



DEFENSE *news*

The Legal News Journal for New Mexico Civil Defense Lawyers

Winter 2007/2008

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NMDLA Managing Partners Luncheon



Thursday - April 24, 2008
Seasons Rotisserie & Grill
2031 Mountain Rd - Albuquerque, NM

11:30 am Check-in
11:45 am Lunch is Served
12:00 noon Welcome and Opening Remarks

Dealing with the Effects of Managed Litigation: Litigation Guidelines and the Dynamics of Lawyers Managing Lawyers - Kathleen Wilson, Esq.

Update and the Trials and Tribulations of Billing Guidelines - Nancy Franchini, Esq.

Retirement Plans: A Discussion on the Safe Harbour 401(k) Plan - Karen Kahn, Esq.

Open Mic Session: A Discussion of Current Topics that are Rearing Their Heads - Mark Riley, Esq.

1:00 pm Adjourn

DLA Managing Partners Luncheon - April 24, 2008 Registration Form

DLA Members \$25

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The New Mexico Defense Lawyers Association is the only New Mexico organization of civil defense attorneys. We currently have over 350 members. A common misconception about NMDLA is that its membership is limited to civil defense attorneys specializing solely in insurance defense. However, membership in NMDLA is open to all attorneys duly licensed to practice law in New Mexico, who devote the majority of their time to the defense of civil litigation. Our members include attorneys who specialize in commercial litigation, employment, civil rights, and products liability.

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.

- The services we provide to our members include, but are not limited to:
- Exceptional continuing legal education opportunities, including online seminars, and self study tapes including 5 Professionalism seminars – significant discounts for DLA members;
- A quarterly newsletter, the “Defense News”, the legal news journal for New Mexico Defense Trial Lawyers;
- Quarterly members’ lunches that provide an opportunity to socialize with other civil defense lawyers, share ideas, and listen to speakers, who discuss a wide range of issues relevant to civil defense attorneys;
- An e-mail network and website, where members can obtain information on judges, lawyers, experts, jury verdicts, the latest developments in the law, and other issues; and
- An Amicus Brief program on issues of exceptional interest to the civil defense bar.

Contributions and announcements to Defense News are welcome, but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the New Mexico Defense Lawyers Association or the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the NM Defense Lawyers Association of the product or service involved.

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Women in the Courtroom: Guidance for the Female Litigator

Friday, May 9, 2008
JCC - Albuquerque
6.5 MCLE Credits



AGENDA

8:30 am Registration

9:00 am **“Alley McBeal for Real???” The perception of women in the Courtroom”** -
Mary T. Torres - Modrall Sperling Roehl Harris & Sisk PA

10:00 am **Balancing Litigation with Life** – Agnes Fuentevilla Padilla - Butt Thornton & Baehr PC

11:00 am Break

11:15 am **A Man’s Perspective** – Honorable William F. Lang - Chief Judge, Second Judicial District Court

12:00-1:00 – Networking Lunch (included)

1:00 pm **How Do Women Communicate with Jurors?** Joann Erickson - Southwest Jury Consulting

2:00 pm **What works, what doesn’t: Can women litigators be as aggressive and confrontational as male litigators?** Power Panel: Honorable M. Christina Armijo – United States District Judge, Honorable Linda M. Vanzi – Second Judicial District Judge, Maureen A. Sanders - Sanders & Westbrook PC, Nelse T. Schreck - Rodey Dickason Sloan Akin & Robb PA, W. Ann Maggiore - Butt Thornton & Baehr PC, Joann Erickson- Southwest Jury Consulting, Moderator: Jennifer D. Hall - Miller Stratvert PA

3:30 pm Break

3:45 pm **Business Development and the role of women in law firms and law firm management?**
Honorable Wendy E. York - Sheehan Sheehan & Stelzner PA

4:45 pm **Advice for the Young Woman Lawyer** – Carolyn Ramos, Butt Thornton & Baehr PC

5:00 - Hosted Wine and Cheese Reception

Visit www.nmdla.org to register

DLA Members \$179

Non Members \$199

Space limited - register early!

A Message from the President

by Gary J. Van Luchene, Esq. - Keleher & McLeod



Dear NMDLA Members:

On behalf of your board of directors, I would like to take this opportunity to thank you for your membership in the New Mexico Defense Lawyer's Association. I also want to fill you in on the status of our organization.

First, we need to acknowledge some changes on the NMDLA board. This year, we bid farewell to two hard-working advocates for the defense bar, who are leaving the board. Lee Rogers from Atwood, Malone, Turner & Sabin in Roswell served our membership with thoughtful dedication for many years. Nicole Werkmeister of the Narvaez Law Firm also is moving on after many years of commitment to our organization. We owe both Lee and Nicole many thanks for their efforts on our behalf, and we look forward to their continued participation in NMDLA. The board also welcomes three new members: Nancy Franchini, Michelle Hernandez, and Bryan Evans.

We have watched this organization grow over the past several years to include a large segment of the defense bar. NMDLA currently has about 400 active members statewide. NMDLA's goal is to continue to grow both in size and diversity. Our membership is concentrated mostly in Albuquerque and Santa Fe, and we need to make sure that we provide value and service to our members in other parts of the state.

In 2008, NMDLA will continue to provide the best continuing legal education programs in New Mexico. Mark your calendars for the Basic Skills Defense Practice Academy on April 18-19, and for the Women in the Courtroom Conference on May 9. Our insurance law seminar is set for November 13. Also, please make use of the NMDLA website and the "Friday Facts" e-mail blast for other upcoming events, including web-based seminars. We also continue our relationship with DRI, the national defense lawyers' organization, which is a good resource for both attorney education and business development. Please take advantage of the services and resources we offer.

It is important for us to hear your ideas as members of NMDLA. If you have any suggestions for how we can improve our service to you and add value to your membership, please do not hesitate to call me or other members of the board. Thanks again for your continued participation.

SHARE YOUR SUCCESSES - Over the last few years we have been able to enhance the value of membership in the NMDLA by way of electronic access to a variety of information---especially through the use of email inquiries for information. As part of that continuing effort we ask each of you to share with the rest of the membership---be that a good result at trial; a good appellate decision; a successful motion at the trial court level; a good expert; a good mediator; etc. In turn, we will use the broadcast email capability of the DLA to quickly and efficiently disseminate your news or information to the rest of the membership. All members benefit from such a system; but it will take input from all members to make it a real success.

Interview with The Honorable John A. Pasternoster

Interviewed by Ernestina Cruz, Esq. - Narvaez Law Firm

JP=Honorable John Paternoster
TC=Tina Cruz

TC: *Good Morning, Judge Paternoster. My name is Tina Cruz and I am an attorney at the Narvaez Law Firm in Albuquerque. I also serve on the Board of Editors with the New Mexico Defense Lawyers Association. The DLA thought it would be a good idea for someone to come up to Taos and visit with you regarding your work as District Court Judge in the Eighth Judicial District in Raton. Let's start by talking about your background.*

JP: I was born and raised in upstate New York, in Cooperstown, where the Baseball Hall of Fame is located and where baseball was allegedly founded. My father practiced law in upstate New York for sixty-two years. I graduated from a private boarding school in New England and thought that I wanted to study Earth Sciences. There is no better place to do that than in New Mexico, so I applied to the University of New Mexico, was accepted, and came out here in 1964. I was the first in my family to be west of the Ohio River. I graduated from UNM with a degree in History and Geology. I then worked in a gambling casino at South Lake Tahoe. At that time, I did not know who I was or what I wanted to do. I had a summer job there and I liked it. Then I starting feeling like I was not doing anything with my life.

I applied to law school and was blessed to be accepted at Gonzaga University School of Law in Spokane, Washington. I started there in 1971 and plodded my way through, splitting work, traveling and studies. I graduated in 1976 and was admitted after the Spring 1977 bar exam.

My first job was in the District Attorney's office in Clovis. I was really fortunate to be hired later by the Santa Fe District Attorney to work on prison-related crimes, but I burned out pretty fast about a year and half after that and went to the Attorney General's office. At the time, Jeff Bingaman was the Attorney General, and he was finishing up reports about prison conditions. I wrote a report for the Attorney General that studied the local jails and the impact that the prison riots and transfer of inmates out of the Department of



**Honorable John Pasternoster
Eighth Judicial District**

Corrections into the local jails had on the local jail administration. I ended up staying at the Attorney General's office until 1988. I was the first lawyer who had ever been in charge of the Attorney General's Investigation Division. Attorney General Bardacke put me in charge of that law enforcement agency, and it gave me unbelievably valuable experience and understanding on how investigations work.

I then had what you would call a "midlife crisis". I sold everything I owned, gave away the rest, and bought a ticket to Hong Kong. I spent the next seven to nine months traveling through Southeast Asia on my own, just wandering around from China, Australia, Fiji and the South Pacific Islands. I then ended up in California, where I started preparing for the California bar exam. But a huge commercial poaching case had arisen in the Chama area that the Game & Fish Department was investigating, and somehow they found me in an apartment in Palo Alto and asked me to come out and take over the case. I came back to Santa Fe and worked on that case for a couple of years. I was feeling a little "city pressure" as Santa Fe grew, and I had always wanted to live farther north. I moved to Taos and have been in the Taos area since 1991. I worked briefly at the District Attorney's office and then opened my own private practice until I won the District Attorney's race in 1996. I served a term and went back into private practice after I lost a very close primary. I was again in private practice for a while, and then I sought a District Judge position.

TC: *As you noted, you were in private practice at various periods during your career prior to serving on the bench. What types of cases did you handle while in private practice?*

JP: I mostly handled criminal defense cases. I really like criminal law and search and seizure issues. I enjoyed jury work, so I naturally gravitated to that kind of work since I could pick and chose the case I would defend. I also did some administrative hearing work and civil work. Ironically, I tried to stay away from domestic relations work since I thought dealing with criminal defense was stressful enough.

TC: *Why did you decide to apply for the District Court Judge position?*

JP: I think about that question often because I had to explain it to the Judicial Selection Commission, and I again explained it to the Governor when I was interviewed. I know that this is going to sound old fashion, but I am the grandson of Italian immigrants and they taught me those old-fashioned values of humility, honesty, and hard work. I had enjoyed watching judges throughout the state, and I was really blessed in my early years to get to try cases all over the state. For the six years prior to running for District Judge, or competing for the job originally, I had been the Municipal Judge in Eagle Nest when my wife and I still had a home there. I enjoyed it immensely. I realized there were some aspects of my character that were kind of lending themselves to comfort on the bench. I will tell you up front, Tina, I am a recovering alcoholic. It is the thing I am most proud of. In January 2007, I celebrated my 21st anniversary.

TC: *Congratulations.*

JP: Thank you. You can't go through a life-changing process like that without finding out who you are at the very deepest levels and you can't be comfortable in any calling, especially in a professional calling if you don't know who you truly are. I realized that I was comfortable as a Municipal Judge. So then an opportunity arose and in thinking about this both then and again after looking at your questions, I realized as old-fashioned as this sounds, that throughout all the years I had been practicing law, I never really was motivated by money. I was more motivated by a desire to help people and to have scholarly efforts. I thought this was a good job for me to compete for, especially, because of all the years I practiced in this district. I came to know the people and the issues. So, I threw my hat in the ring and I believed that I had a fair chance to come

up with a recommendation from the Judicial Selection Commission because I had worked hard and tried to avoid controversy. I had failed and made mistakes like anybody, but I owned up to them and I tried to correct myself. I also believed I had the ingredients of a good jurist because of my experience in dealing with the prison- related cases to some of the largest public corruption and commercial crime racketeering cases.

TC: *Let's turn to your advice for lawyers who appear before you.*

JP: First of all, it is important for lawyers to remember what the judge's job is— and that is to make decisions. So, it does not help me to be handed, on the morning of the motions hearing, a handful of cases. I am not going to be able to read them. I want them fully developed in the briefs and it helps if the lawyers pre-mark their exhibits. It is un-nerving and disruptive to have a lawyer hand my court reporter, in the middle of the proceedings, documents for marking. It really speeds things up, when then are pre-marked.

With reference to motions, I asked myself, for years as a practitioner, "why does a particular rule apply to this case?" Sometimes an argument cannot be expressed in one sentence. So, I am willing to extend page limits on briefs in order to get a good argument. It helps if the lawyers don't just express the chain of logic in one or two sentences. They should tell me why

Some Benefits of Membership

Expert Requests

Have you used the email query to obtain information on an expert or transcripts of depositions? You can remain anonymous or have responses come directly to you. Contact Rhonda at nmdefense@nmdla.org for more information.

Share your Trial Decisions

Let the members of DLA know what happened in trial. Visit our website at www.nmdla.org.

Interview with Honorable Pasternoster Continued

certain case law is important and tie in important facts. I don't want a canned brief. Instead, I want an honest discussion of the cases, so it is a lot easier if a lawyer presents me a brief that discusses cases in depth. It is also helpful to have exhibits attached that explain the factual setting, not just affidavits or pages from a deposition. For instance, in motions to suppress in criminal cases, if blood is an issue or some kind of forensic result, I literally want the forms that record the taking of the blood and the analysis, so I can see what the dispute is over. It does not help to have it defined in the statement of facts so much. It is also helpful to have lawyers submit me bench copies of their motions.

I also like it when lawyers make their presentation fit the amount of time they requested. If they requested a half hour, they will get a half hour because there are many litigants behind them who are waiting for their moment in court as well. Lawyers should get to the point and depend on me to listen. They should also not lie to me or try to fake me out. I am not impressed by theatrics or histrionics. A lawyer should argue a case to a jury differently than they argue it to a judge. I would also say it is important to not abuse, disrespect or be uncivil to court staff. Ultimately, lawyers sticking to "fundamentals" is really important to me. I believe as a trial lawyer, as an advocate, I never did anything fancy. It's the fundamentals of advocacy that really support the judiciary solidly. Don't waste my time.

TC: *Before we began this interview, you mentioned that you are seeing more and more pro se litigants come before you and spoke a bit about what you have done to streamline the process in your Court. What are your expectations with regard to how counsel should deal with pro se litigants that appear before you?*

JP: That's a great question. Pro se litigants can both be frustrated and extremely enlightened because they bring a non-law school perspective to a particular problem. Many times I have been listening to a pro se litigant and they have a moment of brilliance that I think "Gee, I never thought about it that way." It can be refreshing and helpful. Also, I have to restrain lawyers from going over the top sometimes when they are opposed by a pro se litigant. I have to be a traffic cop and make certain there is an evenness on both sides. I learned doing lower court work that sometimes there is no advantage for one person to have a lawyer and

the other person to not have one because our natural inclination is to go with the underdog. But, as a judge, I have to uphold the law, to serve the Bar and preserve society, and that means if the law requires me to hold against a pro se litigant, even if there is some moral difficulty about that, then I must try to explain the operation of law to this person and hope that they understand from the simplicity and compassion in my words why it is that the law requires me to do that and what that result is going to be. I expect lawyers to be fair and courteous.

TC: *We are nearing the end of our interview, and I want to thank you for being so forthright with regard to your background. I think it would also be beneficial to get your perspective regarding the practice of law. What tips do you have for lawyers about maintaining that balance and how do you personally expect to strike that balance as you continue in your position as a District Court Judge?*

JP: You know, Tina, I am probably the worst person to ask that question because I have been guilty of failure to recognize the need for balance throughout my career. I have not taken enough vacations or downtime. I think the first order of business for a lawyer is to recognize that there has to be balance. Practicing law can be extremely stressful. First, stress has very insidious ways of eroding the body and the mind's integrity, so it is important to maintain health. Secondly, I found it helpful to perform Zen-kind of activities. Rather than doing something that requires a great deal of thought - that's what we do as a profession, lawyers should do something that requires mindless hand work that frees the mind. In my case, and I am guilty of this than most people, I really don't have a developed hobby. I have done many things, including scuba diving and mountain climbing. When I drank, I assembled a tremendous collection of beer cans. But now, I am into baseball and trains. My wife bought me an electric train set a couple of Christmases ago. Mostly, I love spending time with my wife.

The thing that is so unique to me about the legal profession, and my father instilled this in me, is that everyday is a new challenge. Therefore, we must like challenges and we must like taking on new things, so there is nothing wrong with doing that as an avocation. Try something new, but try new things that get your mind off what you do. I have many friends who are not

lawyers. I didn't eat meals with lawyers. I just wanted to get away from it so I could free my mind and I could be involved in activities that truly got my mind and my body off the profession. Recognizing the need for balance and maintaining health are the most important things.

TC: *With that being said, is there anything else you would like to share with the members of the New Mexico Defense Lawyers Association?*

JP: I would like to say that I am very flattered and honored that you wish to have your membership get to know me better. I believe one of the keys to success as a judge is that we have to continually recognize that we are part of the Bar. We are the keystone. The only thing that keeps us successful as a profession is our collegiality. The more you know about your clients, your opponents, and the Judge, the better you serve your clients, the Bar, and the Judiciary. It is tremendously important to spend time getting to know the people in the system because there are wonderful people in the system. It is invaluable and it is a credit to your organization that you have taken a step to get to know the new judges. I am about to celebrate my second year on the Bench and I hope I can slow down and sit back

and look back over the last couple of years. Your interview has helped me do that through the questions you have asked. This is what pleases me; that real efforts are being made to know who everyone is in the profession. Years ago I had a San Francisco lawyer tell me "you know this is a joy to get to know your opponents because in the Bar in San Francisco there is no incentive to be civil to the people in the system because you may never see that Judge or attorney ever again." In a small, tightly-knit, mutually-respectfully Bar, like New Mexico's, we are doing a better service than most. We are doing a better service to our Bar, to the clients that are served, and to the Judiciary. I commend you on your desire to do that as well because it is helpful. This is the most important human endeavor that we can ever embark on in our lives; to try to improve society through the Bar. I say to the lawyers-- remember the world is watching.

TC: *Judge Paternoster, thank you again for taking the time to visit with the members of the New Mexico Defense Lawyers Association.*

**Thank you NMDLA Contributors,
without your support this publication would not be possible.**

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Serve on a committee, write an article, plan a CLE or find out what opportunities we have for DLA members. Contact Rhonda Hawkins at (505) 797-6021 to get involved.

The New Mexico Supreme Court Has Spoken: Rule 1-059(E) Motions to Alter or Amend a Judgment are Not Subject to the Automatic Denial Provision of NMSA §39-1-1

by Nancy Franchini - Gallagher, Casados & Mann, P.C.

In *Albuquerque Redi-Mix, Inc. v. Scottsdale Insurance Company*, 2007-NMSC-051, Volume 46, No. 45, SBB page 24(11/5/07), the Supreme Court held that a Rule 1-059(E) motion to alter or amend a judgment is not subject to the automatic denial provision of NMSA 1978, §39-1-1 (Interlocutory orders; final judgments and decrees.) This is an important clarification of the law addressing the timeliness of an appeal.

In this case, Redi-Mix filed a complaint for declaratory judgment, breach of contract, bad faith, breach of fiduciary duties and violations of the Insurance Code and the Unfair Practices Act against its insurer, Scottsdale Insurance Company, which had denied coverage of an auto claim. During the course of litigation, Scottsdale and Redi-Mix both filed motions for summary judgment. Scottsdale's motions were granted, and Redi-Mix filed a motion for reconsideration within ten days after the granting of Scottsdale's motions. Three months later, the trial court issued an order denying Redi-Mix's motion.

Redi-Mix then appealed the denial of its motion for reconsideration. The Court of Appeals dismissed the appeal holding that Redi-Mix had filed an untimely notice of appeal because its motion for reconsideration had been denied by operation of law thirty days after it was filed citing to NMSA 1978 §39-1-1 and Rule 1-059(D) NMRA 2006.

For ease of reference, §39-1-1 states in pertinent part:

"[f]inal judgments and decrees, entered by district courts in all cases tried pursuant to the provisions of this section shall remain under the control of such courts for a period of thirty days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any motion which may have been filed within such period, directed against such judgment; provided, that if the court shall fail to rule upon such motion within thirty days after the filing thereof, such failure to rule shall be deemed a denial thereof. . . ."

Rule 1-059(E) states that "a motion to alter or amend the judgment shall be served not later than ten (10) days after entry of the judgment."

First, the Court held that a motion challenging a judgment, filed within ten days of the judgment, should be considered a Rule 1-059(E) motion to alter or amend a judgment. Therefore, Redi-Mix's motion

for reconsideration was considered a Rule 1-059(E) motion. Second, the Court held that the 2006 and 2007 amendments (see committee comment to Rule 1-054.1) make it clear that §39-1-1 no longer applies to post-judgment motions filed pursuant to the Rules of Civil Procedure that do not themselves explicitly contain an automatic denial provision. In other words, since Rule 1-059(E) did not contain its own automatic denial provision, such motions can only be denied by the entry of an order expressly disposing of the motion. Therefore, the time for filing a notice of appeal starts to run from the entry of an order expressly disposing of the motion.

So, in line with the old adage that "it's not over till the fat lady sings"—a motion for reconsideration filed within ten days of the judgment is not denied until the court enters an order denying the motion.

SHARE YOUR SUCCESSES - Over the last few years we have been able to enhance the value of membership in the NMDLA by way of electronic access to a variety of information---especially through the use of email inquiries for information. As part of that continuing effort we ask each of you to share with the rest of the membership---a good result at trial; a good appellate decision; a successful motion at the trial court level; a good expert; a good mediator; etc. In turn, we will use the broadcast email capability of the DLA to quickly and efficiently disseminate your news or information to the rest of the membership. All members benefit from such a system; but it will take input from all members to make it a real success.



Defense Practice Academy: Basic Skills

Designed for attorneys with 0-3 years experience

April 18-19, 2008

Marriott Pyramid - Albuquerque, NM

9.0 General MCLE Credits



Limited attendance – register early.

A faculty of experienced attorneys from local firms will provide insight into opening a file, pleadings and motions, discovery, depositions, medical records/experts and evidence/trial preparation.

Friday, April 18

8:30 am Registration
9:00 am Understanding Litigation Costs
and Case Review
10:30 am Break
10:45 am Discovery Techniques and
Disputes
12:15 pm Lunch (on your own)
1:30 pm Pleading and Motion Practice
3:00 pm Break
3:15 pm Working with Your Expert
Witnesses and Understanding
Medical Records
4:45 pm Adjourn

Saturday, April 19

8:30 am Registration
9:00 am Depositions – Taking, Defending
and Preparing the Witness
10:30 am Break
10:45 am Evidence and Trial Preparation
12:15 pm Adjourn

Registration Form

\$199 DLA

\$249 Non Members (see reverse side for membership information)

Add \$20 after April 16

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A Case Review and Comment

by Christopher J. DeLara, Esq. - Guebert, Bruckner & Bootes, P.C.

**GULF INSURANCE COMPANY V.
MICHAEL J. COTTONE,
STATE FARM INSURANCE COMPANY,
BERNITA NUTT,
FARMERS INSURANCE COMPANY OF ARIZONA,
MAURY MINGLE, SANTIAGO SANDOVAL,
PAUL ATKINS, THOMAS A. COOTZ and
CONTINENTAL CASUALTY COMPANY**

The New Mexico Court of Appeals issued its opinion in the matter of *Gulf Insurance Company v. Michael J. Cottone, State Farm Insurance Company, Bernita Nutt, Farmers Insurance Company of Arizona, Maury Mingle, Santiago Sandoval, Paul Atkins, Thomas A. Cootz and Continental Casualty Company*, 2006-NMCA-150, 148 P.3d 814 on December 19, 2006. Chief Judge Bustamante wrote the opinion, with Judges Sutin and Castillo concurring.

Background

This matter was the result of an automobile accident that occurred on a foggy morning on February 22, 2001, at the intersection of US Highway 70 and NM Highway 202, between Clovis and Portales, New Mexico. A semi tractor-trailer owned by Richard Lobrado, d/b/a El Rio Trucking, Inc., and driven by Rogelio Sarana, was hauling liquid carbon dioxide on NM 202. In the process of attempting to turn from NM 202 onto US 70, the semi tractor-trailer turned in front of an oncoming vehicle driven by Jaylene Armstrong that was headed north towards Clovis on US 70. Ms. Armstrong's vehicle collided with the El Rio semi tractor-trailer, which came to rest in the left-hand lane of southbound US 70. The impact ruptured the semi truck's storage tank causing carbon dioxide to leak from the truck, and created very limited, perhaps zero visibility at the accident site.

Following the initial collision between Mr. Sarana and Ms. Armstrong, seven additional vehicles were involved in collisions at the scene. Brenda Rapp, the driver of one of the seven vehicles involved in the subsequent pile up, sustained severe burn injuries as the result of direct exposure to liquid carbon dioxide. Ms. Rapp filed suit against Richard Lobrado, Rogelio Sarana and El Rio Trucking, Inc., Gulf Insurance Company, El Rio's insurer, subsequently settled Ms.

Rapp's claims for \$1,700,000.

Following settlement with Ms. Rapp, Gulf filed a separate action for "Damages and Subrogation" against the drivers of the other vehicles involved in the pile up, and the drivers' insurers, Michael J. Cottone, State Farm Insurance Company, Bernita Nutt, Farmers Insurance Company of Arizona, Maury Mingle, Santiago Sandoval, Paul Atkins, Thomas A Cootz and Continental Casualty Company. The defendants filed motions to dismiss, and motions for summary judgment, which were all granted by the District Court.

The Appellate Decision

Gulf appealed the decision of the District Court to the Court of Appeals claiming that summary judgment was improper because, (1) Gulf paid the claims of the "original creditor" Rapp, and thus was classically subrogated to her rights; (2) Gulf can seek indemnification/contribution from Defendants for the "enhanced damages" they caused under New Mexico's successive tortfeasor doctrine; and (3) El Rio Trucking was engaged in an inherently dangerous activity and thus joint and several liability applies permitting Gulf to seek subrogation/contribution from Defendants. *Gulf*, at ¶ 6.

Gulf also argued "that the release signed by Rapp acted to release all Defendants and thus effected an assignment to (Gulf), or created a right of subrogation in (Gulf), as to all of Rapp's claims against Defendants." *Id.*

The Court of Appeals rejected all of Gulf's arguments. The Court found that "subrogation between the insurer of a tortfeasor and the tortfeasor's victim," was not cognizable under New Mexico law because "Gulf is not an insurer of Rapp," and "had no contractual duty or responsibility to Rapp." *Id.*, at ¶ 11. The Court also found that New Mexico's adoption of pure comparative negligence and the "abolition of the doctrine of joint and several liability between defendants," "argues strongly against Gulf's position." *Id.*, at ¶ 12.

Gulf argued that under the successive tortfeasor doctrine, and the public policy exception to several liability, joint and several liability was applicable to Gulf's claims. However, the Court found, that as a matter of law, "Gulf fail(ed) to establish that Rapp suffered a distinct original injury caused by the negligence

of Gulf's insured, followed by a second, distinct injury or enhancement caused by Defendants....All of Rapp's injuries were caused by exposure to a single agent: liquid carbon dioxide. Rapp suffered a single, indivisible injury from exposure to the same product." *Id.*, at ¶ 22. In response to Gulf's argument that the inherently dangerous activity exception to several liability was applicable, the Court wrote, [w]e need not reach the question of whether Gulf's insured was conducting an inherently dangerous activity because even if we did conclude that the activity was inherently dangerous, there is no connection between the activities of the insured as a transporter of carbon dioxide and the activities of Defendants as travelers on the roadway.... Here, there is no connection between Defendants and the allegedly dangerous activity.

Id., at ¶ 25.

Gulf's final argument, that the release executed by Rapp effectively assigned Rapp's rights to Gulf, was also rejected because: (1) the Rapp release "contains no hint that Rapp was releasing anyone other than Gulf's insured;" (2) "[I]n the context of this case, reading the release as Gulf does would run counter to...the common law rule prohibiting assignment of personal injury claims;" and (3) "Gulf's insured and Defendants are concurrent, not successive, tortfeasors and therefore contribution among tortfeasors is inapplicable." *Id.*, at ¶¶ 26 – 29.

Successive Tortfeasor Liability

Although the Court rejected all of Gulf's claims, the Court's opinion leaves open the possibility that an insurer who can present sufficient facts to show that successive liability is applicable, might be successful in asserting claims for contribution. The Court rejected Gulf's argument in support of joint and several liability because factually the Defendants were not successive tortfeasors. In support of its ruling, the Court cited *Payne v. Hall*, 2006-NMSC-29, 139 N.M. 659.

In *Payne*, the Supreme Court addressed successive tortfeasor liability in detail, and wrote, In New Mexico, when concurrent tortfeasors negligently cause a single, *indivisible* injury, the general rule is that each tortfeasor is severally responsible for its own percentage of comparative fault for that injury....Under several liability, fault is compared among concurrent tortfeasors, limiting the liability of each to the dollar amount that is "equal to the ratio" of each concurrent tortfeasor's comparative responsibility for the single, indivisible injury....While several liability is the majority rule, however, certain narrow exceptions still allow for joint and several liability....

Under the theory of joint and several liability, each tortfeasor is liable for the entire injury, regardless of proportional fault, leaving it to the defendants to sort out among themselves individual responsibility based on theories of proportional indemnification or contribution....Whereas comparative fault and several liability apply when concurrent tortfeasors cause a single, indivisible injury, our analysis shifts when successive tortfeasors causes separate *divisible* injuries. Under successive tortfeasor liability, a first injury is caused by an original tortfeasor. That injury then causally leads to a second distinct injury, or a distinct enhancement of the first injury, caused by a successive tortfeasor.... As an exception to the general rule of several liability, the successive tortfeasor doctrine imposes joint and several liability on the original tortfeasor for the full extent of both injuries, those caused by both the original tortfeasor and the successive tortfeasor....The original tortfeasor is responsible for both injuries because it is foreseeable as a matter of law that the original injury... may lead to a causally-distinct additional injury[.]...

[T]he doctrine is limited to a "narrow class of cases," in which a plaintiff can show more than one distinct injury successively caused by more than one tortfeasor."

Payne, ¶¶ 11 - 15, 139 N.M. at 663-65 (citations omitted)(emphasis in original).

The Court's opinion in *Gulf* appears to leave open the possibility that a claim for contribution based upon successive tortfeasor liability could be successful, under the appropriate facts. In *Gulf*, the Court specifically found as a matter of law that there was no separate and distinct injury sustained by Rapp, and therefore joint and several liability was not applicable. It is unclear from the opinion, however, if a claim for contribution by a tortfeasor's insurer who settles claims against its insured, despite facts evidencing the applicability of successive tortfeasor liability, would still fail based upon the common law rule prohibiting the assignment of personal injury claims, and the lack of a right to subrogation of the claims of an injured third-party. See, *Gulf*, at ¶ 28.

Profession a Group of People Who Serve Others

Every once in a while, we have the unique and pleasurable opportunity to experience a poignant and moving presentation by a fantastic speaker. Last September in Santa Fe at the Texas Association of Defense Counsel's Annual Meeting there was just such a moment. Consequently, we have re-printed the remarks of former New Mexico Supreme Court Chief Justice Gene Franchini, whose emotional appeal to us all was inspirational to say the least. Thank you to TADC for sharing this with the members of the NM Defense Lawyers Association.

Ladies and Gentlemen,

First, a definition:

Profession: A group of people who serve others, i.e., their clients and their communities- Service, not a sale of goods and services.

There are only 3 true professions: Law, Medicine, and Ministry

A quote by Kitts - "Too many attorneys and not enough lawyers; too many advocates, not enough counselors; too many problem creators and not enough problem solvers."

It is disturbing that of the most recent polls on lawyers, judges & courts; citizens find them to be "dishonest, unethical, unprofessional cheaters, selfish, unscrupulous, uncaring, self-centered and purely political."

How did we get here? Why did we get in this mess? It took some time and some big mistakes. Let me suggest a few major reasons:

First, we have become more concerned about our welfare than our clients' welfare, both financial and personal. We are more concerned about financial results and of doing business than justice. We view the practice of law as a business rather than a profession.

Second, we have been more diligent about creating problems because it creates more business for us rather than working on just solutions to those problems.

Third, we and our clients (especially our clients, and we fell for it), came up with the truly damnable idea of billable hours for our profession and our service providers, rather than developing the idea of working and spending fruitful hours in reaching an acceptable resolution and conclusion to the conflicts and problems facing our clients. We have more concentration on the clients' wealth than on their legal problems.

Damnable! Why? We've become bean counters rather than counselors. We have traded an hourly rate for the quality of our service, our talent, our reputations as lawyers, regardless of the complexity of the case, regardless whether we have succeeded or failed, and regardless the financial status of our clients. We have put a price tag on our

integrity; it's only one factor, and by far not the most significant one. The slowest lawyer who takes the most time will bill the most hours, and make the most money.

Counselors, if we are to turn the public scorn and derision for lawyers, judges, and this profession around, we must turn ourselves around. We must be personally involved in improving ourselves professionally and willing to share our time, knowledge and talent with the public. We need a monumental attitude adjustment. We need commitment to the profession rather than the business of practicing law.

A great lawyer and judge, Elbert Parr Tuttle of 11th Circuit Court of Appeals recently passed away just short of his 99th birthday. Speaking in masculine terms, but well recognizing the professional women of the bar, he said to a group of Emory Law students a few years ago:

"The professional man is in essence one who provides service. He has no goods to sell, he has no land to till, his only asset is himself. It turns out, that there is no right price for service. For what is a share of a man's worth? If he does not contain the quality of integrity, he is worthless. And if he does, he is priceless. The value is either nothing, or it is infinite."

Read Scott Turow's Article in the August ABA Journal - "The Billable Hour Must Die."

"It rewards inefficiency - Makes clients suspicious - And it may be unethical."

So what can we do about it? And is it too late?

The answer to these two questions may be "not much" and "maybe."

Turow points out: Of the 8 Guidelines mentioned in Rule 1.5 "Fees" of ABA Model Rules of Professional Conduct, only one speaks of time spent. Still, we accept as the almost universal standard of commercial litigation: dollars x the hours spent.

I have difficulty believing that as smart as we are we could not develop a better way to agree on fees with our clients. I cannot believe that we and our clients refused to consider all eight guidelines in setting a fee and not just one. He concludes by saying, "if I had only one wish for our pro-

fession from the proverbial genie, I would want us to move toward something better than dollars multiplied by hours. We have created a zero-sum game in which we are selling our lives, not just our time. We are fostering an environment that doesn't provide the right incentives for young lawyers to live out the ideals of the profession. And we are feeding misperceptions of our intentions as lawyers that disrupt our relationships with our clients. Somehow, people as smart and dedicated as we are can do better."

Number two, I think we have to remember why most of us became lawyers in the first place. We have to remember Clarence Darrow and Atticus Finch, two lawyers, one real and the other fictional.

Clarence Darrow represented a lot of people and charged no fee. Most people don't realize this but it has been estimated that over half of his fees were never charged or were never paid. He once said to a graduating class, "by accepting the degree you receive today you owe society a substantial part of your knowledge, talent and ability. You don't give it to them as a gift - you owe it to them and they deserve it." Clarence Darrow is not remembered for the cases he won or lost but for the causes he took. He is remembered for his thoughts and observations, his philosophy and his ability to question almost everything. He was remembered for his great service to his clients, his community and his country.

He made everyone think about the answers to questions that had been taken for granted for years. He was the ever present skeptic, the epitome of the critical thinker. He once said "If I have been charitable in my judgments of fellow man; if I have tried to help him as best I could; if I have done my utmost to truly understand him, I know why I have taken this course - I could not help it. I could have no comfort or peace of mind if I had acted any other way. I have been interested in the study of man, and the motives that move and control his life. I have rejoiced with him and have grieved with him; I have followed my instincts and feelings and sought to rescue the suffering when I could." Counselors, remember Clarence Darrow.

The fictional lawyer Atticus Finch, the hero of *To Kill a Mockingbird* by Harper Lee, took an unwinnable case. He took it not for the money or the fame but because it was his duty and obligation as a lawyer - and he always did his duty - always fulfilled his obligations even if it meant personal sacrifice, even danger.

The case involved a black man, Tom Robinson, accused of raping a white girl in fictional Maycomb County, Alabama in the 30's. He was wrongly accused of the crime and Atticus Finch showed this to be the true fact during the trial. He was truly magnificent in the manner and style of his direct and cross examination. His closing was dynamic. Tom Robinson was absolutely and obviously innocent, but the case was lost as the all male, all white jury found him guilty. Everyone, including Atticus knew they would, Alabama being what it was in those days. The prejudice against African Americans was withering and oppressive and trial for a black man accused of sexual offense against a white woman was impossible to win.

In this book, Atticus was observed through the eyes of his daughter Jean Louise, nicknamed Scout. At the climax of the case when the jury returned the guilty verdict,

Scout and her brother Jem had been sitting at the table in the high balcony of the court room next to Reverend Sykes, Tom Robinson's pastor. They were in the segregated area of the court set aside for black people. Even the court houses in Alabama in those days, dedicated to the equal administration of justice under the law, were segregated. As Judge Taylor polls the jury Scout observed "I peeked at Jem. His hands were white from gripping the balcony rail and his shoulders jerked as if each 'guilty' was a separate stab between them."

After the verdict, Atticus spoke briefly to Tom, the court reporter and the prosecutor, gathered his papers, put on his coat and leaves the courtroom walking down the middle aisle. Most of the whites on the main floor were gone but the blacks in the balcony stayed. Scout says "I followed the top of his head as he made his way to the door. He did not look up. Someone was punching me but I was reluctant to take my eyes from the people below us and from the image of Atticus' lonely walk down the aisle. Miss Jean Louise? I looked around. They were all standing around us and in the balcony on the opposite wall. The Negroes were getting to their feet. Reverend Sykes voice was as distant as Judge Taylor's. "Miss Jean Louise, stand up. Your Father's passion."

How many big verdicts would any lawyer give up, how much money and power and prestige would any lawyer give up for such a tribute, for such an expression of appreciation and admiration; not only for the man but for what he had just done; not only for his talent and ability but for his honesty and integrity and most all, his courage. He has made all lawyers look better than perhaps we ever thought we could be.

Counselors, remember Clarence and remember Atticus. Remember while you still can, why we became lawyers in the first place. As Scott Turow made a wish for all of us, I too have a wish for all of you today.

Please have a wonderful conference here in Santa Fe and thank you very much for your invitation to visit with you. Most of all thank you for thinking about this great profession and your place in it.





Women in the Courtroom: Guidance for the Female Litigator

Friday - May 9, 2008

JCC - Albuquerque

6.5 MCLE Credits

Networking Lunch Included

Wine and Cheese Reception to Follow



See page 4 for more information



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