DEFENSE LAWYERS
new mexico DLA ASSOCIATION

DEFENSE *news*

The Legal News Journal for New Mexico Civil Defense Lawyers

Summer 2008

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Mark your calendars!

2008 Annual Meeting
Thursday, October 9, 2008
Albuquerque Marriott Pyramid
Back by popular demand.
Professor Patrick Longan

NMDLA September Member Luncheon

September 10, 2008
Seasons Rotiesserie & Grill
2031 Mountain Rd - Albuquerque, NM

11:30 am	Check-in
11:45 am	Lunch is Served
12:00 noon	Welcome and Opening Remarks
1:00 pm	Adjourn

Guest Speaker

Retired NM Supreme Court Chief Justice Gene E. Franchini

"Courthouse Developments: Their Effect on the Rule of Law and the Administration of Justice"

DLA September Luncheon - September 10, 2008
Registration Form

o DLA Members $25
Name: _____
Firm: _____
Address: _____
City/State/Zip _____
Phone: _____ Email _____

oCheck oMasterCard oVisa #_____ Exp Date: ____

Mail or fax to:

NMDLA
PO BOX 94116
Albuquerque, NM 87199
phone (505) 797-6021 fax (505) 858-2597
Register online at www.nmdla.org

NMDLA

Board of Directors

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;

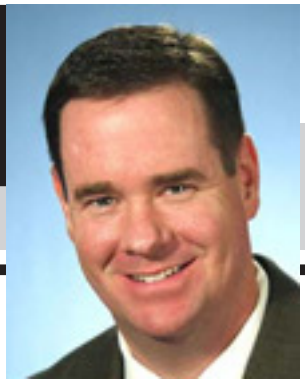
•A quarterly newsletter, the "Defense News", the legal news journal for New Mexico Defense Trial Lawyers;

•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.

A Message from the President



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

Dear NMDLA Members:

As autumn approaches, so too does NMDLA's annual meeting. This year's meeting will take place on Thursday, October 9, at the Marriott Pyramid Hotel in Albuquerque. We are pleased to welcome the return of Professor Patrick Longan, who will give a new presentation on the five components of professionalism. The CLE program also will include a presentation by Bennett Pugh on Medicare issues in litigation, and by David Levin on mediation. As usual, NMDLA is committed to providing you with the best programs available, and we expect these presentations to be very informative and engaging.

The annual meeting also is the time NMDLA presents its awards. This year, we are proud to present our award for Civil Defense Lawyer of the Year to Al Green from Butt, Thornton & Baehr. Jessica Hernandez from Rodey, Dickason, Sloan, Akin & Robb has been selected to receive our award for Young Lawyer of the Year. Those of you who are familiar with Al and Jessica will agree that they represent the best in our profession, and that they are deserving recipients of this special recognition. Please join us at the annual meeting to help show our appreciation for their contributions to the civil defense bar.

I would like to take this opportunity to thank you once again for your membership in NMDLA and to thank the law firms that have made sponsorship contributions to our organization. As I have said in previous messages, it is the goal of our organization's goal is to serve you. If you have ideas for legal education programs or other ways in which we may improve our efforts, please contact me or any member of the NMDLA Board.

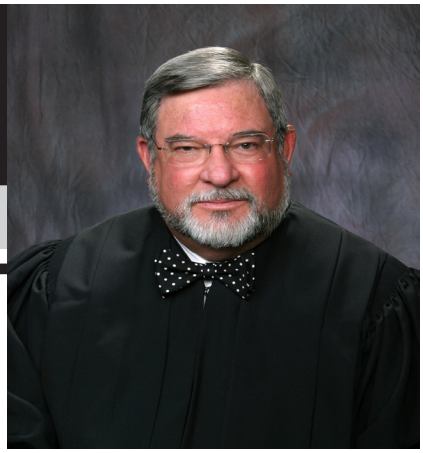
Best Regards,

Gary J. Van Luchene

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.

Annual Meeting Ad

Interview with The Honorable Mike Murphy



Interviewed by Leonard Piazza and Nancy Franchini

Taken on March 3, 2008 in Judge Murphy's Chambers

LP *I wanted to ask you a question first, that we did not have on the list which is, could you please comment on Alternative Dispute Resolution and whether you think it is over used at present?*

JM It depends on the kind of case. I think that it's still under-utilized in family law cases, and I think that ADR is a very important component particularly in dealing with cases that concern custody and time-sharing issues. The philosophy ought to be that parents made their kids, and nobody in the world is better prepared to raise them. When they can't agree and they are deadlocked, they end up with a politician in a black robe making important parenting decisions for them. The judge is not there because he was the smartest lawyer or the most capable lawyer or the wisest lawyer. He is there because he won an election. It has always seemed to me that it's just kind of terrible when something as intimate as parenting decisions about how to raise your child are decided this way. Often, this is sometimes necessary because the parents just can't get there on their own.

In this judicial district, we have a very vibrant mediation program that we require people to go through. We have mandatory parenting classes. Both of these are alternatives to dispute resolution by adjudication, and frankly, in family law cases when you think about it, adversarial fact-finding is a process that looks backwards. It doesn't look forward, and with kids and with families in this situation looking backwards really doesn't do much except assign blame. So I think ADR is very important and certainly could be utilized more often, and I would like to see more funding be made available for these programs.

In the civil area, I am not quite as convinced that ADR is as effective. I think that we lawyers are in the business of advocating for our clients, taking positions, or trying to find advantage, not resolution. And so I think there is a place for ADR both in getting the case ready for trial and to try to get people to be realistic in their expectations, and in some cases, particularly ones that are very very complicated, I think ADR may well give you a more sophisticated finder of fact when you are dealing with the underlying issue of liability then you would get from a jury. But, I think there is also a belief that ADR will result in a lower verdict where there has been liability established. I don't know that for a fact, but I know that the perception is out there, both in the defense bar and in the plaintiff's bar.

NF How many cases are currently on your docket?

JM Let's see, I don't have that number this morning. It was 1380 last week. That is the largest docket in this district. Part of that is my own doing because just by inclination I'm a workaholic. I like being down here and doing this. I do all of the district's mental health commitments in addition to my regular docket. I do that every Friday when I go out to the mental hospitals, and conduct the hearings out there. Typically around a hundred, hundred-twenty of those cases are pending at any given time, although we turn them over about every three weeks. We get a very fast disposition rate on those. I've got about eight hundred-fifty to eight hundred-sixty domestic matters, and then I have all of the court's criminal cases that involve DUI, both felony and misdemeanor.

We have an unusual situation here in our district because our District Attorney as a result of an anomaly in the rules in the Magistrate Court (where you can't appeal a suppression motion). If the defendant does not take the plea offer in Magistrate Court the prosecution dismisses the case and refiles it in district court. The defendant then gets a jury trial if the counts aggregate to a hundred-eighty days or more, irrespective of whether the charges are all misdemeanors or traffic offenses or whatever. Right now I have about three hundred and seventy-five of those including felony DWI pending in my division.

NF *I was under the impression that you were just the domestic judge, but that's not the case at all--- not even close.*

JM That's right, and then I have about a dozen civil cases that are jury cases, and several out- of- district cases, where people have decided that, having excused a local judge, that they would ask me if I would hear it. I guess flattered to be asked, so I almost always say yes if we can work out the time. So that comes to about 1380 cases in all.

NF *Before you got on the bench, what kind of law did you practice?*

JM I have been very fortunate to have had a diverse career. I started out in one of the largest law firms in Los Angeles as a first year associate. I quickly figured out that I was not cut out to work for a firm that required you to keep your suit coat on in the office during business hours, so I stayed only a couple of years there. Then I came to Carlsbad to do primarily oil and gas, which was very lucrative at that time. I was in a law firm that had various members. Mike Rosenberg was our senior partner. Both Judge James Schuler, now retired, and his sister Judge Jane Schuler were in the firm with me as was Tito Meyer. We did just about everything that you would expect in a small town practice from probate to criminal work. I did quite a bit of criminal work before. I did Plaintiff's work but did no defense work there at all, since Mr. Rosenberg would have rather opened a vein rather than represent an insurer. I also did a lot of transactional work for doctors and real estate work and represented the largest local bank. In 1987, I came to Las Cruces and went in with the Weinberger firm where I primarily did insurance defense and family law. I have done family law all the along the way. I think really without intending to, I got a broad based education in the practical aspects of being a lawyer.

During my private practice I became a fellow of the American College of Trust and Estate Counsel, and a fellow of the American Academy of Matrimonial Lawyers.

LP *During my 15 years of practice in the Las Cruces area, I have known you most as a divorce lawyer.*

JM Family lawyer, right.

LP *As a family lawyer, I'm sorry. And I became aware that you represented Val Kilmer. Can you tell us about that?*

JM There are a lot of show people in New Mexico. He's not the only celebrity that I have been involved with, but Mr. Kilmer is a long time resident of Tesuque. He's been here since the early 80's. I was primarily involved in the custody aspects of his divorce.

LP *Can you explain your approach to running and controlling your docket?*

JM Well, we do an awful lot behind the scenes. A lot of what I do when I am not in the courtroom deals with case management. We have a very antiquated system called FACTS, which is going to be replaced within the next year, which is our electronic case management system. You have seen some of the product if you go online for case lookup. Why case lookup sometimes is easier to use than the underlying system is a mystery to me, but a lot of my time is spent making sure that the cases are moving along. I try to be proactive in civil cases by making sure the scheduling orders are completed in a nice way, I do this by sending out letters saying, "you know we need to move this along or it is going to be dismissed for a lack of prosecution. What can I do to help?" Lawyers seem to react quickly and positively to this approach compared to the receipt of a "nastygram" from the court. With the criminal docket, keeping it moving is just a nightmare because the Public Defender's office here is significantly understaffed. The court itself needs at least one more full-time criminal division judge here. In the last time study that was conducted we qualified for 3.8 additional judges. We asked for 1, and got none. We qualified, I think, for 23 additional full-time employees, but by the time we got through our own budgeting system that number was cut down to 7, and we ended up with 2. So an awful lot of time is spent being a kind of juggler. Trying to make sure that the limited assets and resources that we've got really are brought to the cases that are pending in such a way that we can be as efficient as possible is a continuing challenge. We set jury trials on criminal cases ten deep. Sometimes they will all go off. It's a good day if most of them go off because they were pleas or nolle prosequi. When they're continued, we try to find a place to put them in before speedy trial issues come up. So that's a very long answer to a short question, but it is a lot of what goes on here during the day.

LP *What I wanted to cover with you, we had talked a little bit about this before going on the tape, about the time I remembered that you had a Rule 16 scheduling conference in chambers and had provided coffee to the attorneys. I wanted you to kind of talk about your thoughts on treating attorneys and handling matters more informally versus being extremely formal and rigid.*

Interview with Judge Murphy Continued

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JM Well, I think that first of all, a lawyer who is holding a judicial position is still a lawyer. I think it's good to remember that you are a lawyer. Every individual is different, and I think that to be effective, you have to be comfortable with want you are doing. I see myself as pretty hospitable, and to the extent that we can actually efficiently take care of business and do it here in chambers with a reporter, if we need one, have a cup of coffee while we are doing it or whatever, I don't see anything inherently wrong with that. Nor do I see anything inherently wrong with calling the lawyers before the bench in a courtroom in a formal setting and doing it. A lot of it depends on the lawyers that are involved with the case--- how prepared and how collegial they are and what facilities are available to you and what your docket is like. I don't have a big civil docket. So when I find the time to do what I need to do with the civil case, perhaps I have a little bit more time available to me than somebody who has 800 civil cases and can't brew that much coffee. I can understand that there might be a lawyer or two that would not think that going into chambers and sitting, having a cup of coffee while you did business was either comfortable or appropriate. And certainly if a lawyer said to me, "Gee, I would rather not do that Judge", then that would be perfectly fine.

NF *Are you interested in transferring over to the civil division so that you would handle all civil cases?*

JM No, and in this district that would probably not be something that would happen in the immediate future. We are formed into divisions here and do not rotate. When there is an opening we rotate on the basis of seniority. Right now our two most senior judges, Judge Robles who has been here, I think, 17 years, and Judge Valentine who has been here 14 or 15 years, occupy those civil division positions.

Frankly, we could use another civil judge because as you may or may not know, Judge Valentine is the also the water judge and has all of the stream adjudications, so if you go into his chambers, you have to find a place to sit, because he's got stuff everywhere. I think at this point in time, without getting an additional judge from the legislature, we're all going to be staying where we are.

If I were going to make a change, I would have to think long and hard before I got out of domestic pri-

marily, but it probably would be to a criminal docket. I enjoy doing criminal trial work. I enjoy watching lawyers do their stuff. And frankly, the numerous cases filed by self- represented litigants, puts a lot of stress on the judge and particularly on the judge's TCAA, to try to manage the case load and help those unrepresented people effectively prosecute their case.

NF *Judge you just mentioned having to deal with a lot of pro se litigants?*

JM We surveyed this Court last year. Approximately 52% of all of our DM filings were pro se on both sides. Approximately 70% were pro se on one side. For these folks we have a pro se clinic manned by volunteer lawyers. Up until recently we had a pro se director to try to help them deal with the judicial process. We have the forms and all, but a lot of these folks just don't either have the knowledge or, or sometimes the inclination, to gain the knowledge necessary to do the job and they rely on the Court to help them get through the process. And, you know, to a certain extent we can do that. But we just can't be their lawyer, and so the load on my TCAA, who is processing these 1380 cases, is very heavy. I am very fortunate because I have been able to get a couple of interns in from our local college paralegal program to assist us. This is something Chief Justice Chavez is interested in because he called me and asked how we were doing it. We hope it is very good for interns, as it has certainly been very helpful to us in trying to manage the paper flow, answer the phone and do the things that we have to do to assist the pro se litigants.

NF *I know that dealing with pro se litigants as a lawyer is, in my opinion, really difficult.*

JM It is interesting, don't you think?

NF *It's very difficult. I can't imagine what it would be like being a Judge and having to deal with pro se litigants.*

JM It's interesting because a significant percentage of our pro se litigants are not indigent. The majority is, but there are some folks that have just decided that being a lawyer just can't possibly be all that difficult, so they will just go it alone.

NF *Fair enough. I think one of the final questions that we had for you is, now that you have been on the bench for awhile, what is your pet peeve with lawyers?*

JM I really like lawyers, so I don't know that I have one. I think that most lawyers are very earnest. They are really interested in their clients. They want to do the right thing. They respect the rules of the court. Obviously, some are more talented than others. My job is not to tell inexperienced lawyers how to do their business. I mean, I am not the Oracle of Delphi or Professor Wigmore. I try to be tactful, make a suggestion now and then. I think that if I have a peeve it's --- let me say it this way, this is a very small state still and a lawyer ends up with the reputation that he or she has earned. And I think that's true of a person's peers and colleagues, as well as the bench. It's difficult for me to understand a lack of candor, even when embarrassed or pushed through the wall. By the same token, when the court makes a mistake, for there to be any lack of candor on the part of the court to say a mistake has been made is not acceptable either. So if I have a peeve, I guess it would be a lawyer who just can't see the way clear to be straight and honest. All a lawyer's got to sell is credibility and competence. If you are willing to give short shrift to either one of those, it seems to me that you should think about doing something else for a living.

NF J*udge Murphy, thank you so much for your time today, we really appreciate it.*

Calendar of Events

September 11 - Member Luncheon

September 19 - Women in the Courtroom Workshop

October 9 - Annual Meeting

November 13 - Insurance Law Seminar

December 5 - Civil Rights Law Update

Watch your email for information on these events.

Rule 35 Independent Medical Examinations: Who Should be Allowed to Attend?**

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

In the last year, I have noticed more and more often that if my client wants the plaintiff to undergo an Independent Medical Exam (IME), the plaintiff's counsel insists that plaintiff's counsel, a nurse practitioner, a court reporter or some other third party or machine such as a video recorder will attend the IME with plaintiff. When I was first confronted with this issue, my response was "OK plaintiff's counsel, you can attend. By the way, when is your client's next doctor's appointment? I have to make sure that I can fit it into my schedule so I can attend as well." At that point, the conversation goes immediately south.

Rather than describe the colorful conversations you can have with opposing counsel about the demand to be present at the IME, the purpose of this article is to lay out some of the Federal rulings on this issue. The ruling by Chief Federal Magistrate Judge Lorenzo F. Garcia in ***Gutierrez v. Plains Transportation, Inc. and Boris Jolic***, Case No. 24, 06-cv-01129 filed May 22, 2007. (Doc.24) provides the essential argument why no one or noting besides the plaintiff should attend an IME.

Although there is no consensus win the Federal Courts, Judge Garcia points out that a large number of courts have left it to the discretion of the trial court to decide whether a third party can attend an IME with the plaintiff. Therefore, this issue is generally decided on a case by case basis.

The general arguments by the plaintiff's counsel in support of having a third person present or having the examination recorded are as follows:

a. Dr. X only testifies for the defense in matters of personal injury and that in itself suggests bias and prejudice.

b. A third party needs to be present to make sure that Dr. X will utilize proper examination techniques.

c. Dr. X will improperly conduct the examination to obtain admissions or other damaging concessions from the plaintiff.

d. The plaintiff will need emotional support or comfort during the examination.

Needless to say, it appears that the courts require evidence to support the arguments made by plaintiff's counsel. The mere assertion of a doctor's bias or improper techniques is insufficient as the courts assume that IMEs will be conducted professionally and ethically.

In the cases where the court has denied the plaintiff's request to have a third party present, the bases of those rulings are as follows:

1. The mere presence of the third party or recorder changes the atmosphere from an independent, objective, neutral examination to that of an adversarial proceeding.
2. Allowing plaintiff's attorney to attend an IME places that attorney in the position of having to choose between participating in the trial as a litigator or as a witness.
3. Allowing a third party to attend an IME destroys the 'level playing field' contemplated by Rule 35. As an example, allowing IME's to be recorded but not allowing the plaintiff's regular medical appointments to be recorded creates an unlevel playing field.
4. Allowing a third party to attend an IME might invalidate the results of the examination, especially in the case of a mental examination.
5. The presence of a third person could get in the way of a full and thorough examination by the third person, such as with the attorney interjecting information regarding the plaintiff's injuries or the plaintiff not being forthright regarding injuries or the doctor feeling pressure during the examination to come to a certain opinion.

Defendants counsel should consider presenting some evidence of the risk of the above, such as an affidavit from an expert. Another useful tool for presenting this may be medical journals and articles as well as rules promulgated by medical or psychological associations.

Additionally, courts have pointed out that plaintiff's counsel has many options to challenge an IME report without allowing the plaintiff's counsel or any other third party or recorder to attend the IME. Plaintiff's counsel has a right to receive a copy of the IME report pursuant to Rule 35. Plaintiff's counsel can use the report to depose the doctor, cross-examine the doctor or introduce contrary expert evidence. Also, plaintiff's counsel can challenge the evidentiary use of the report at trial. Taking these into consideration, the courts have found that these procedural safeguards adequately protect a plaintiff without his counsel being present for an IME.

While gathering information to write this article, I learned that New Mexico district judges have gone

both ways regarding this issue. In states other than New Mexico, this issue is sometimes decided pursuant to state statue. However considering the New Mexico Rules of Civil Procedure are based on the Federal Rules of Procedure, the following federal cases are helpful and should be persuasive on this issue:

Warrick v. Brode, 46 F.R.D. 427 (D. Del. 1969)(personal injury plaintiff requested to have her attorney present at a pre-trial physical examination where the court held that the attorney could not attend, but plaintiff's physician could attend);

Tomlin v. Holecek, 150 F.R.D. 628 (D. Minn. 1993)(plaintiff seeking emotional and physical damages as the result of an assault requested that his attorney attend plaintiff's psychological examination; court held that plaintiff was not entitled to have his attorney present for the examination nor was he entitled to have the examination recorded);

Barrett v. Great Hawaiian Cruises, Inc. 1997 WL 862762(D. Hawaii 1997)(plaintiff who was injured on a cruise ship was not allowed to have her attorney present for her medical examination because attorney's presence would make the examination partisan and if the attorney was allowed to attend, he may need to be called to testify as a witness);

Holland v. United States, 182 F.R.D. 493 (D. S.C. 1998)(plaintiff in medical malpractice action requested that his independent medical examination be recorded and that his attorney be present, but the Court denied both requests);

Hertenstein v. Kimberly Home Health Care, 189 F.R.D. 620 (D. Kan. 1999)(plaintiff who brought a sexual harassment and retaliation suit did not show good cause that her psychological examination to be recorded, that a third party should be allowed to attend the examination, that the examination should be conducted in a familiar place or that the examination should be limited in another way);

Abdulwali v. Washington Metro Area Transit Authority, 193 F.R.D. 10 (D.D.C. 2000)(plaintiff in wrongful death and negligent infliction of emotional distress action did not show compelling reason for her attorney should to be present during her psychiatric examination, that the examination needed to be recorded or that the scope and duration of the examination needed to be limited)**

* Although this article is titled Independent Medical Examinations, the same argument could apply to Independent Psychological Examinations.

**Thank you to Tina Cruz of Narvaez Law Firm and Richard C. Civerolo of Civerolo, Gralow, Hill & Curtis, P.A. for providing me with information to write this article.

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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.

Professionalism Defined

by Professor Patrick E. Longan

Patrick E. Longan holds the William Augustus Bootle Chair in Ethics and Professionalism at the Walter F. Geoge School of Law of Mercer University in Macon, Georgia. This article is adapted by permission from his forthcoming article, "Teaching Professionalism," which will appear next year in the Mercer Law Review.

"Professionalism" is a word that we hear with some frequency at Law Day celebrations, bar luncheons, and similar functions. As a law professor, I hear such speeches mostly at law school orientations. On these occasions, most law students will be urged to conduct themselves with "professionalism." They will have no idea what this means. Oddly, many of the speakers who deliver this message also will not be able to give a precise meaning of that they mean by professionalism. Their presentations, though they are well-intentioned, often have an "I know it when I see it" quality. "Professionalism," as generally defined, means simply the set of qualities that are characteristic of a particular profession. For lawyers in particular, however, the word has an aspirational quality as well as a descriptive one. Lawyers and law students are exhorted to act with something called "professionalism" in the hope that certain qualities will remain, or again become, characteristic of the legal profession. The word itself, however, does not convey what those qualities are or what they should be. That requires deeper analysis.

There has been no shortage of attention to the expectations that the legal profession has for its members. The American Bar Association's Model Rules of Professional Conduct are in part an expression of those expectations. Since the mid-1980's, dozens of courts and bar associations have issued codes of conduct or civility that are intended to put in writing in even greater detail what lawyers should and should not be doing. The ABA's two major reports on professionalism each discusses the meaning of professionalism. From these sources it is possible to develop a definition of lawyer professionalism that students and lawyers can learn, remember, and apply. In other words, it is possible to set forth precisely the qualities that are, or should be, characteristic of members of the legal profession. Professionalism has a particular meaning for lawyers, and we need not rely on platitudes. As it turns out, lawyer professionalism has five components.

One easy way to think about the first three characteristics is to consider what you expect from members of the medical profession. First, patients expect their doctors to have specialized knowledge and skill. In other words, they expect their doctors to be competent. Second, patients expect their doctors to act in the patient's best interests. Patients are at a disadvantage when they deal with their doctors, and they have to rely on the doctors to know more than they do. Patients also usually come to the doctor at times of illness or injury, which often are times of vulnerability for the patient. The combination of the doctor's superior knowledge and the patient's vulnerability makes it possible for the doctor to take advantage of the patient - by ordering unnecessary but expensive tests, for example - but the patient relies on the doctor to resist that temptation. Third, we expect doctors to care for the sick and injured, at least in emergency situations, without regard to the patient's ability to pay. In other words, we expect doctors to render service when they are needed. A related and broader point is that we expect doctors to bear some responsibility for organizing medical care in such a way that the sick and injured have access to the help that they need. What we expect of doctors is clear from our common experience, and the medical profession itself confirms the legitimacy of these expectations.

We expect similar things from lawyers. Clients go to lawyers for help that requires special expertise. Competence for lawyers means, in particular, having the knowledge, skill, diligence, and judgment necessary to assist the client. The need for such help often arises because of crises that make the clients vulnerable. The clients may have been injured, or they may be getting divorced, or they may have been accused of a crime. That vulnerability, combined with the lawyer's expertise, puts clients at the mercy of their lawyers in ways that are analogous to the patient's. We expect lawyers not to exploit the opportunity to take advantage of clients. We expect them to be faithful to their client's interests, to demonstrate fidelity to the client. Furthermore, there are circumstances in which

we expect lawyers to provide service regardless of the client's ability to pay. Like doctors, we expect lawyers to be of service and to work to try to maximize access to their professional services for people who cannot afford them. "Justice for All" is a platitude, but it captures a popular expectation for our legal system. These first three components of lawyer professionalism -- competence, fidelity to the client, and service -- emerge easily from a comparison between doctors and lawyers.

The other two components of lawyer professionalism are unique to lawyers. One is exemplified in a scene from the classic movie, Anatomy of a Murder. Lawyer Paul Biegler is counseling his client, Lt. Frederic Manion, about how a murder defendant can defeat the charge. In the course of describing the law of homicide, Biegler arguably coaches his client into a lie that could exonerate him. In one sense, helping the client lie surely may help the client and thus seem at first glance to be consistent with professionalism as defined thus far. Surely, however, we can all agree that "professionalism" does not include an expectation that an attorney will suborn perjury. One can easily expand the example to include not just suborning perjury but also the destruction or creation of evidence, or the bribing or intimidation of witnesses or jurors. In conventional parlance, we have to recognize that lawyers have some obligations as "officers of the court" that must supersede their duties of fidelity to the client. The point actually is broader than expectations we have for lawyers as advocates. Imagine circumstances, such as the manipulations that led to the downfall of Enron, in which a lawyer's knowledge and skill could be used to violate the law in profitable ways. We expect lawyers to refuse such assistance. The general point that emerges from these examples is that part of lawyer professionalism is fidelity to the law and its institutions, even at the cost of client advantage.

The fifth and final component of lawyer professionalism is civility. It is not part of the definition of professionalism for other professions. Doctors do not operate on patients while another doctor tries to slap the scalpel away. Lawyers practice under circumstances in which they are expected to cooperate with lawyers whose interests and efforts are in direct opposition to theirs. A vivid example of what happens when lawyers do not act with civility is a deposition that involved the famous Texas lawyer, Joe Jamail. In an excerpt that is available for viewing on YouTube, Jamail calls a witness a "dumb son-of-a-bitch" and invites the witness to fight, among other things. In another published exchange, Jamail insults a fellow lawyer by telling him (among other things) that he "could gag a maggot off a meat wagon." Civility as a crucial component of professionalism appears in numerous codes of conduct and professionalism.

So lawyer professionalism requires that a lawyer act with competence, fidelity to the client, fidelity to the law and its institutions, and civility. It also requires the lawyer to render service to those who cannot afford to pay for it and, more generally, to act to ensure access to legal services for all. This more precise definition is crucial to any effort to see that lawyers act with professionalism, because lawyers are entitled to know what they are being asked to do. A second and often overlooked aspect of this discussion, however, is the effort to explain why professionalism matters so much.

All aspects of lawyer professionalism are important to clients individually and to society. Start with competence. The importance of competence to the individual client is obvious. The need for expert assistance is, after all, what led the client to seek a lawyer in the first place. An incompetent lawyer at best will do the client no good and at worst will make matters worse. The importance of lawyer competence to society is only slightly less intuitive. A good example from recent experience would be to suppose that Terry Schiavo and her husband go to see a lawyer to do some advance planning. A competent lawyer would recommend that the couple each sign a will, a power of attorney, a living will, and a health care surrogate designation. If the Schiavos go to an incompetent lawyer who does not know the importance of the living will or the health care surrogate, they might leave the office without them. The significance of these documents will become clear only when Mrs. Schiavo becomes disabled. The courts will have to intervene, at great cost in time, expense, and strife, into a situation that could have been resolved quietly, cheaply and privately. The cause of that intervention (in this hypothetical) is that a lawyer was incompetent. The lawyer's incompetence thereby harms the clients and the public. The actual Schiavo case is a vivid example of the kind of trouble that a competent lawyer can help to avoid.

The Schiavo example shows how a lawyer with an office practice can impose costs on others by not anticipating and preventing future disputes. The point also applies to litigators. The simple truth is that an incompetent lawyer can lose a client's case, and the client may as a result lose his money, his freedom, or even his life. Incompetent representation in court also slows down the working of our judicial system and imposes costs on the public (through increased court involvement and delay), on adversaries, and on others who must wait their turn for judicial attention. It undermines faith in the judicial process and thereby invites people to seek other, possibly more destructive, ways of resolving their disputes. Incompetence in court and

Professionalism Defined - Continued

out exacts a private and a public cost.

Lack of fidelity to the client also matters because of the harm it can cause specifically to one client and more generally to society. Lawyers can be unfaithful to clients in many ways. Primary ways include charging clients more than they should and selling out client interests to help themselves or other clients. In each case, clients suffer obvious harm. Infidelity to client interest affects the rest of society as well, once it is known or perceived to be common. There is another apt analogy to medicine. If you do not trust your doctor, you stay home and self-medicate. If you do not trust your lawyer, you either ignore problems that need attention or you tend to them in your own amateurish way. Either decision poses risks to the rest of us. If you ignore a legal problem, such as by never making a will, you open the door to preventable disputes later. The public must clean up the mess by having the courts resolve them. If mistrust of lawyers leads you to represent yourself by documenting a transaction with forms downloaded off the internet, then you risk that the documentation will be ambiguous or otherwise inappropriate. When the documentation begins to unravel, it becomes again a public problem, especially if you compound the difficulties by representing yourself in court. Fidelity to the client matters because it serves the individual client best and because it promotes trust in lawyers, which in turn can prevent future disputes and ease the resolution of the disputes that do occur.

A lawyer's fidelity to the law and its institutions might seem at first to be contrary to a client's interests. Some clients undoubtedly want to take actions that would constitute fraud on others or on a court. However, a lawyer who refuses to assist in such activities actually serves the client well, for at least two reasons. First, many of these clients want to take these actions without knowledge that they are illegal. Lawyers are experts in the boundaries of the law, and surely most clients want to conform their conduct to the law. The lawyer who counsels a client about a proposed course of action helps the client do so. For the minority of clients who know the boundaries and still want to exceed them, the lawyer can protect them from themselves by advising them on the potential consequences or, at least, by raising the cost of non-compliance by refusing to help. Most clients are well-served by lawyers who refuse to help them violate the law.

Society also benefits when lawyers act with fidelity to the law and its institutions. Society's interest is in seeing its laws obeyed. The cheapest way to achieve compliance is through voluntary obedience. Lawyers help achieve voluntary obedience when they counsel their clients about the boundaries of the law and refuse to exceed those boundaries. Clients who are dissuaded from violating the law will not need the coercive mechanisms of public law enforcement to adjust their behavior. With respect to litigators in particular, lawyers who refuse to violate rules of court protect the integrity of the judicial system. Cheating is a form of corruption, and a system that is, or is seen to be, corrupt will not command the respect or obedience of the public. The legitimacy of the judicial system depends upon people believing in it and abiding by its results. A corrupt system in which no one believes invites self-help. One type of self-help is violence. Fidelity to the law and its institutions benefits society by encouraging voluntary compliance with the law and by preserving the legitimacy of the judicial process.

Civility matters to clients in ways that may not be readily apparent. In fact, advertising for lawyers indicates that perhaps some clients prefer lawyers who promise or imply that they will be uncivil to their adversaries. Incivility, however, is an expensive strategy, in part because it begets more incivility. Lawyers who cannot cooperate will need the court's intervention to resolve even the smallest of disagreements, such as where to hold a deposition. Clients who pay lawyers by the hour to fight about matters that should be resolved by agreement are not being well served. Furthermore, some clients suffer when their lawyer's behavior brings about retaliatory incivility. Some clients are not good candidates for Rambo litigation. For the sake of their money, and sometimes for the sake of their psychological well-being, clients benefit when lawyers comply with the expectation of civility.

Civility matters to the public because of what incivility does to the judicial system. First, the petty disputes that incivility generates will slow down the progress not just of that case but of every other case that waits behind it. Second, incivility makes life miserable for every lawyer who does not derive independent satisfaction from nastiness. Rampant incivility will tend to drive out of litigation everyone who detests incivility. In the long run, nobody will be left to litigate except the uncivil lawyers. The result will be litigation that takes longer and is more expensive than it otherwise would be. Those are public costs. Civility helps to minimize them.

The private and public benefits of pro bono service by lawyers should be readily apparent. The poor person who needs a lawyer's help with an eviction no-

tice, a restraining order, or a habeas petition benefits directly from the lawyer's services. More generally, people in need of lawyers benefit when lawyers regulate themselves in ways that promote inexpensive access to legal services. Society also benefits. Lawyers who help the poor navigate administrative or judicial proceedings make those proceedings more efficient and legitimate. They legitimize these processes as means of resolving disputes and thereby discourage self-help in resolving them. When the delivery of legal services is organized in ways that promote access, lawyers can help avoid disputes that will be costly for society to resolve. Service, including insuring access, matters to individual clients and to the broader society.

Professionalism is a worthy subject for all those Law Day and bar luncheon speakers. It is important for students to hear the word at orientation. When we talk about professionalism, however, it is crucial that we agree on what we mean by it and that we understand why we care about it. Only in that way will the professionalism speeches of our bar leaders have any lasting effect. This article sets forth what I would say on such an occasion. I would welcome the comments of the readers of this article on my definition of professionalism and my explanation of why it matters. I can be reached at longan_p@law.mercer.edu.

[1]Many of these are collected on the web site of the American Bar Association Center for Professional Responsibility, http://www.abanet.org/cpr/professionalism/profcodes.html.

[2]See ABA BLUEPRINT, *supra* note 5 at 10-11, and TEACHING AND LEARNING PROFESSIONALISM, *supra* note 5 at 5-7.

[3]*See* the Charter on Medical Professionalism of the American Board of Internal Medicine, available at http://www.annals.org/cgi/content/full/136/3/243.

[4]MODEL RULE OF PROFESSIONAL CONDUCT 1.1 provides that "A lawyer shall provide competent representation to a client." In 1986, the ABA defined professionalism in part by the expectation "that its practice requires substantial intellectual training and the use of complex judgments." ABA BLUEPRINT, *supra* note 5 at 10. Ten years later, the ABA listed as "essential characteristics of the professional lawyer "learned knowledge…skill in applying the applicable law to the factual context…thoroughness of preparation…[and] practical and prudential wisdom." TEACHING AND LEARNING PROFESSIONALISM, *supra* note 5 at 6-7. Justice O'Connor may have said it best when she wrote that "[o]perating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts. This training is one element of what we mean when we refer to the law as a 'learned profession.'" Shapero v. Kentucky Bar Ass'n, 486 U.S. 466,495 (1988) (O'Connor, J., dissenting).

[5]Requirements of fidelity pervade the rules on conflicts of interest. *See* MODEL RULES OF PROFESSIONAL CONDUCT 1.7-1.12. The ABA BLUEPRINT, in discussing the meaning of professionalism, states that since clients cannot adequately evaluate the quality of the service, they must trust those they consult" and that "the client's trust presupposes that the practitioner's self-interest is over-balanced by devotion to serving both the client's interest and the public good." ABA BLUEPRINT, supra note 5 at10. The ABA later included among the supportive elements of professionalism the "[s]ubordination of personal interests and viewpoints to the interests of clients and the common good." TEACHING AND LEARNING PROFESSIONALISM, supra note 5 at 7. Justice O'Connor's articulation of the need for this element of professionalism is that the lawyer's specialized knowledge "by its nature cannot be made generally available and it therefore confers the power and the temptation to manipulate the system of justice for one's own ends…[including] abuse of the client for the lawyer's benefit." Shapero, supra note 15 at 495.

[6]*See* MODEL RULE OF PROFESSIONAL CONDUCT 6.1 (every lawyer should aspire to render fifty hours of pro bono service per year). In the ABA BLUEPRINT and in TEACHING AND LEARNING PROFESSIONALISM, the ABA uses Roscoe Pound's definition of a profession, which includes the pursuit "of a learned art in the spirit of public service;" the latter document adds that one of the essential characteristics of a learned profession is "[c]ost-effective legal services." ABA BLUEPRINT, *supra* note 5 at 10; TEACHING AND LEARNING PROFESSIONALISM, *supra* note 4 at 6-7.

[7]ANATOMY OF A MURDER (Columbia Pictures1959).

[8]MODEL RULES OF PROFESSIONAL CONDUCT 3.1 – 3.8 are specific examples of restrictions and responsibilities that we place on lawyers to uphold the integrity of the adversary process. Justice O'Connor has described one temptation that flows from the lawyer's specialized training as "overly zealous representation of the client's interests; abuse of the discovery process is one example." Shapero, *supra* note 15 at 489.

[9]*See* MODEL RULE OF PROFESSIONAL CONDUCT 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent….").

[10]In TEACHING AND LEARNING PROFESSIONALISM, the ABA included among its essential characteristics of a professional lawyer "[z]ealous and diligent representation of clients' interests within the bounds of the law" (emphasis supplied). TEACHING AND LEARNING PROFESSIONALISM, *supra* note 5 at 7.

[11]The video is available at www.youtube.com/watch?v=td-KKmcYtrM. In fairness, Mr. Jamail is not the only lawyer who betrays some incivility in this episode.

[12]Paramount Communications, Inc. v. QVC, 637 A.2d 34, 54 (Del. 1994).

[13]*See*, *e.g.,* the AMERICAN BAR ASSOCIATION SECTION OF LITIGATION GUIDELINES FOR CONDUCT, available at http://www.abanet.org/litigation/conductguidelines/. *See also* TEACHING AND LEARNING PROFESSIONALISM, *supra* note 5 at 7 (one of the essential characteristics of a professional lawyer is "appropriate deportment and civility").

[14]Although MODEL RULE OF PROFESSIONAL CONDUCT 1.2 forbids a lawyer to assist with a crime or fraud, it does permit a lawyer to "discuss the legal consequences of any proposed course of conduct with a client…."

[15]For example, one United States District Judge ordered two lawyers to resolve such a disagreement by playing a game of "rock, paper, scissors" on the steps of a federal courthouse. Avista Management, Inc. v. Wausau Underwriters Insurance Company, No. 6:05-cv-1430-ORL-31J

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