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DEFENSE *news*

The Legal News Journal for New Mexico Civil Defense Lawyers

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The purpose of NMDLA is to provide a forum where New Mexico civil defense lawyers can communicate, associate, and organize efforts of common interest. NMDLA provides a professional association of New Mexico civil defense lawyers dedicated to helping its members improve their legal skills and knowledge. NMDLA attempts to assist the courts to create reasonable and understandable standards for emerging areas of the law, so as to make New Mexico case law dependable, reliable, and a positive influence in promoting the growth of business and the economy in our State.

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•An Amicus Brief program on issues of exceptional interest to the civil defense bar.

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So You Think You've Settled? Think Again!
Medicare Set-Asides For the Practitioner

By
Bennett L. Pugh, Esq.
Carr, Allison, Pugh, Howard, Oliver & Sisson
Birmingham, Alabama

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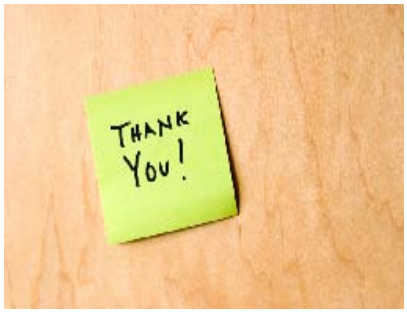

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Interview with The Honorable Steven L. Bell

Interviewed by Carla Neusch-Williams, Esq. - Atwood, Malone, Turner & Sabin, PA

DLA Please introduce yourself.

BELL Steve Bell. I am one of four District Judges in Chaves County, the others being Charles Currier, Freddie Romero and Ralph Shamas.

DLA When did you first join the bench?

BELL I was appointed by the Governor on August 7, 2006, and came to work on September 5. I was elected in November.

DLA Prior to becoming a Judge, you practiced law at Atwood, Malone, Turner & Sabin, in Roswell, New Mexico. What brought you to New Mexico, to Roswell, and to that firm?

BELL In 1977, I was a second year law student at the University of Texas. I interviewed with John Bassett and R.E. Thompson for a summer clerkship and came to Roswell for the first time in my life in May, 1977. I also clerked for a larger Texas firm. At that time, Atwood & Malone had eight lawyers, four of whom were doing exclusively trial work and the rest were doing transactional work, mostly oil and gas. After my first day of clerkship, I came home and told my wife, Sharon, that I wanted to move to Roswell. She was less than enthusiastic but supported my ultimate decision to leave the great State of Texas for what seemed at the time an adventuresome move to New Mexico. My law school classmates couldn't believe I was taking a job in a small firm in New Mexico.

DLA While in private practice, what was the nature of your legal practice?

BELL Early on, I handled a variety of insurance defense cases. After several years, I began to mostly represent governmental entities.

DLA During private practice you earned the reputation for being an accomplished trial lawyer. What drew you to litigation and trial work?

BELL Actually when I first came to Atwood & Malone, I wanted to do oil and gas work. Within weeks I was bored to death looking at abstracts. One day Russ Mann came in my office and said, "Young man, do you really enjoy that type of work?" When I told him how bored I was, he picked up the large stack of abstracts off of my desk and took them back to the partner that had given them to me. I tried a case with Russ the next week, and that was that.

DLA What were the key lessons you learned defending trials that helped you succeed as a trial lawyer?

BELL In my first two or three years of trial work, I mostly assisted Russ Mann, Bob Turner and Bob Sabin. I saw how thoroughly prepared they were for trial and how honest and professional they were with opposing counsel and the court. After I started trying cases on my own, I did my best to imitate them in every way.

DLA In 2004 you were inducted into the American College of Trial Lawyers. What can you tell us about the ACTL?

BELL Well, first of all, I was shocked and very pleased to be invited to become a Fellow in the American College of Trial Lawyers. Many others were, and are, more deserving of this honor than I am. The ACTL is composed of civil trial lawyers, representing both plaintiffs and defendants, as well as prosecutors and criminal defense lawyers from the United States and Canada. There are approximately 40 Fellows from the State of New Mexico. The goals of the College are to improve the quality of trial and appellate advocacy, as well as professional ethics and the administration of justice. The College sponsors the National Moot Court Competition and National Trial Competition among law schools in the country. It also is active in promoting Access to Justice and Legal Services and evaluating proposed changes and making recommendations for changes to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and Federal Rules of Evidence. I was particularly pleased to be inducted into the College by Stuart Shanor of the Hinkle Law Firm in Roswell, who was the Immediate Past President of the College.

DLA How important is written advocacy to the success of a trial lawyer?

BELL I think it's of the utmost importance. A trial judge makes a first impression of a case on the written submissions. As a trial lawyer, I always thought that was the case, but as a trial judge I know that for sure.

DLA What advice do you have for lawyers submitting briefs in New Mexico Courtrooms?

BELL In addition to being thoroughly researched and well-organized, I think the two most important attributes of good briefing are brevity and honesty. By brevity, I do not mean that all briefs should be short; I mean they should be thorough, but concise. Too many times good arguments are lost in excess verbiage. By honesty in briefing, I mean citing contrary authority and other potential weaknesses and then explaining why they do not apply to the facts of the case.

DLA Since you began your practice, how has the practice of law changed in New Mexico's state and federal courtrooms?

BELL I don't think it has changed very much. Although there are probably twice as many lawyers in New Mexico as there were in 1978, it's still a relatively small community. As a result, trial lawyers tend to deal with each other on a regular basis, making collegiality a lot more likely.

DLA How has your transition been from trial lawyer to judge?

BELL It's been a very natural transition. I've certainly had a lot to learn about substantive criminal and domestic relations law, but trials are trials.

DLA What have you found most surprising after taking the bench?

BELL Nothing really. I think if there was any surprise at all, it's that I enjoy the job more than I thought I would.

DLA Anything most troubling?

BELL No. I've enjoyed all aspects of the job. I've particularly enjoyed meeting lawyers with whom I had never had prior practice experience, for example, members of the District Attorney's and Public Defender's Offices.

DLA What is the size of your criminal and civil docket?

BELL I think the Judges in Chaves County average about 1,250 cases each. My docket has been slowly building and will probably not reach that level for another several months.

DLA Given the size of your docket, and the resources available to you, how do you prepare for hearings on complicated matters?

BELL Files are brought to me several days in advance of a scheduled hearing. This gives me the opportunity to review the files thoroughly and research any legal issues.

DLA Federal judges are able to employ clerks and staff attorneys to assist them in legal research and opinion writing. Would New Mexico citizens benefit from similar resources being devoted to New Mexico state courts?

BELL Absolutely. I think that State trial judges have at least as much use for law clerks as do Federal trial judges. In the last several years of my trial practice, I had the luxury of someone else doing 99% of my research. I've had to refamiliarize myself with Westlaw.

DLA How has the bench been for your golf game?

BELL I don't think it has changed my golf game much. I certainly don't play any better or any more often. I am getting a little tired of the line from Caddy Shack: "It's your honor, Your Honor".

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Medicare Set-Asides in Litigation

by Bennett L. Pugh and Melisa George Zwilling - Car, Allison, Pugh, Howard, Oliver & Sisson
Birmingham, Alabama

When we first began using the words "Medicare Set-Aside" many years ago, most clients, colleagues and others reacted with expected perplexion. Immediately, the question became, how can Congress or Medicare require a state court settlement to pass inspection at the federal level? As we now know, Medicare Set-Asides (MSAs) have evolved many times since the beginning. The MSA practice encompasses complex federal legislation, fiscal intermediary manuals and policy memos from Medicare. It is absolutely critical to use experienced and expert legal counsel in the handling of these matters in order to avoid the pitfalls and penalties that come from the failure to protect Medicare's interests. There are numerous vendors who seek to develop this as a business; however, primary payers should realize that the use of non-lawyers in this practice jeopardizes the very case closure and release of claims that settlements attempt to bring. I am sure this process will continue to change as the Centers for Medicare and Medicaid Services (CMS) adapts to the ever-changing pace of litigation.

Our firm handles the entire MSA process including the allocation, the preparation of the agreements, the submission to CMS and the establishment of the account. Although we do not act as custodian of the funds, we work closely with the claimant or the custodian to ensure that the account is properly established.

Background:

The 1960's proved an exciting time for landmark legislation. The Civil Rights Acts were passed in that decade, as was the Voting Rights Act. Social legislation reached its zenith in those ten years. In that decade, Congress also amended Title XVIII of the Social Security Act to include Medicare in 1965. It's hard to believe that Medicare is now 40 years old. The noble purpose of this public benefit was to provide a medical care safety net for two main groups of beneficiaries: the elderly and the disabled. Medicare coverage applies to those over 65 and individuals who are disabled under the Social Security Act. See 42 USC §1395(c). Moreover, the Secretary for Health and Human Services is charged with administering Medicare through CMS, formerly known as the Health Care Finance Administration.

Medicare coverage basically falls into two categories. Coverage A provides public health benefits for hospital related treatment and Coverage B deals with physician care. Medicare is financed through two trust funds, one for each of these plans. Coverage B is elective and beneficiaries pay a small premium for it. However, Coverage A is not charged to the enrollee. Social Security and Medicare are funded by taxes on wages. A worker pays 6.2% for Social Security, up to $94,200 in earnings, and another 1.45% for Medicare on all the earnings. The employer matches these amounts but self-employed individuals pay 15.9% of earnings for both programs, deducting the employer's portion from income taxes.

The Medicare Secondary Payer Statute:

This statute was adopted in 1980 when Congress realized that Medicare faced funding problems brought about by public health coverage of treatment that should be covered by a "primary payer". That term applies to group health, managed care plans, workers' compensation carriers, Longshore defendants, Black Lung employers and liability defendants. Before 1980, Medicare generally paid for medical services, even though a beneficiary had coverage under one of these plans. See generally, 42 USC § 1395y(b)(2)(A)(ii). The Medicare Secondary Payer Statute (MSP) was enacted with the primary purpose to reduce federal health care costs by providing Medicare with subrogation rights. Generally, Medicare will make contingent payments on behalf of a beneficiary who may be covered under a primary plan and then seek reimbursement to the appropriate trust fund from the primary payer.

Other legislation in the 1980's granted the United States the right to pursue claims against primary payers. The Deficit Reduction Act of 1984 provides a right of recovery against primary payers, and the Omnibus Reconciliation Act of 1986 allows for a private cause of action to recover funds paid by Medicare. The collection of statutes that combine to create the MSP have withstood many challenges in the courts regarding reasonableness and constitutionality. The Medicare Drug Improvement and Modernization Act of 2003 (the "drug bill") also works to close certain loopholes in the original statute.

How the MSA Works:

The dual purpose of the MSA is to prevent the taxpayer from funding medical treatment for those covered by primary plans and to avoid disturbing Medicare benefits for those enrollees. It's a compromise of sorts that allows for money to be "set aside" from a settlement and used for medical treatment until it's depleted. Once exhausted, the claimant's medical care will be

covered under Medicare. The MSA requires 1) a certain amount to be allocated for medical treatment, 2) appropriate settlement documents and set-aside agreements, and 3) CMS approval, in order to be effective and binding. It is absolutely necessary to have CMS approve the MSA, within the threshold criteria, to avoid penalties and liens. Also, it is imperative to have a properly prepared MSA agreement in order to release all claims.

When is a MSA Necessary:

As mentioned above, in litigation the MSA comes into play in workers' compensation, Black Lung, Longshore and liability cases. A MSA is required when future medical care is settled by payment of money to the qualified claimant. There is a slightly different approach by CMS to liability cases as opposed to the other employment related claims, and this is discussed later in the article. For employment related injuries, a CMS-approved MSA is necessary when there is a settlement that involves future medical closure with either:

1. Class I: A Medicare beneficiary at the time of the settlement, if the total settlement is greater than $25,000, and

2. Class II: A person who has a reasonable expectation of being on Medicare within 30 months AND the total settlement is over $250,000.

The monetary thresholds include the payment of any attorneys' fees, expenses, indemnity benefits, money paid previously to settle any portion of the claim, any money paid by the defendant at the time of the current settlement and any conditional payment claims asserted by Medicare. The inclusion of prior settlement money will dramatically increase the number of cases which fall within the MSA and CMS review threshold. CMS has made it abundantly clear that even if the settlement is below the review thresholds, Medicare's interests must still be considered and protected. This may be accomplished by a Medicare Custodial Account (MCA) which is mentioned below.

CMS has also provided the criteria for "reasonable expectation". This includes individuals who have applied for Social Security Disability (SSD), those who have been denied SSD but anticipate appealing, applicants in the process of appealing or re-filing, workers who are 62 1/2 years of age or older, and those with end-stage renal disease. Approval by CMS is accomplished through the Workers' Compensation Review Center and CMS Regional Offices (ROs). There are currently ten ROs in the country, one for each Medicare region.

Liability Cases:

CMS has yet to publish a memo with strict criteria for review of liability cases. However, based on our experience in handling MSAs for many years, I can provide an outline of when the MSA comes into play in tort cases. An MSA should be used when 1) a liability case is settled with a Class I claimant and future medical payments are expressly closed pursuant to the settlement documents (this can be from either an occupational or non-occupational injury) or 2) a "reasonable expectation" claimant (Class II), who is injured in a work-related accident, maintains a third party action, the settlement of which closes the future medical obligation of either the liability defendant or the employer through subrogation.

Each RO has discretion in the review and approval of liability claims. Currently, two regions insist on reviewing all liability settlements, while most require approval if it's deemed "catastrophic". If the RO decides to review the settlement or if it is a catastrophic case, the procedure is the same for an employment-related MSA. However, even if the RO does not wish to review and approve the settlement, Medicare's interests still must be considered and protected. The process is the same as the work-related settlement but without CMS prior approval. The settling party can simply set up a Medical Custodial Account ("MCA"), which is discussed below, and notify the RO with the MCA agreement and allocation.

The MSA Process:

To secure CMS approval of the settlement, there must be a designated amount set aside for future medical care. The nurses we employ do this on a daily basis using Medicare's requirements to determine the expected future medical needs of the beneficiary. We calculate to the penny the amount CMS will require to be set aside for prompt approval. The allocation should not be subject to debate or negotiation and this allows for an unbiased approach to calculating the future medical needs of the claimant.

Most vendors, or their sales staff, assert that the allocation is the most critical part of the MSA. Actually, the most important piece of this puzzle is the MSA agreement. It is critical to employ a properly prepared MSA agreement in order to accomplish the purpose of the MSA, that is 1) to settle the claim and avoid future exposure, 2) protect the claimant's Medicare benefits, and 3) avoid future penalties and liability in the event of unexpected contingencies. The possibilities include misappropriation of funds, distribution of funds at the claimant's death, past Medicare liens, specificity of treatment, payment of taxes on the interest, duties of self-administration, and those situations where the claim must be settled prior to CMS approval. Virtually no form or state court settlement document can encompass the breadth of the MSA agreement, and it is the only way for the settling party to rest assured that there is no future exposure on that claim.

The third part of the MSA is the account. This is essentially an account with the claimant as the beneficiary. It can be maintained by either a qualified claimant or a custodian. CMS has adopted many guidelines for the account to deal with payment of fees, payment of claims, accounting to Medicare on a yearly basis and other requirements. The breath of life to the account is the MSA agreement, and it essentially creates a new legal entity, with its own rights, fiduciary responsibilities and duties.

Medical Custodial Account:

Even if the settlement does not rise to the CMS workload monetary threshold, CMS still requires the parties to a settlement to protect Medicare's interests. We recommend an MCA to accomplish this purpose. The MCA is set up like an MSA with an allocation, medical expenditures agreement and account. However, there is no need to submit this to CMS for approval,

Medicare Set-Asides Continued

and it assures the defendant that a right of recovery will not be asserted by Medicare in the future.

Penalties and Punishment:

Medicare, by design, is not intended to deny claims made by beneficiaries. CMS has the authority to do so, but we have seen this used rarely. If a settlement is consummated without protecting Medicare, CMS has two options. First, it can simply deny Medicare benefits to the beneficiary until the entire settlement is used for medical care. This is the exception rather than the rule, but this possibility exists. We all know that if this occurs, the claimant will assert yet another claim against the defendant for failing to preserve Medicare benefits. That is an inherent risk if an MSA agreement is not used. Secondly, CMS may pay for the claimant's medical treatment and assert a "right of recovery" (i.e. conditional payment claim or lien) against the primary payer. This is accomplished through lead contractors who act as intermediaries with CMS, and they monitor claims payments of Class I and Class II claimants. They are aggressive in asserting rights of recovery, and failure to reimburse Medicare will result in an action against the primary payer by the Secretary to recover the funds. In the event that suit is filed, there is a statutory double penalty that is imposed on the primary payer. This amounts to a triple penalty since the offending party paid money to settle medicals (without an MSA) and then is required to pay a double penalty for the amounts spent by Medicare for treatment of the claimant. Moreover, the Secretary can pursue these claims on behalf of the United States against any party to the settlement including the lawyers.

Prescriptions:

Effective 1/1/06, CMS now requires that prescription medication be included in the MSA allocation. Medication should be priced at the average wholesale price or the actual cost. This policy change was brought about by the new drug bill which took effect on the same date and applies to all submissions on or after 1/1/06. Our nurses have software enabling them to accurately predict the amount of medication that a claimant will need over the course of his or her life.

Summary:

The MSA process is a constantly evolving area of the law which considers many facets of Medicare legislation, policy and benefits. It is not like case management or vocational rehabilitation that can be handled routinely by vendor companies. It requires competent and experienced legal counsel to ensure that all issues are resolved fully and finally. It is my desire to continue to update clients and colleagues when changes occur so that all affected interests are protected in the eventual settlement. Should anyone have any questions about this area of the law, feel free to contact me at blp@carrallison.com or Melisa Zwilling at mcz@carrallison.com.

So You Think You've Settled? Think Again!

Medicare Set-Asides For the Practitioner

At this program you will learn when Medicare Set-asides should be used.

Presented by:

Bennett L. Pugh, Esq.
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Legislation of Interest Considered in the 2007 Session

by Gary Kilpatric - Montgomery & Andrews, PA

As has been extensively reported in the press, the New Mexico Legislature considered and passed a number of major pieces of legislation dealing with such headline-grabbing issues as banning cockfighting and legalizing the use of medical marijuana. However, this year's legislative agenda contained few significant measures dealing with issues of importance to the civil defense bar. The Legislature considered over 3000 measures including almost 2700 bills. The Legislature and the Governor both appeared to loosely apply the "80-20" rule as the Legislature passed approximately 18 percent of the bills the body considered and the Governor vetoed just under 20% of those that reached his desk. Of the 368 laws passed by the Legislature and signed into law by the Governor, only a handful appear to affect the rights and responsibilities of those involved in the civil legal system. The measures described in this article became law on June 15, 2007 unless another effective date is specifically referenced.

During the 2007 session, the Legislature enacted or amended six uniform laws, two of which may be of interest to the civil litigation attorney. The Uniform Trust Code ("UTC") was revised by House Bill 182 (Chapter Law 218) to incorporate the 2005 revisions adopted by the National Conference of Commissioners on Uniform State Laws. Among the new provisions of the UTC are statutes of limitations for contesting the validity of a trust and for bringing actions against a trustee; provisions providing remedies for breach of a duty owed to a beneficiary by the trustee; and limitations on a trustee's liability as a general or limited partner if the trustee holds that interest only in its fiduciary capacity. These trust code revisions went into effect on July 1, 2007.

The Legislature also passed House Bill 231 (Chapter Law 135) which enacts the new Uniform Power of Attorney Act which repeals and replaces existing law regulating powers of attorney. The new Act regulates powers of attorney, which grant authority to an agent to act in the place of the principal. This Act regulates all aspects of powers of attorney, including signing, survival after incapacitation of the principal, the effect on an agent of the appointment of a conservator or guardian, the effective dates of the trust, termination provisions, agent compensation and extent of agent authority. The new law wentinto effect on July 1, 2007 and contains a statutory power of attorney form.

As a result of other legislation passed this session (Committee Substitute for House Bill 770 (Chapter Law 40)), New Mexico has joined the Federal Government and twelve other states in enacting a law providing for the bringing of a civil action by a qui tam plaintiff and the State against persons alleged to have defrauded the State, made a false claim for payment by the State, or conspired to commit fraudulent or false claims upon the State. The Fraud Against Taxpayers Act allows for a civil action to be brought either by a private party on behalf of the State, or by the Attorney General or its designee, or both. The qui tam plaintiff who brings the action on behalf of the State is entitled to a portion of the proceeds collected. Anyone who is found by a preponderance of the evidence to have committed a false or fraudulent claim upon the State is liable for three times the amount of damages as well as civil penalties and court costs including attorney fees. There are whistleblower protections for employees who participate or cooperate with investigations and lawsuits brought pursuant to the Act. The Act went into effect on July 1, 2007 and allows for civil actions based upon conduct committed after July 1, 1987.

There was an attempt this session to phase in increases to the maximum amounts recoverable pursuant to the Tort Claims Act for damages caused by a governmental entity or public employee. These damage caps have been in place since 1976. Ultimately the Legislature passed an amended committee substitute to House Bill 14 (Chapter Law 121) which only raised the limit for recovery from $100,000 to $200,000 for damage sustained for each occurrence of injury to legally described real property; all other liability caps remain in place. This amendment to the Tort Claims Act applies to claims for torts committed beginning July 1, 2008.

The Legislature has provided confidentiality protections for mediation communications, subject to certain exceptions, such as when communications are threatening or otherwise required to be disclosed pursuant to court rules. House Bill 192 (Chapter Law 11) also provides for enforcement of a settlement agreement reached through mediation as with any other written contract, and its terms may be incorporated in an order or other document disposing of the matter mediated.

Two bills were passed by the Legislature to limit the liability of volunteers providing medical assistance. Senate Public Affairs Committee Substitute for Senate Bill 23 (Chapter Law 104) provides Tort Claims Act immunity to certain licensed health care providers, as determined by rule of the Secretary of Health, who volunteer to provide health care services to others without compensation and who have no medical liability insurance, such as retired physicians, beginning on July 1, 2007. House Bill 639 (Chapter Law 163) amends the Cardiac Arrest Response Act to provide limited immunity from civil liability to a "good Samaritan" who lacks automated external defibrillator training, and tries, but fails to rescue a person by using a cardiac arrest unit, without being compensated, provided the "good Samaritan" acts in good faith as an ordinary prudent person would have in the same or similar circumstances.

The Private Investigators and Polygraphers Act has been amended by Senate Public Affairs Committee Substitute for Senate Bill 621 (Chapter Law 115) to change the title of the Act to the Private Investigations Act. Private investigators and their employees, private patrol operators and their employees, including security guards, and polygraph examiners are now regulated pursuant to the Act which clarifies licensing proce-

dures and creates a registration procedure for employees of private investigators and private patrol operators. The amendments went into effect on July 1, 2007 but several provisions are phased in through October 31st of this year.

Two bills change provisions under the Motor Vehicle Code in ways that might affect the civil liability for injuries sustained as a result of violations of those provisions. First, House Bill 321 (Chapter Law 92), effective on July 1, 2007, makes it a violation of the Code for a driver to fail to yield to a pedestrian when the pedestrian is in any part of that crosswalk, regardless of whether the pedestrian is in that half of the roadway where the vehicle is traveling. Senate Judiciary Committee Substitute for Senate Bill 440 (Chapter Law 322), which went into effect on April 2, 2007, expands the crime of driving under the influence of intoxicating beverages to prohibit an alcohol concentration of .08 as proven by a test given at any time within three hours of driving a vehicle, provided that the alcohol was consumed before or while driving the vehicle. The three hour window also applies to alcohol concentrations for commercial vehicles and for the crime of aggravated driving under the influence of intoxicating liquor.

Although legislation to address appellate court decisions interpreting the Workers' Compensation Act were all defeated, some measures affecting the Act passed. House Bill 88 (Chapter Law 327) added licensed athletic trainers as health care providers under the Act, thus allowing them to receive referrals and to be reimbursed for services performed pursuant to the provisions of the Act. Also, unpaid health professionals deployed by the Department of Health in response to a declared emergency are to be considered public employees for the purposes of the Worker's Compensation Act under House Bill 605 (Chapter Law 328). Although the Legislature failed to pass legislation to limit benefits for the loss of use to medically-based findings contained in the AMA Guides to the Evaluation of Permanent Impairment so as to remove the subjective assignment of a loss of use percentage by a workers' compensation judge, the State Senate passed Senate Memorial 73 requesting the Director of the Workers' Compensation Administration to appoint and convene a task force, including representatives of all of the stakeholders, to review the current law and valuation relating to the "loss of use" of various parts of the body and to report its findings to the appropriate legislative interim committee by November 2007. In addition, House Memorial 52 requests the Workers' Compensation Administration to create a task force to study the fiscal and policy implications of adding coverage for farm and ranch workers.

State judges will now be covered as public officers by the Governmental Conduct Act pursuant House Bill 823 (Chapter Law 362), effective July 1, 2007. The judges and those who deal with them will be subject to the restrictions and penalties relating to such topics as: disclosures of conflicts; disclosures of confidential information for personal gain; acceptance of anything of value for a promised performance of an official act; and coercion of state officers or employees to make political contributions, to vote for a particular candidate for political office, to engage in any political activity, or to allow use of state property for other than authorized purposes.

Much of the information for this article was obtained from the databases and publications of the New Mexico Legislative Council Service. This author recommends that you also avail yourself of the Legislature's web site at http://legis.state.nm.us to obtain further information on the activities of the New Mexico Legislature.

Difficult Clients - Using the Tools of a Lawyer and the Tools of a Psychiatrist

by Nancy Franchini, Esq. - Gallagher, Casados & Mann, PC

Have you ever had a client who was overly emotional, overly involved or over-reacted to every situation? I think every lawyer has had to deal with such a client, but the problem is that we were never taught in law school how to deal with these types of people. Instead, we were taught what the law says, how to apply the law to the facts of the case, whether someone is entitled to damages, what evidence will be admissible in trial, etc. Wouldn't it be nice to know how to handle a client who calls at least once a day hysterical about one thing or another related to their case? I realize that family law lawyers have to deal with this constantly, but it is not a situation that a civil defense attorney has to deal with very often—at least not this civil defense attorney.

How are we supposed to deal with these types of clients without getting "sucked into"' the client's emotion? I have done a bit of research into this topic, and I have found two ways to look at this type of situation—through the eyes of a lawyer and through the eyes of a psychiatrist. Both ways can be combined to effectively work with a difficult client.

Handling the Difficult Client—Attorney's view

Carole Curtis is an attorney in Toronto, Ontario who has written an article titled "Dealing with the Difficult Client", dated October 2003. Although Ms. Curtis discusses how to deal with the difficult client from the time the client walks into your door for the first consultation, through the time of handling the case, to the time the case is completed or the time the attorney fires the client, I found her information about how a lawyer is to deal with the client after the lawyer client relationship has been formed to be the most pertinent for this article. It seems to me, more times than not, a lawyer will not realize they have a difficult client until after the attorney-client relationship has been formed.

Ms. Curtis sets out five tips to deal with a difficult client: 1. Understand your role, 2. Protect yourself throughout, 3. Be calm, be patient, be clear, 4. Include your staff in the plan for the client, and 5. Manage expectations. First, Ms. Curtis explains that the lawyer must understand his role is to be the lawyer and not the decision-maker. In other words, our job as lawyers is to tell the client the possible solutions to a problem and make sure the client understands the choices. It is up to the client to make the decision on which solution to chose. Ms. Curtis explains that lawyers must not make the decision for the client. If the client refuses to make the decision, see if a close family member or friend can help the client make the decision.

Second, Ms. Curtis explains that the lawyer must document every phone call, e-mail and conversation with the client should the client come back later and make a complaint about the lawyer to the Bar or in a malpractice suit. Ms. Curtis suggests that the difficult client is more likely to not pay your bill, to file a complaint with the Bar or to file a malpractice suit against you. It is important to have everything documented should a disagreement arise between the client and lawyer.

Third, Ms. Curtis explains that it is imperative that the lawyer be calm, patient and clear when dealing with the client. Most importantly, Ms. Curtis says you should not let the "difficult client turn you into the difficult lawyer, or the unhappy lawyer . . ." She explains that if you start to notice that you are becoming a difficult lawyer, you should transfer the file to another lawyer. Additionally, the best way to be clear with a client is to put everything in writing including the retainer agreement, fee agreement and all conversations and interactions with the client.

Fourth, make sure your staff documents all of their contact with the client. Additionally, do not allow the client to be abusive to your staff.

Fifth, manage the client's expectations about the services that will be provided, the time that will be spent, the possible results and the potential cost. This includes the client's expectations on how quickly the lawyer will return the client's phone calls, to how often the client will be billed, to the fact that the lawyer's staff will also be working on the case, not just the lawyer.

Handling the Difficult Client-Psychiatrist's View

R. Gregory (Greg) Franchini, M.D. is an Associate Professor Emeritus at the University of New Mexico School of Medicine and one of my cousins. I contacted him regarding how he teaches his students to handle difficult patients. He graciously provided me with notes from a seminar he gave titled "Challenging Patient Interviews". Certainly, the role that a doctor plays with his patient and the role a lawyer plays with a client are different in many areas, but they are very similar in that both the doctor and lawyer are dealing with the emotions of their patients and clients. It was Dr. Franchini's seminar notes dealing with the interaction of a doctor's and patient's feelings and emotions that I found interesting and applicable to the interaction of a lawyer's and client's feelings and emotions. Although Dr. Franchini's seminar dealt with doctors and patients, I will relay his seminar information referencing attorneys and clients.

The thrust of Dr. Franchini's seminar is that when you are faced with a difficult client "one can explore, evaluate and define the problem as a first step to finding a solution or an approach that will work." He discusses the concept of reframing—learning to view situations from a different perspective. He teaches that difficult clients should be viewed as "challenges" and "learning opportunities" rather than the bane of our existence. He teaches that it is important to realize that our response and reaction to clients is influenced by our own attitudes and prejudices. Be-

fore we can help a difficult client, we need to become aware of our own feelings, attitudes, prejudices, values and defenses. He explains that feelings are contagious—they arouse similar feelings within us. Moreover, he states that at some level all feelings make sense. In other words, if a client is angry or anxious there is a reason why the person is angry or anxious. If a client raises anger or anxiousness in us, it is important to recognize when that occurs and not let it interfere with counseling a client.

When dealing with an anxious client, Dr. Franchini suggests using an unhurried calm approach. Take time to acknowledge the client's anxiety. The client may express his anxiety through his questions to you. When these questions are asked, it is important to not falsely reassure the client.

When dealing with an angry client, Dr. Franchini states that these types of people are more difficult to handle. There may be many reasons for the anger, but it is important to remember that most have nothing to do with you. It is important to listen to the client, maintain neutrality, at least initially, and not take sides. It is important to explore why the person is angry so that you can better devise a solution to their problem.

When dealing with a controlling patient, Dr. Franchini states that it is imperative that you manage the urge to engage in a battle for control. However, it is important to remain calm, firm and focused on how the problem will be solved and not why there is a problem in the first place.

Application of Both Views

After learning and thinking about these two perspectives, I believe that both need to be used by an attorney to effectively deal with a difficult client. Clearly as lawyers, we are taught to write everything down to protect ourselves in the future should any disagreements come up. However, as attorneys, we need to remember that we are dealing with people who have feelings and emotions. We cannot always be "black and white". Sometimes we need to wallow in the clients' "gray" so we can better help them with their problem.

I was recently able to put my theory to the test. I had a client who was very emotional about the case. The client would call at least two times a week and cry or yell about the opposing party, opposing counsel or some "lie" the opposing party and counsel were telling about the client. At first, I would allow myself to get caught up in the client's emotion and react to the emotion by shooting off a heated letter to the opposing attorney. When it turned out that one of those heated letters was not deserved by the opposing party or counsel, I realized that I needed to step back from the situation. I realized that the client's emotion and my reaction to that emotion were clouding my legal judgment. At that point, I took the time to learn why the client was so emotional about the case. I learned that the client and the opposing party had ended a 27 year co-dependent relationship two years before and the case was the last tie between the client and opposing party. Once I took the time to learn this, I was better able to understand where the client was coming from, why the client was so emotional about the case, and better explain the options that were available to the client. I was able to understand and realize that most of the emotion was not about the case, but instead was about the relationship that the client and opposing party had had in the past.

Although we are lawyers, there will be times that we will need to act like the mental heath provider. We will need to listen to what the client is saying, understand why the client is angry, anxious, etc. to be better able to counsel the client on how to handle or solve a legal problem. Remember, we aren't just dealing with the Pacific Reporter and the Uniform Jury Instructions. We are dealing with people—many of whom are emotionally tied to their cases for reasons that may not be apparent until well after the attorney client relationship has been formed.

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