DEVELOPMENTS IN LEGAL MALPRACTICE
By Daymon Ely, J.D.
May/June 2012

When I am asked to talk or write about legal malpractice, I suspect that most lawyers are thinking about Shakespeare’s Dick the Butcher’s line in Henry VI, “The first thing we do, let’s kill the lawyers.” This famous line is quoted liberally to imply that everyone wants to get rid of attorneys. But, ironically, it was actually provided as a suggestion to help create an autocratic society. So, in thinking about legal malpractice, you can at least find solace in the fact that in this instance, Shakespeare may have actually been complimenting lawyers. However, before you get too cheery, read some Charles Dickens, who truly despised lawyers. He described one lawyer as a “red-eyed cadaver whose lank forefinger . . . . makes clammy tracks along the page.” And he described another attorney “as looking at the client, as if he were making a lingering meal of him with his eyes.”

I love Dickens but, according to him, we are usually in moldy, dimly lighted offices “like maggots in nuts.”

So, with that preamble, let’s explore three areas: (1) recent developments in New Mexico appellate decisions concerning legal malpractice; (2) changes in the disciplinary proceedings and rules; and (3) some observations on recent trends.

NEW MEXICO APPELLATE DECISIONS CONCERNING LEGAL MALPRACTICE

A. Trial by Jury.

Nationally, lawyers suing lawyers is becoming a more accepted part of the practice of law. So, not surprisingly, the case law is starting to develop along with this trend. New Mexico is no exception.

The New Mexico case to start with is Andrews v. Saylor, 2003-NMCA-132. Debbie Andrews divorced her husband who was a City of Albuquerque fire-fighter. Several years after the divorce was finalized, Ms. Andrews was standing in line at the grocery store when she recognized a woman who had also been married to a fire-fighter. They started talking and then the other woman said something like, “thank goodness my lawyer got me half of my husband’s retirement.” Debbie was stunned. She did not know that she was entitled to any of her husband’s retirement and her lawyer had not told her.

Debbie hired another attorney who moved to revise the divorce decree to include a division of the retirement benefits. The trial judge, Judge Lang, denied the request for a revision of the divorce decree. The new attorney decided not to appeal Judge Lang’s decision because he believed the appeal was not viable. Debbie hired malpractice counsel and sued her initial attorney for failing to include her husband’s retirement benefits in the division of community property.

The attorney being sued, Ms. Scarborough, filed a motion for summary judgment arguing that Judge Lang’s decision should have been appealed. Ms. Scarborough’s attorneys argued that Judge Lang was wrong and that his decision would have been reversed. The attorneys further argued that the failure to appeal was, in effect, an intervening cause that precluded the malpractice action. Moreover, the court, not the jury, had to make the decision about the viability of the appeal. The trial court agreed and granted summary judgment. Ms. Andrews appealed.

The Court of Appeals reversed the district court. There are two critical holdings that came out of the Court of Appeals’ decision. First, the court held that lawyers are not to be treated differently from anyone else being sued. The court wrote: “We see no need for treating legal malpractice any differently than other types of professional malpractice.” Para. 16. And the court continued: “We are concerned that our adoption of a special rule that insulates malpracticing lawyers from jury scrutiny of their conduct would give the public the impression that we are simply lawyers protecting other lawyers.” Id. (The court reaffirmed this principle in Akutagawa v. Laflin, 2005-NMCA-132 explaining that lawyers should not have the benefit of “a
special rule” insulating them from liability.) Thus, issues relating to attorneys should be treated as if the lawyer is simply another member of the public.

In keeping with that principle, the Court of Appeals faced this question: Are legal issues submitted to the jury? In this case, the issue was whether an appeal from a ruling by a district judge would have been successful. The court held that, indeed, even legal issues can be jury questions. “We are confident that a jury, aided by the testimony of experts versed in the relevant area of the law, is capable of making a prediction as to the outcome of a hypothetical appeal with the degree of certainty required by a preponderance-of-the-evidence standard of proof.” Para. 16. Thus, each side could call attorneys to testify as to the viability of an appeal and the jury would make the ultimate decision. Causation remains a jury question even when there are issues of law.

Andrews v. Saylor is consistent with our appellate courts’ protection of trial by jury. While not a legal malpractice case, Blea v. Fields, 2005-NMSC-029 is also instructive. This was a medical negligence case where the issue was a party’s entitlement to a jury trial in a case involving both legal and equitable claims. The Supreme Court held that when a case involves both equitable and legal claims, a trial judge may decide the equitable claims first if the equitable claims do not have any disputed fact issues in common with the legal claims. However, when equitable and legal claims present common issues of fact that are material to the disposition of both claims, the legal claims must be submitted to a jury before the equitable claims are decided. “Otherwise, the judge while deciding the equitable claims will have invaded the province of the jury by deciding disputed facts that are material to the legal claim.” Id. at Para. 1. Blea and Andrews are good examples of the Court’s preference for and protection of the jury decision-making process.

B. Statute of limitations

The statute of limitations for legal malpractice claims is four years. Sharts v. Natelson, 118 N.M. 721, 885 P.2d 642 (1994). The statute of limitations for legal malpractice claims commences when: (1) the client sustains injury; and (2) the client discovers, or through reasonable diligence, should discover the facts essential to the cause of action. 118 N.M. at 724. See also, New Mexico Public Schools Insurance Authority v. Arthur J. Gallagher & Co., 2008-NMSC-067.

But the application of the statute of limitations can be tricky. For example, in Jaramillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979), the statute of limitations did not begin to run until the purported beneficiary of a negligently drafted will suffered an actual injury, which was when the will took effect upon the testator’s death. However, in the case of negligently drafted restrictive covenants, an attorney’s client was actually injured when the deeds containing those covenants took effect. Sharts, 118 N.M. at 72.

In Brown v. Behles & Davis, 2004-NMCA-028, the clients hired defendants who were bankruptcy attorneys. The clients claimed that they were assured that all judgment liens would be avoided or forgiven through the bankruptcy process. Twelve years later, in 1997, the clients, the Browns, attempted to refinance the mortgage on their home and discovered liens were still on their residence even after the bankruptcy. The Browns sued their attorneys in June 2001. The district court dismissed the legal malpractice lawsuit on the basis that the four-year statute of limitations had run. The Court of Appeals disagreed and noted that they could not find any principle of law that imposed a duty on landowners to be cognizant of the status of their title at all times. Imposing such a duty on landowners would be unreasonable after they had hired attorneys to take care of just this problem. “Imposing such obligations on claimants is contrary to our professional malpractice law, which recognizes that a plaintiff may not always be qualified to ascertain an injury or source of an injury; for example, the law does not require a patient to seek a second medical opinion in order to discover whether the first doctor made mistakes.” Id. at ¶13. (Emphasis added.)

C. Res Judicata/Collateral Estoppel

New Mexico law permits clients to file a legal malpractice claim even after a charging lien is resolved. In Computer One Inc. v. Grisham and Lawless, 2008-NMSC-038, the attorneys filed a charging lien. After the charging lien was resolved, the client brought a malpractice claim. The attorneys argued that the resolution of the charging lien estopped the client from bringing a malpractice claim. The Supreme Court agreed that the client was precluded from re-litigating those issues material to the charging lien, e.g., the validity of the fees, but held that the client was not precluded from bringing a malpractice claim. However, see Brunancini v. Kavanaugh, 117 N.M. 122, 869 P.2d 821 (Ct. App.1993), cert denied, 117 N.M. 215, 870 P.2d 753 (1994) (malpractice claim could be barred if lawyer brought a lawsuit against the client which prompted the compulsory counterclaim of legal malpractice).

D. Duties of attorneys in wrongful death cases
Attorneys can have duties to non-clients. You may recall Leyba v. Whitley, 120 N.M. 768, 907 P.2d 172 (1995). In Leyba, the attorneys resolved a wrongful death case and gave the money to the personal representative of the estate who spent all of the money. The problem was that there was a minor child who was the beneficiary of the wrongful death proceeds and who received only a fraction of the total of the recovery. The question was what duties the attorneys had, in that situation, to protect the child.

The court concluded that an attorney owes a duty to a non-client if the attorney and the client intended to benefit the non-client. “The very nature of a wrongful death action is such that we will imply in law a term in every agreement between an attorney and personal representative that the agreement is formed with the intent to benefit the statutory beneficiaries of the action.” Id. at 776.

This duty to non-clients has come up again in Spencer v. Barber, 2011-NMCA-78. In Spencer, the attorney represented a parent, the mother, of the decedents. In this case, the attorney made clear that he represented the mother and the father indicated he understood this. The father worked out a settlement with the attorney for his share of the proceeds. The father then believed the settlement was unfair to him and sued the attorney. The issue was what duties did the lawyer, who had disclosed his relationship to the father, have to the father. The Court of Appeals held that the attorney did not have a duty because he properly disclosed the relationship. The Court dismissed the malpractice lawsuit but allowed the father to challenge the settlement agreement.

The case is now at the Supreme Court and NMTLA has filed an amicus brief. The case will hopefully clarify the duties of attorneys in these wrongful death cases.

**RECENT DEVELOPMENTS IN THE DISCIPLINARY PROCESS**

First, there is a change in the rules relating to insurance. Rule 16-104 of the Rules of Professional Conduct requires a lawyer to reveal, in writing, to his/her client if he/she does not have a professional liability insurance policy with limits of at least $100,000/300,000. The form required to be used is provided in the Rule.

Second, perhaps the most significant change to the disciplinary process in recent memory was announced in the case captioned In the Matter of Dennis W. Montoya, 150 N.M. 731, 266 P.3d 11 (2011). At the very beginning of the opinion, the Supreme Court notes that a disciplinary complaint had been made against the attorney “almost three years ago.” The Supreme Court noted: “For reasons beyond the scope of this Opinion, resolution of these complaints was delayed inexcusably before the Disciplinary Board, which enabled Montoya to claim an appearance of innocence for far too long. As a result, this Court has undertaken substantial revisions to our disciplinary process to ensure that no such delays will reoccur.”

While not discussed in the opinion, among the changes made to the disciplinary process was the abolishment of a custom of the disciplinary counsel to stay prosecution of the disciplinary process if there was a pending legal malpractice claim. This historical custom meant that if the lawyer was the subject of a disciplinary complaint and also sued, the lawyer would not face prosecution of the disciplinary complaint until the legal malpractice case was resolved. The Supreme Court, sensibly, eliminated the practice, and disciplinary prosecutions are no longer stayed.

In addition, the Court in Montoya discussed the application of Rule 16-107 of the Rules of Professional Conduct and specifically 16-107 (A)(2) which provides: “A concurrent conflict of interest exists if there is a significant risk that the representation of one client will be directly adverse to another client or will be materially limited by the lawyer’s responsibilities to another client.” For any lawyer involved in representing clients with divergent interests, this opinion is an excellent primer for conducting yourself in a professional manner.

If you are or plan to be local counsel, you should also review In Re Estrada, 140 N.M. 492, 143 P.3d 731 (2006) which involved a discovery dispute and the introduction of forged evidence. The case gave the Supreme Court the opportunity to discuss the professional and ethical issues that may occur when New Mexico attorneys must confer with out-of-state counsel for corporate clients involved in litigation in New Mexico. In such situations, attorneys licensed to practice in New Mexico have an independent duty to the New Mexico judiciary to obey New Mexico’s ethical and discovery rules, regardless of the opinion of out-of-state counsel.

**RECENT OBSERVATIONS**

With the economy in a slump, there appears to be an uptick in the number of lawyers getting involved in cases where they are not experienced or staying involved in cases where there are conflicts. The first issue is easily addressed. If you find yourself in this situation, get help from someone experienced in the area. Don’t “wing it.” For conflicts, review Rule 16-107 and tell your clients, in writing, about the conflict and insist they have another attorney review the matter.
Also, lawyers are still surprised that they get sued even if they don’t have insurance. Every lawyer I know who prosecutes legal malpractice cases will pursue an attorney regardless of whether there is insurance or not. Otherwise, lawyers will be encouraged to not purchase insurance and leave his/her client unprotected.

Two final notes. One, insurance is relatively cheap, particularly for young lawyers. About 20% of private practitioners do not have insurance. That is just inexcusable. If you have insurance, not only will you be covered if there is a claim against you but your lawyer will handle the day-to-day stress of the litigation.

Second, a note of caution. If you think you have committed malpractice, don’t panic. Talk to a trusted colleague before calling the client or your insurance company. This person needs to help you evaluate the situation from a more objective view. Then, if appropriate, call your carrier. If you are like me, you will think you have messed up almost every day. The intervention of a third person is indispensable.