7.6**, “Political Contributions to Obtain Government Legal Engagements or Appointments by Judges,” disqualifies a lawyer from accepting a government legal engagement or appointment if the lawyer or the lawyer’s firm makes a political contribution for the purpose of obtaining or being considered for the engagement or appointment. The Code of Professional Conduct Committee does not explain why these new rules were omitted from the proposed revisions.

Confidentiality

The revisions to the rules regarding confidentiality represent some of the most significant changes arising from the Ethics 2000 initiative. The proposed revisions to Rules 16-106 (“Confidentiality of Information”) and 16-113 (“Organization as

Client”) create more exceptions to lawyer-client confidentiality as necessary to allow lawyers to comply with corporate governance laws and other mandatory reporting laws.

Conflicts, Disqualification, and Screening

The rules regarding conflicts of interest and disqualification (16-107 through 16-112) have been reorganized for clarity. Substantial new commentary has been provided for guidance in what has traditionally been one of the most difficult areas of the rules to navigate. Some specific changes are worth mention here.

Proposed Rule 16-110, regarding imputation of conflicts in law firms and non government organizations, differs from the current rule and the model rule by allowing, in limited circumstances, a law firm to screen a lawyer hired by the firm who would otherwise be disqualified due to a conflict arising from a former representation. The current rule requires disqualification absent consent by the affected clients.

The revision to **Rule 16-111**, regarding conflicts of former and current government officers and employees, will allow the same lawyer who represents a government agency to concurrently represent a private client before the government agency under limited circumstances.

Trial Publicity

The revision to **Rule 16-306**, limiting trial publicity, proposes a significant departure from the current rule, and materially modifies the model rule. The current rule limits public statements only with respect to criminal jury trials. The revision applies to all pretrial and trial proceedings in both civil and criminal matters, and all public communications which “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” All lawyers who respond to media requests for information on pending cases will need to study this rule and the committee commentary carefully.

Fee Sharing

The proposed rule on fee sharing, **16-504**, is notable for what it does not include. The revision omits the provision from the model rule which provides that “a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.” The practice currently is being used in New Mexico by lawyers cooperating with the American Civil Liberties Union. Removing the provision from the New Mexico Rule indicates an intent by the Supreme Court to prohibit the practice.

continued on page 8

The Ethics Advisory Committee

The Ethics Advisory Committee is a volunteer committee of the State Bar of New Mexico, composed of lawyers who practice throughout the state. The Committee is currently chaired by James T. Reist and Peter H. Pierotti.

The mission of the Committee is to inform and advise inquiring lawyers on the Committee’s interpretation of the *Rules of Professional Conduct*, as applied to the inquiring lawyer’s duties. The Committee provides nonbinding opinions to assist lawyers in determining their appropriate course of conduct without rendering opinions on matters of substantive law. The Committee also assists and educates lawyers on issues of professional conduct by presenting thoughtful analysis through (1) informal written opinions on matters of individual concern; (2) formal published opinions that are more broadly relevant to the State Bar as a whole; (3) special projects to improve access to advisory information; (4) continuing legal education programs sponsored by the State Bar and local bar associations; and (5) responses to Supreme Court requests for comments on proposed rule changes.

This year the Committee has already received over 25 requests for advisory opinions and has provided public comment to the New Mexico Supreme Court’s proposed revisions to the *New Mexico Rules of Professional Conduct*. The Committee has posted its comments on the State Bar Web Site.

When the new rules are published, the Committee intends to review each formal opinion issued by the ABA Center for Professional Responsibility during 2007, with a view of determining whether formal opinions issued by the New Mexico committee are in conflict and, if so, determining whether the New Mexico opinions should stand, be revised, or be withdrawn. The Committee will develop a PowerPoint presentation based on rule changes, recent inquiries, and any formal opinions the Committee withdraws or modifies. This presentation will be available for use by committee members, local bar associations, and the State Bar.

Lawyers who volunteer their time as members of the Committee include Alexander Wold, Christian Doherty, Christopher Carlsen, Eric Darnell, James Reist, Julie Vargas, Kristin Davidson, Marjorie Jones, Nancy Cronin, Peter Pierotti, Slate Stern and Stephen Simone.

When DISCIPLINE Comes Calling (A Cliff Notes Version)

By Briggs Cheney

A more appropriate title for this article might be, *The Letter from Virginia Ferrara*, because that is generally the lawyer's first notice of a disciplinary complaint and the beginning of the "screening phrase" in the disciplinary process. The letter is a form letter, the thrust of which is very direct: we have received the attached complaint, please respond on or before "x" date.

This letter should not be ignored. Unfortunately, far too many lawyers do just that; some out of fear, some out of anger and others put the letter aside with the best intentions of responding when time permits. While disciplinary counsel are fair, pleasant folks, they do not appreciate being ignored.

The threshold question for the lawyer receiving Virginia's letter is, "Do I respond to her letter myself, or do I get help?" There is not a bright line answer to this question. Too many lawyers do themselves a disservice by trying to respond to a disciplinary complaint on their own. Generally a complaint from a former client is preceded by some tension or disagreement and when that past disagreement materializes again in the form of a disciplinary complaint, emotions often compromise the lawyer's ability to respond in the appropriate

Too many lawyers do themselves a disservice by trying to respond to a disciplinary complaint on their own.

fashion. Angry and upset, the lawyer, without giving the matter sufficient thought, fires back a response which may not accurately respond to the complaint and often is more of an attack on the client than a calm recitation of the lawyer's

side of the representation, what happened and why.

A high percentage of complaints are dismissed following the lawyer's response to *Virginia's Letter* as lacking merit. For that reason I am reluctant to say a lawyer must retain counsel to respond to this letter, but, if not, it should be done with care and only after sharing a draft with a colleague who can provide detached comments.

The receipt of a disciplinary complaint should be shared with the lawyer's firm. A disciplinary complaint can represent a potential claim for professional liability and may be viewed by the firm's carrier



as triggering the requirement to provide the company with notice. If notice is not given, regardless of the outcome of the disciplinary complaint, the company could deny coverage for a later filed malpractice action. Because most insurance applications elicit information about disciplinary complaints, there is no reason not to give notice.

While on the topic of professional liability insurance, many policies provide what is called "reimbursement coverage" for disciplinary matters, under which the lawyer can retain counsel to assist in responding to a disciplinary complaint and the company will reimburse the cost of that representation, customarily from \$2,500 to \$10,000.

Further investigation is deemed necessary with some complaints. Rule 17-105(B) NMRA. This *further investigation* can be frustrating as it is often accomplished through more than one letter asking specific questions and requesting documents and records. At this stage, investigation is accomplished pursuant to the lawyer's obligation to respond to disciplinary counsel's inquiry. Rule 16-801(B) NMRA. There exists almost no basis to resist the reasonable requests of disciplinary counsel and to do so may only insure the filing of Specification of Charges. It is the disciplinary counsel's duty to investigate thoroughly and, while frustrating, the lawyer must cooperate—even when the lawyer believes disciplinary counsel is being unreasonable.

If the disciplinary complaint is found to have merit, the Disciplinary Counsel's Office is required to file Specification of Charges. Failure to respond results in the charges being deemed admitted. When this occurs, the only remaining issues for future consideration are matters *in aggravation and mitigation* and appropriate *discipline*. With the filing of Specification of Charges, the process begins to resemble the civil process most lawyers are accustomed to, but still very different. Rules 17-301 to -316 NMRA.

A hearing committee comprised of two lawyers and one lay person is appointed. This is the first level in the formal disciplinary process and the most important. "Important" because this is the only evidentiary hearing a lawyer will have in the disciplinary process. Following evidentiary presentations, the hearing committee issues Findings of Fact, Conclusions of Law and Recommendations. Rule 17-313 NMRA.

continued on page 10

Dealing with the TROUBLESOME CLIENT

By John A. Bannerman, Esq.

Not all clients are troublesome, but there are certain clients who can try one's soul. This article is intended to help you identify them, and, to the extent space permits, how to deal with them.

The best way to deal with the troublesome client is to avoid being retained to represent one, but even the most experienced and intuitive lawyers often find themselves dealing with difficult clients. Avoiding the troublesome client starts on the phone or in the waiting room. Non-lawyer staff usually deal with the person first. If you have receptionists or paralegals that have good instincts regarding people, ask their opinion before you make the decision to represent the person. And never fail to meet the potential client face-to-face. It is suggested that no lawyer should accept representation unless he or she has met with the client for at least one hour, during which time the potential client is asked not only why they are seeking legal advice and representation, but what they want to accomplish in using your services. If they have unreasonable expectations, they may become a difficult client. Even insurance defense lawyers need to personally meet the client as soon as possible, if the circumstances permit. If you decide not to represent someone, tactfully decline in writing.

When in doubt, do not be afraid to ask for references. Ask permission to check their credit. Use Google or other Internet services to check them out. There are many Internet resources available, and it may be worth paying a nominal fee to avoid a difficult client.

Ask the potential client if he has been represented before and by whom. Ask why he was dissatisfied with other counsel and carefully measure the response. Use the on-line docket systems available in the federal and state district courts to determine if he has been a party in other lawsuits. Call the lawyer who handled the prior matters. Beware of the client who has been represented by many other lawyers.

A well-written retention or engagement letter will help in dealing with the troublesome client. Everything that should go into an engagement letter is beyond the scope of this article, but it is always important to define in writing the basic terms and conditions for the representation. Make certain to include what you will and will not do for the client, your rates and chargeable costs, how you will bill or handle the retainer, how you will handle conflicts, and under what circumstances and how the attorney client relationship may be terminated. Also, include an explanation of what is expected of the client as well as the firm. The engagement letter should be tailored to every case, and when you sense that you may be entering into the

"Troublesome Client Zone," even greater care should be given to the engagement letter.

Define your right to withdraw, and do not simply refer to the grounds for withdrawal set forth in the *Rules of Professional Conduct*. These grounds are limited and various portions of Rule 16-116, NMRA 1978 Comp., rely on subjective tests measured against what is reasonable. *In*

the end, remember, the client can always fire you, but you may not be able to fire the client.

Rule 16-116 will control the termination of the attorney-client relationship—unless you and the client have agreed to a different process in writing.

AVOIDING THE TROUBLESOME CLIENT...

is like trying to avoid an angry teenager. Unlike the teenager, the troublesome client comes in all ages and is found in all reflections of humanity. While there are ways to avoid being retained by the troublesome client, accepting the challenge of representing a troublesome client will take patience, professionalism, and planning.

The key is enhanced communication, and the beginning of the communication process is a well-written engagement or retention letter. The *Proposed Rules of Professional Conduct*, printed in the June 15, 2007, *Bar Bulletin Special Edition*, requires, more than ever, written agreements with the client. Such an agreement is imperative when dealing with the potentially troublesome client.

The key to all client relationships is communication. The engagement letter starts the communication process, but it does not end there.

You need to return calls and keep the client informed. You also need to resist the tendency to avoid taking calls from the troublesome client. Delaying or not returning calls can exacerbate the problem. Before you return a call, stop and think about what needs to be said. Rehearse it, and take a couple of deep breaths before you make the call. Remember, you are the professional, and you are the one taking a large percentage of the recovery or billing by the hour. You are the grown-up dealing with the teenager. If you have a client that hounds you or your staff, ask him or her to come to the office and then explain that, per your agreement, you can charge for the time spent on the call and the follow-up. Reach an agreement that they will save their questions and concerns and express them in one call that can be routinely scheduled. The fundamental rule is, whenever you communicate, document it.

When things really get bad, resort to a third party. The engagement letter can and should provide for alternative means to resolve disputes. If the central problem is fees, use the State Bar's fee mediation service. Consult with a senior lawyer or an experienced lawyer in another firm and ask for their assistance in dealing with the client, if the two of you agree it will help.

For further insight into dealing with the difficult client, see Nancy Franchini's excellent article in the summer issue of the *Legal News Journal for New Mexico Civil Defense Lawyers*: "Difficult Clients—Using the Tools of a Lawyer and the Tools of a Psychiatrist."

About the Author

John Bannerman is a member of the State Bar's Lawyer's Professional Liability Committee. He is the senior shareholder in Bannerman & Williams, PA, and he represents attorneys and other professionals in various matters related to their practice.

MANOS ARRIBA:

Abuses in Attorney Billing Practices

By Tonya Noonan Herring



Rule 16-105 of the *Rules of Professional Conduct* states that, “A lawyer’s fee must be reasonable,” but what does that really mean? The rule gives eight factors (see box) to be considered in determining the “reasonableness” of a fee; however, it says nothing about what is fair. An attorney will argue that the client is dissatisfied because he did not obtain the outcome he wanted, but most “reasonable” clients recognize an attorney who works hard and charges accordingly. These same clients are not fooled by unfair billing practices and justifiably complain when they have been cheated.

Some cases of abuse are obvious, but most cases are insidious, difficult to prove, or even accepted as standard practice by the bar. The fact is they are still unethical, whether or not they are the usual and customary norm. Abuses involve, although are by no means limited to:

- doing little substantive work on a case,
- providing minimum and/or less than adequate service,
- churning the case,
- padding the bill,
- charging a “flat,” and thus implied, non-refundable fee,
- overcharging for costs and paralegal work, or
- charging the client the attorney rate when a paralegal or legal assistant is actually preparing documents.

No one would argue that an attorney who accepts a retainer and then does nothing on the case and does not refund the retainer is in violation of the *Rules of Professional Conduct*. But wait! Some attorneys argue that their fee is a flat fee and thus they do not have to refund any portion of it, regardless of the amount of time committed to the case. For example, criminal attorneys understandably get hefty retainers up

front. If the charges against a client are subsequently dropped, or the attorney withdraws before the case is resolved, some attorneys feel justified in keeping the entire retainer, even if that retainer is \$10,000 and they put in relatively few billable hours. Recently, a client called to complain that she had sent a criminal attorney \$2,000 to represent her son who was in jail. She also sent \$100 under separate cover and asked the attorney to give the money to her son when he was released. The attorney kept all of the money, justifying this by saying he was using it for gross receipts taxes on his fee. Further, the attorney attended the bond reduction hearing and then withdrew from the case and refused to refund any of the money. Fortunately, this scenario is governed by a New Mexico Supreme Court case that states, “the *Rules of Professional Conduct* in this state do not permit lawyers to charge nonrefundable unearned fees.” (*In re Dawson*, 2000 NMSC 024, 129 NM 139, 8 P.3d 856 [see box, page 8].)

Even when an attorney acknowledges that a refund is appropriate, the money might not be refunded in a timely manner, if at all, until the client files a formal complaint. Attorneys tell clients they will send a final accounting and a refund and then make excuses as to why it has not been done: “I only bill once a month” (but it’s been three months); “My bookkeeper is ill;” “I moved my office;” “My printer is broken,” or lamely, “I forgot.” There shouldn’t be any question that the funds are in a trust account, a workable billing system is in place, and an accounting and refund check can be generated within a week or less.

Clients also report that their attorneys do not communicate with them, are not prepared for court, do not initiate filings and do not respond in a timely manner to opposing counsel or the court. At the same time, the client is being charged for multiple reviews of their case file, phone conversations with various parties related to the case, and court appearances where their attorney simply asks for a continuance but charges the client as if the hearing were productive. Some attorneys bill their clients for reading desperate e-mails from them begging for a status report. A recent case in Florida involved an employee suing her employer for \$11,000 in unpaid overtime wages.

continued on page 8

8 Factors* Determine the “Reasonableness” of a Fee

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer performing the services; and
8. whether the fee is fixed or contingent.

*Rules of Professional Conduct 16-105

Pro Bono Considerations

The proposed change to **Rule 16-601** is the deletion of the language that a lawyer should aspire to render at least 50 hours of pro bono legal service per year or in the alternative contribute financial support of \$350 to an organization that provides legal services. The revised rule now simply states lawyers have a “responsibility” to provide pro bono publico service.

Advertising and Solicitation

The entire text of the existing rule **16-703** is proposed for deletion and replacement with a rule containing more specific guidelines for direct contact with prospective clients. The revisions address electronic media issues by regulating real-time electronic contact, and all written, recorded or electronic communication. Most significantly, personal injury lawyers must now wait a period of thirty (30) days before directly soliciting a potential client in any manner.

The above examples provide some insight into the depth of the proposed revisions. Members of the Ethics Advisory Committee have prepared an analysis of the revisions to each of the fifty-plus rules. This analysis can be accessed from the State Bar Web site, www.nmbar.org.

The revision of the *New Mexico Rules of Professional Conduct* is an historic occasion for the State Bar. The overhaul of the rules provides an opportunity for New Mexico lawyers to study the rule changes and thereby renew our passion and commitment to our clients, to each other, and to our great profession.

Endnotes

¹The ABA maintains an updated chart with Web links to individual state initiatives at http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf

²The State Bar of New Mexico Ethics Advisory Committee provided comments to the proposed revisions to the *New Mexico Rules*, which can be viewed on the State Bar Web site.

³The text of the ABA *Model Rules* and commentary can be accessed on the ABA Web site, http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

⁴See, *In re Estrada*, 2006-NMSC-047, ¶¶ 21, 24, 140 N.M. 492, 143 P.3d 731.



About the Author:

Peter H. Pierotti is an attorney in the Litigation Division of the City of Albuquerque. He has served as an officer and director of the Albuquerque Bar Association, co-chair of the State Bar Ethics Advisory Committee, and as an adjunct professor of ethics at UNM.

The case lasted three years and produced thousands of court files and attorney's fees in excess of \$142,000 for 455 hours of work at \$300 per hour. On appeal, Florida Southern District Chief Judge William Zloch denied the attorney's request for attorney's fees of \$150,000. Judge Zloch stated the attorney's "unwillingness or inability to settle this matter was an unreasonable course of behavior in a direct attempt to garner greater fees from this action." (America Bar Association, Fee Arbitration Issues Discussion, Julie Kay, *Daily Business Review*.)

Padding the bill is not an uncommon practice either. A California client was involved in a classic case of over-billing and double billing. It happened that her neighbor was a bailiff. Her attorney appeared in court on a motion for a continuance which, according to the bailiff who was in attendance, took no more than a minute because it was uncontested. The attorney charged her for two hours of courtroom time, a total of \$600. The attorney was also there for at least five other cases and presumably he charged all of them—an equal opportunity

The Supreme Court held in *In re Dawson*, that a "lawyer's claim that he or she charged a client a flat fee or retainer that is nonrefundable will not suffice to justify a failure to deposit unearned client funds in a trust account, a withdrawal of client funds from a trust account to pay fees that have not yet been earned, or a failure to promptly return unearned funds to a client upon termination of the representation."

crook (<http://www.selmaenterprise.com/articles/1007/01/17/opinion/opinion02.txt>). In a poll of 5,000 attorneys conducted by William Ross, a professor of law at the Cumberland School of Law in Birmingham, Alabama, 54% admitted performing unnecessary tasks to increase billable hours.

Perhaps more disheartening than the abuses and unethical fee practices is that many attorneys see nothing wrong with this approach. Attorneys have forgotten that they are "fiduciaries" in the highest sense of that word. A client entrusting an attorney with his money or property is a measure of his trust. Safeguarding those funds by ensuring that a fair and accurate accounting system is in place and that fees are reasonable and charges are made only when productive and necessary are **minimum** standards. The concept of fair billing practices should not be based on what an attorney can "get away with." Part of the fee is the attorney's time; but in fairness to the client, other factors should be weighed, such as the necessity of the task and the benefit to the client. An attorney, who deals unfairly with his own clients, does himself, his client and the legal profession a disservice.

About the Author

Tonya Noonan Herring manages the Client Attorney Assistance Program (CAAP) at the State Bar of New Mexico. She is also the administrator for the Client Protection Fund Commission. Upon graduation from the UNM School of Law in 1988, she worked as a staff attorney for the Securities and Exchange Commission in Washington D.C. and as a guardian ad litem for the Children's Court.

A Lawyer's Bedside Manner

By Stuart D. Shanor

The term "bedside manner" is one frequently used to describe the personality traits, mannerisms, psychology and interpersonal techniques employed by a physician in the development and nurturing of a physician-client relationship. The term is glib and catchy, and it is interesting to apply that term to lawyers and their relationship with their clients. To this extent, the two professions have great similarity. Perhaps we can all picture in our mind's eye those things which cause us to admire and become comfortable with a physician. Have you ever thought about taking guidance from your own experience with the medical profession to successfully establish and continue a relationship with a client?

A successful attorney-client relationship begins with the basics. I do not purport to have all of the answers or even the right answers. However, I do know some of the basic things that have worked for me during my 45 years of practice. Many of the things that I will mention in this article are common sense. However, if I succeed in making you think about some of these issues, I will have achieved the purpose of this article.

The Beginning

The beginning of a client relationship is crucial. The client wants promptness, a sympathetic ear and a demonstration of personal interest. The client also wants your undivided attention and your assurance of confidentiality and candor. What must we do, as lawyers, to get off to the right start with the client? Return the call promptly. Solicit from the potential client only sufficient facts upon which to make a judgment as to whether or not you wish to or are able to accept the case. Explain to the client about conflicts of interest and why their identification is important both to the client and to you. You should establish with the potential client a precise time when you will call him back. If you have a conflict, or you decide not to further pursue the representation, assist the client in finding other representation. Many times someone you have helped in this way returns to you later for another, perhaps more important, matter.

If your initial contact and subsequent contacts with the client are to occur in your office as opposed to on the telephone, establish a personal rapport with the client. Get out from behind your desk so that you and the client are in the same space. Dress appropriately and portray a professional appearance. Avoid interruption during your conference with the client. No matter what the mode of contact, spend some time getting to know the client and/or the client's business. Time spent learning details of family background or of the client's business ensures the client that you care about what interests him the most.

The Performance

Once you establish an attorney-client relationship, it is all about communication. Return all telephone calls no later than the next day. If you cannot promptly return a call, have your legal assistant inform the client of when to expect a return call. The client wants to know that you are attending to the matter and what the status of the matter is at any given point in time. Thus, it is important to call the client even when there is nothing to report. Make the most difficult calls first. If you are untimely in attending to the work of the client, do not hide behind your voicemail. Rather, call the client, explain the situation and provide a reasonable timetable within which you will have accomplished some progress on the matter.

E-mail is another cost-effective manner of communication. E-mail can be an effective way to communicate short status reports or copies of communications with opposing counsel. It should not, however, be the primary or sole method of communication. It is important when projecting a professional image that substantial communication be done by well thought out, edited correspondence on your professional letterhead.

Explain how you deal with your professional colleagues. Some clients want a "mean dog" lawyer. If that is not your style, and I hope it is not, explain to the client how you will interact with opposing counsel and explain the types of decisions that you, as the professional, will make in terms of extensions of time and other accommodations. If your professional style does not suit the client, it is better for you to find that out early in the relationship so the client can find new counsel. You must also explain what your obligations are in terms of honesty, candor and fairness with the court and with opposing counsel.

The End

When you have effectively concluded a representation, either by successfully closing a transaction or obtaining a favorable verdict, there is no trick to being in the hero role. Unfortunately, things do not always go your client's way. If you have done your job during the course of the representation, you will have prepared your client for the possibility of an unfavorable result. There are many factors in every representation that you cannot control, such as an unpredictable jury, the credibility of a witness, unreasonable negotiating tactics or brinkmanship by your opposition on issues important to your client. Only if you have fully briefed the client on these types of dangers have you done your job of proper evaluation. Lawyers who give the client an unrealistic view have done the client a disfavor.



If you suffer an unfavorable result, do not duck and run or allow your ego to get in the way. The client may need to vent, and it is your responsibility to give him the opportunity to do so. Communication is the key. Contact the client within a day or so after the bad result to let him know that you understand his frustration and that you care. Avoid being overly defensive, even if you are justified in doing so. Maintain your professional demeanor and composure and you will survive to fight again.

If you practice and master these basics, you may be able to give

advice to your friend, the physician, about bedside manner.

About the Author

Stuart D. Shanor is a partner in the Roswell office of Hinkle, Hensley, Shanor & Martin, LLP, where he has practiced for nearly 45 years. His practice primarily involves litigation and banking matters. Shanor is the former president of the American College of Trial Lawyers and has served the legal profession through work on numerous State Bar and Supreme Court committees.

When Discipline Comes Calling continued from page 5

The committee's findings, conclusions and recommendations are referred to a hearing panel—the next step in the process. Comprised of one or more members of the Disciplinary Board, the hearing panel considers no additional evidence, although written argument is allowed, if requested. I hesitate to describe the hearing panel phase as an appeal stage, but it resembles that process.

Following argument, the hearing panel can accept the findings, conclusions and recommendations of the hearing committee, modify them or reject them. The hearing panel is not restricted to the hearing committee's findings, conclusions or recommendations and has wide latitude under the code and may make its decision on the record or "any additional findings that it may make." Rule 17-315 NMRA.

The Supreme Court retains ultimate jurisdiction over the disciplinary process. All recommendations flowing through the disciplinary process are submitted to the Court for approval. A hearing may occur before the Court, but only under certain circumstances and only when timely requested by the lawyer.

Not discussed up to this point is the *Consent to Discipline*, a negotiated agreement entered into between Disciplinary Counsel's

Office and the lawyer, the purpose of which is to accomplish the Court's goals for the disciplinary process: **to protect the public and not for the purpose of punishing the lawyer.** Rule 17-211 NMRA; *In re Zamora*, 130 N.M. 161, 164, 21 P.3d 30 (2001) and The Code of Professional Responsibility, *Preface*.

A Consent to Discipline does not avoid the disciplinary process. A Specification of Charges must be filed and the lawyer must answer. The agreement is then submitted to a hearing committee for its approval and subsequent approval by the hearing panel and the Court.

These are just the highlights of the disciplinary process; there is more. Many are familiar with Edward Albee's play, *Who's Afraid of Virginia Woolf?* There is no real reason to be afraid of *Virginia Ferrara's Letter*.

About the Author

Briggs Cheney has practiced law since 1973 in Albuquerque, and practices with Sheehan, Sheehan & Stelzner, PA, as an of counsel. Over the last fifteen years, he has devoted more of his active practice to mediation. Cheney has been very active in local, state and national bar activities.



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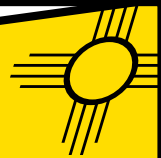
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