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Is a Certificate of Merit Required in a Professional Liability Action by a Non-Client Against a Lawyer? — Revisited

About six months ago, this author reported in this space on *Chizmar v. Borough of Trafford*, 2009 WL 1743687 (W.D.Pa.), a federal district court case in which it was held that a certificate of merit (COM) is required under Pennsylvania Rules of Civil Procedure 1042.1 *et seq.* for professional liability actions by a non-client against an attorney. Although these are state rules of civil procedure promulgated by the Pennsylvania Supreme Court, the federal courts in diversity actions treat them as substantive state law. As a result, the federal courts have occasion to interpret some of their provisions.

These rules were promulgated to create a screening process with respect to professional liability claims at the inception of the lawsuit. Subject to exceptions, within 60 days after filing a complaint, a plaintiff must file a COM in which certain representations must be made. These include a statement that plaintiff has retained “an appropriate licensed professional” who has offered a written statement that there exists “a reasonable probability” that the standard of care has been breached and such breach caused the harm, that the claim against the professional is based on the conduct of other professionals supervised by the defendant or that expert testimony is not needed under the circumstances. But does this chapter of rules apply in instances where claims are asserted by non-clients who are not standing in the shoes of the client, such as in a claim for abuse of process? The two reported cases are split on this issue.

Chizmar involves a claim against a lawyer for wrongful use of civil proceeding under 42 Pa.C.S.A. Section 8351 *et seq.*, commonly referred to as the Dragonetti Act. This necessarily means a claim by a defendant in the underly-

ing action, a non-client, against the lawyer for his or her professional conduct in the prosecution of that action. The fact that the plaintiff in the Dragonetti action was a non-client of the defendant attorney raises the question of whether Rule 1042.3, which requires a certificate of merit “[i]n any action based upon the allegation that a licensed professional deviated from an acceptable professional standard,” applies to Dragonetti and other claims brought by non-clients.

This question appeared to have been answered with the June 16, 2008, (effective immediately) amendments to this chapter of the rules when Rule 1042.1(a) was rewritten to state: “The rules of this chapter govern a civil action in which a professional liability claim is asserted by or on behalf of a ... client of the licensed professional. ...” [emphasis added] That language would seem to restrict the need for a COM only to instances where the lawyer has been sued by his or her own client on claims arising out of his or her professional conduct. But in *Chizmar*, Judge Terrence F. McVerry disagrees with that conclusion because he does not believe that “a civil action” means the same as “any civil action.” By drawing a distinction, he does not find that “a” limits this chapter of rules only to professional liability claims brought by clients against their own lawyers.

He also ignored the Explanatory Comment, which was part of the 2008 amendments, that the above language was added “to make clear that Rule 1042.1 *et seq.* ... applies to claims by or on behalf of ... clients against licensed professionals.” [emphasis added]

Further light has been shed on this issue by a recent Superior Court decision. In *Sabella v. Milides Estate*, ___ A.2d ___ (PA Super. 2010), 2010 WL 1080720, a three-judge panel held that a COM is not required in Dragonetti and abuse of process claims against a lawyer. Accordingly, the court found that the trial judge had committed an error of law when the judge denied the plaintiff lawyer’s motion to strike the judgment of non pros under Rule 1042.6, which defendant had praeciped the prothonotary to enter, because the plaintiff had filed no COM.

Sabella was actually decided under the version of this chapter of rules in effect before the June 2008 amendments because the defendant had praeciped for non pros before their effective date. Therefore, the court did not have the benefit of the new language in Rule 1042.1(a) and the Explanatory Comment in deciding the issue, although the opinion authored by Judge Susan Peikes Gantman notes that the result would have been the same under this chapter of rules as amended. Moreover, this

timing had allowed defendant to file his praecipe without any advance notice to plaintiff of his intention to do so, something that can no longer occur because of the 30-day written notice requirement under Rule 1042.6(a) and (d) (although subject to exceptions).

Notwithstanding these circumstances, the court found that a COM is required for claims against a lawyer arising out of his or her professional conduct only in instances where a professional relationship had existed between the plaintiff and the lawyer.

The court did note that there are some instances where a non-client can assert a legal malpractice claim, such as, for example, as an intended third-party beneficiary. Although the court did not so state expressly, presumably a COM would be required in all such instances where the claim involves a breach of duty by the lawyer to his or her own client, although the claim has been brought by a third party.

The *Sabella* court did not even cite, much less try to distinguish, *Chizmar*. Of course, *Chizmar* is a federal district court ruling and constitutes only persuasive, not binding, precedent. Fortunately, the *Sabella* court did not designate its opinion non-precedential, but it is still only persuasive precedence for the federal judiciary. But because of the notice-of-intent provision added as part of the June 2008 amendments, plaintiff will in effect receive a warning of the need to file a motion under Rule 1042.6(c) “to seek a determination by the court as to the necessity of filing a certificate of merit” if plaintiff contends that the circumstances do not warrant a COM.