DEFENSE LAWYERS new mexico DLA ASSOCIATION

DEFENSE *news*

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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 tp 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 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 newsletter, the "Defense News," the legal news journal for New Mexico Defense Trial Lawyers;
- 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 S. Carolyn Ramos - Butt Thornton & Baehr P.C.

Dear Members,

It is hard to believe that 2009 is coming to an end.

As I previously reported, our Executive Director, Rhonda Hawkins, died this summer after battling sudden and severe illness for over two months. The NMDLA Board of Directors remains committed to the mission of the organization, including its day-to-day operations. In this regard, Kendra Yevoli, has agreed to serve as Interim Executive Director for the foreseeable future. Many of you may recall that Kendra was our Executive Director previously but had to leave us to explore other endeavors. We are so grateful to have her back.

While Rhonda was incapacitated, we were unable to fully access the membership, historical and financial information of the association. This created a temporary interruption of our communications which has since been resolved. Based on what we have been able to locate regarding our finances however, it has become clear that our assets are not what we had believed them to be due to discrepancies discovered since Rhonda's illness. Accordingly, an internal investigation of our finances has been underway to reconcile these issues and fundraising efforts have been initiated to replenish our accounts.

In that regard, I want to extend my deepest gratitude to my partners at Butt Thornton & Baehr and the law firms of Atwood, Malone, Turner & Sabin; Gallagher, Casados and Mann; Keleher & McLeod; Modrall, Sperling, Roehl, Harris & Sisk; Riley & Shane; Rodey, Dickason, Sloan, Akin & Robb, the Defense Research Institute (DRI) and the State Bar of New Mexico for making immediate and generous contributions to the organization. I am pleased to report that our organizational documents with the State are up to date, our taxes have been timely filed and income is flowing again from CLE and other endeavors. Indeed my colleagues on the Board have worked tirelessly to ensure that the NMDLA remains viable.

I would be remiss in not specifically recognizing the extraordinary contributions of Secretary/Treasurer Nancy Franchini, President-Elect Bryan Garcia and of course, Interim Executive Director Kendra Yevoli during this challenging year. The hours each put into the resuscitation of the NMDLA this year are countless and I cannot thank them enough for their talent, professionalism and loyalty during my Presidency.

I am sad to announce that two of our long-standing directors will be stepping down this year. Paul Grand has held the Santa Fe post on the NMDLA Board since 1996, and he served as President in 2002. Our Annual Meeting was Paul's brainchild and his thoughtful contributions will be sorely missed. Jim Johansen joined the board in 1993 and served as President in 1995 and DRI Representative from 1996-1998. Jim recruited me to the Board when I was a young lawyer with an eye toward the future of the organization and achieving more diversity in its leadership. He has been a key advisor, mentor and "go-to" man to me ever since. I thank Paul and Jim, sincerely, for their distinguished and dedicated service to the NMDLA and to the profession.

I am grateful for the opportunity to have served as President of this great association. I thank each of you for your encouragement and support this year and for your continued allegiance to the New Mexico Defense Lawyers Association.

May your holidays be happy and your new year prosperous!

Mil Gracias.
S. Carolyn Ramos

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 inquires 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 Beatrice Brickhouse

by Kelly P. O'Neill and Jacqueline Olexy - Madison, Harbour & Mroz, P.A.

DLA **Judge, why did you decide to become an attorney?**

Judge Well, that's not so simple a question. I had a curiosity about the law when I was a teenager after spending some time with lawyers. When I went to college I started researching what it took to be a lawyer, what lawyers really did. I took a couple of classes and ended up thinking "I think this is something I can actually do." However, first I went into the Army after undergrad as a Signal Corps officer. When you're an officer in the Army you are assigned what they call additional duties. One of my additional duties was called a "Recorder," which doesn't tell you anything about what the job is, but the job consisted of me prosecuting non-commissioned officers who came up positive on drug tests. And so they would come up positive on drug tests, and then the base commander would give me the case, a non-lawyer, a second lieutenant, and say, "go prosecute this in front of a panel" of two officers and one NCO. The NCO would have an attorney, an actual JAG officer who was representing him/her. So I had to actually go in and put on my case that the NCO should be discharged from the Army because of a positive drug test. I did about six of those prosecutions when I was stationed at Fort Huachaca, Arizona, and I won all of them; although I think the odds were stacked in my favor. From this experience, I knew I wanted to be a lawyer. I end up going to the University of Arizona Law School, about 70 miles away from Fort Huachuca, Arizona.

DLA **How did you come to New Mexico?**

Judge I came to New Mexico because in my last year of law school, someone had told me about Albuquerque having the balloon fiesta. Myself and a friend drove here for the balloon fiesta. I thought it was a pretty amazing thing, pretty nice, and I looked around. It reminded me somewhat of Tucson, but everyone was telling me it wasn't quite so hotin the summer, so I decided to move here. I graduated in December '92, packed up my pick-up truck and I drove to Albuquerque. I studied for the bar exam for the next two months, took the Bar exam in February of '93, and was admitted in May '93.

DLA **Let's talk a little bit about your background as an attorney. You have a very diverse background – varied background.**

Judge [laughing] That's a nice way of putting it. Some people would say, "You bounced around a lot."

DLA **You have a lot of experience. What helped you to decide to become a judge?**

Judge You know what, I'm not one of those people who planned on being a judge.

The Honorable Beatrice Brickhouse

No. I envisioned myself trying cases-being in the courtroom. I pictured myself as the lawyer in the courtroom, not the judge. Until very recently, I never imagined myself as a judge.

DLA **It's funny that just a year or so ago, you were still not interested.**

Judge It wasn't that I was not interested. The process seemed intimidating and I didn't like the idea of not being successful. Like most trial lawyers, I am very competitive. I did not want to apply and not get the position. But, I was very inspired by the Obama campaign and election to take a chance and apply. I have two kids, a son and a daughter. We were really interested in the presidential election. It was a big deal in our family. We were talking all the time about the election and its significance for our country.

It was one of those situations where my son was talking to me about careers, and his desire to be an engineer. I told him "You know, you can be anything. You could be president." My son asked me if I could do something besides being a lawyer, and he said "Well, then can't that be the same for you? You could be anything you want to be." And I thought, "Well, that's true." Then I had a conversation with my husband, who is also a lawyer, and it was just a total coincidence that around that time I saw the announcement about the application period for the judgeships. He and I talked about the vacancies for the three judgeships announced in the Bar Bulletin, and he said, "You know, you could be a judge. I think your whole career has been heading towards you being a judge." The next week, he emailed me the application, and said, "Fill it out." That's how it happened.

DLA **What from your broad experience in your legal career do you call upon now as a judge?**

Judge Probably the experiences I had in southern New Mexico. I worked in Ruidoso. I worked for Gary Mitchell,

doing criminal defense work and plaintiffs' personal injury work. Although I was based out of Ruidoso, I really travelled the entire southern half of the state. I spent a lot of time on the road going to small towns, appearing before a lot of different judges. I draw from those experiences quite a bit, remembering the personalities of the judges, and procedures they used. They worked hard, with crowded dockets, yet they still treated people with respect. I saw many different temperaments, with a variety of approaches to running their courtrooms. The majority of these judges were accessible, and committed to justice. I probably learned as much from having a cup of coffee with different judges, as from anything else. So I probably draw from that experience the most as a lawyer - what it was like to practice in that part of the state and spend so much of my time in so many different courtrooms.

DLA **What do you expect of attorneys appearing before you in court?**

Judge Well, it's nice that they appear. [Group laughs.]

It's always good if they show up. Attorneys should be prepared, of course. And to be a zealous advocate for their client, within the confines of the rules of professional responsibility. I expect lawyers to treat their opposing counsel with respect. I expect them to treat everyone, including the Court, my staff, the parties, and witnesses with respect. The courtroom is a dignified, professional place and deserves to be treated as such.

DLA **What should attorneys appearing before you in court expect from you?**

Judge They should expect that I will enforce basic courtesy and professionalism. I also expect more than a warm body with a law license. You can assume that I have actually read the pleadings. I find that many attorneys completely regurgitate their brief and their motions, and I haven't quite figured out how to handle that particular situation. When I go out, I tell everyone, "I have read your motion, your response and your reply."

I've read the file. I know what the lawsuit is actually about. So to use that as a starting-off point, that would be helpful for me. I would say I would like for attorneys not to just merely regurgitate their brief. If you want to expand upon a particular case you cited, expound upon a particular theory or particular argument, do that. I don't find it helpful just for attorneys to read or summarize their brief.

DLA **What has been the biggest challenge of sitting on the bench so far?**

Judge One is, as I mentioned earlier, dealing with attorneys who to me don't seem to respect the decorum that you should have in a courtroom. There is a difference between advocacy and thumping on counsel's table. I think number one, that's really been a challenge of how to address those issues; and then number two, I would say, how to keep a poker face. [chuckle]. Not only in hearings, but in a jury trial.

I had my first jury trial earlier this year as a judge. Did numerous ones as a litigator, of course. And that was really a challenge. You don't realize how much of a challenge it is to be - just to keep that poker face no matter what happens. Along with that is the fact that it is not my job to try the case for the attorneys. There have been times when clearly objectionable evidence was coming in, and you just have to really control yourself not to even look at the attorney who should be objecting.

That was challenging. I would never have thought that it was quite that challenging to just sit there, but it really is.

DLA **What has surprised you the most on becoming a judge?**

Judge Probably the number of attorneys that come to court not well prepared. Also, the number of self-represented parties, whether for TRO's ,or otherwise, has also been surprising. Those cases present unique challenges.

I am also surprised at the number of attorneys that don't respond to motions.

There are more than I would have thought.

I would say those things are probably the most surprising.

DLA **How many cases do you have on your docket?**

Judge I think the last time we checked, it was around 1300-1400.

DLA **Any plans for managing that?**

Judge Being aggressive on dismissing for lack of prosecution, and setting hearings and trials to keep the cases moving.

DLA **What are your hobbies outside of work?**

Judge Well, besides being a soccer and basketball mom, I do a lot of reading, including a lot of travel books, with a lot of dreaming about travel. I try to exercise, and I enjoy cooking and gardening..

DLA **Was there any advice that you received about being a judge that you use?**

Judge Shortly before I took the bench I had my last mediation with former Judge Wendy York. She told me that she believed it was better practice that if you don't know about an area of law, go out, admit it to counsel, "You know what this is not an area I'm familiar with so it is your job to educate me." And I think sometimes attorneys forget that. The depth and the breadth of civil cases is quite challenging. On a typical day, you may handle a guardianship and conservatorship, construction case, med-mal case, real estate dispute, and end with a TRO about neighbors fighting with each other. The variety of cases requires a great deal of work and thought.

Now retired Judge Lang told me, "Be there and make a decision." He said, "If you're not going to make a decision, then what are you there for?" I really try to adhere to all this good advice.

Sanctions in Settlement Conferences

by Harriet J. Hickman - Gallagher, Casados & Mann, P.C.

Are sanctions appropriate for violation of a local court rule requiring parties to participate in settlement negotiations in good faith? In *Carlsbad Hotel Associates, L.L.C. v. Patterson-UTI Drilling Co., L.P., L.L.L. P. and Chi Operating Inc*., 2009-NMCA-005, the Court of Appeals affirmed an award for sanctions against Patterson after upholding the district court's decision that Patterson did not participate in a settlement conference in "good faith."

Initially, the Court of Appeals acknowledged that there are problems defining "good faith." Moreover, there are a number of problems requiring settlement facilitators to report "bad faith." Reporting what a facilitator perceives as "bad faith" places the facilitator in a role that compromises his or her facilitative and neutral roles and can produce unwanted incursion into confidentiality. As the Court noted, the possibility of a sanction gives one party a weapon against the other party that may increase adversarial behavior. *Id*. at ¶5.

Another set of problems arising from the possibility of awarding sanctions is the resulting litigation to enforce the sanctions. This creates additional litigation resulting in more time and expense which is contrary to the purpose of mediation. *Id*.

Then, there is the problem of how to litigate a claim for sanctions. Should the parties have the claim resolved by the court or by a jury? Since a settlement conference is not on the record, any hearing to take evidence on what happened likely will produce conflicting evidence as well as invade the confidentiality of the mediation. Can the mediator, who has his or her own views of what happened during the settlement facilitation make a decision regarding sanctions fairly and impartially? *Id*.

The Hotel in this matter sued Patterson and Chi for loss of business damages resulting form a gas well blowout and emergency evacuation in Carlsbad. *Id*. at ¶8. In October 2004, the parties agreed, at a Rule 1-016 scheduling conference, to participate in a settlement conference as set forth in the district court's local rule, LR5-205. As provided in the local rule, the district court assigned another district court judge, Judge Currier, to conduct the settlement conference. *Id*.

Each party was required to send Judge Currier a letter or memorandum summarizing the issues and giving an appraisal of its strengths and weaknesses. The order also provided that each party "…shall participate…in good faith….absent truly unusual circumstances, the parties will be expected to compromise from their last offer. Sanctions may be imposed if a party does not participate in the settlement conference in good faith." *Id*. at ¶9. LR5-205(B) also requires that the parties participate in good faith. *Id*.

Before the settlement conference, Patterson submitted its position statement explaining to Judge Currier its position of no liability. *Id*. at ¶10. Before the settlement conference, the Hotel demanded $32,000 and Chi offered $10,000. *Id*. at ¶11.

At the settlement conference, Patterson maintained that it had no liability, and it did not make an initial offer. *Id*. Judge Currier insisted that Patterson make an offer and threatened Patterson with sanctions for acting in bad faith. *Id.* After being threatened with sanctions, Patterson offered $1,000. *Id*. Judge Currier told Patterson that $1,000 would not satisfy Patterson's duty to participate in good faith. Patterson responded that if the other parties were close to settlement, it might be willing to contribute enough to settle the case. *Id*. Judge Currier asked Patterson if it would contribute $5,000 to get the case settled. Patterson stated that it would do so if Judge Currier could guarantee that $5,000 would get the case settled. *Id*. Judge Currier could not make that guarantee, but he felt the case could be settled with an additional $5,000 from Patterson. Patterson did not make any further offers, and the settlement conference concluded without reaching a settlement. *Id*.

Judge Currier submitted a sealed written report to the district court indicating that Patterson refused to participate in the settlement conference in good faith. *Id*. at ¶12. The Hotel and Chi moved for sanctions against Patterson and sought reimbursement for the costs of their representatives to attend the conference and for attorney fees. *Id*.

Although Judge Currier already provided the district court with his report and conclusions, the district court asked Judge Currier to hold a hearing to determine if Patterson acted in good faith and if sanctions were appropriate. *Id*. at ¶13. Patterson filed a motion seeking Judge Currier's recusal, since he already recommended sanctions, he had personal knowledge of the disputed facts concerning the mediation and he was a material witness whose testimony may have been required on the motion for sanctions. *Id*. However, the district court denied Patterson's motion, and Judge Currier heard the matter on July 1, 2005. *Id*.

At the hearing, Judge Currier noted that although he had been the mediator, he was conducting the hearing on bad faith in his judicial capacity. *Id*. at ¶14. He stated that Patterson's $1,000 offer was "merely a token," and reaffirmed his prior conclusions. *Id*. Among those findings, Judge Currier concluded that Patterson came to the mediation unwilling to settle, that Patterson showed disrespect for the other participants and that Patterson did not participate in the mediation process in good faith. *Id.* Judge Currier entered an order that Patterson conducted itself in bad faith and required Patterson to pay the Hotel $5,156.67 in attorney fees and costs as a sanction. *Id*. at

¶16. Although not on appeal, Judge Currier also ordered that Patterson pay sanctions to Chi. *Id.*

While Patterson's appeal was on the Court's summary calendar, the case settled with Patterson paying $1,000. *Id*. at ¶17. Before settling, the Hotel filed a motion requesting the district court to adopt Judge Currier's findings and to impose sanctions against Patterson. *Id*. The district court agreed and entered an order adopting the findings and decision of Judge Currier. *Id*. at ¶18. Patterson appealed on two grounds. One, that its failure to offer a judicially determined amount at settlement does not constitute bad faith warranting sanctions, and two, that it was improper for Judge Currier to act as judge at the hearing when he was the mediator at the settlement conference. *Id*. at ¶19.

The Court of Appeals upheld the decisions of Judge Currier and the district court. *Id*. at ¶23. The Court found that sanctions were appropriate under the circumstances of this case, because Patterson made its first offer only under the threat of sanction. *Id.* Although the Court questioned the wisdom of having a good faith requirement or a requirement that a party compromise from the last offer in a settlement conference rule, it still found no error in requiring Patterson to make an initial offer upon threat of sanction. *Id*. at ¶26. The Court found that confidentiality was waived, because the parties settled the case, even though the settlement occurred after appeal was on the Court's summary calendar. *Id*. at ¶28.

The Court also questioned the wisdom of having the settlement facilitator hear the sanctions issue as the district court judge. Despite what the Court called a "troubling" process, the Court still held it was appropriate in this case, because Judge Currier's rulings were treated by the district court as "recommendations," and the final decision was made by the district court. *Id*. at ¶29 and ¶30.

Lastly, the Court noted that subsequent to this settlement, the New Mexico Legislature passed the Mediation Procedures Act. As if addressing the problems that arose in this matter, the Act does not require good faith participation or provide for sanctions for failing to act in good faith. N.M.S.A. 44-7B-1 to -6. The Act has exceptions to the confidentiality provision, but there is no exception for use to determine whether a party participated in the settlement conference in good faith. *Id*. Wisely, the Court recommended the elimination of the good faith requirement in court facilitated programs and any rules requiring good faith in such programs. *Carlsbad, Id.* at ¶32.

In his dissenting opinion, Judge Kennedy opined that the requirement to compromise with the resulting threat of sanctions is an invitation to judicial overreaching and steps outside both the local rule and acceptable legal norms. *Id*. at ¶35. Judge Kennedy found that Patterson did compromise, and Judge Currier's arbitrary conduct exceeded the scope and powers conferred by the local rule. *Id*. at ¶37. Patterson compromised and made an offer of $1,000. When asked for more money under threat of sanctions, it offered $5,000 if that sum would settle the case. *Id*. at ¶38. Yet, Judge Currier found Patterson to be in bad faith over $4,000. *Id*. $1,000 was not nothing, and Patterson met the requirement of the local rule to compromise from its last offer. *Id*. at ¶39.

Otherwise, the message is that a party who believes it has no liability should not engage in a settlement conference at all, even if there is a possibility that the party would acquire enough information to change its position.

Judge Kennedy found no bad faith. Patterson compromised, and it objectively showed its willingness to compromise further. *Id*. at ¶40. "Being sanctioned for resisting when the facilitating judge demands a larger offer chills the rights of each litigant to make its own determination as to whether a settlement is advantageous." *Id*. at ¶42. The facilitator does not have the authority to impose a settlement value on the parties, and the local rule does not contemplate the facilitator ordering a party to make a larger offer. *Id*. at ¶43. The facilitator should not impose sanctions merely because it is his opinion that the amount offered is insufficient. *Id*. at ¶44. Judge Kennedy also found that it was not appropriate for Judge Currier "to don a judge's hat to rule on the propriety of his own conduct…." *Id*. at ¶47.

Judge Kennedy concurred with the majority that such rules promoting the coercive use of settlement conferences should be reevaluated. *Id*. at ¶35. Otherwise, the message is that a party who believes it has no liability should not engage in a settlement conference at all, even if there is a possibility that the party would acquire enough information to change its position. *Id*. at ¶48.

Mid-Trial Media Coverage: Dicta from *State v. Holly*, 2009 NMCA-011

by Minerva Camp - Butt, Thornton & Baehr, P.C.

Twitter, iPhone Mediapad, Kindle news, online newspapers, airport TV, PTA pamphlets, even local farmers markets newsletters and other local media outlets have the ability to bombard a sitting jury with information about the case in which they have been asked to render a verdict. Deep within the a criminal case that some of us routinely neglect to read thoroughly, lurked one lonely line of dicta that provides insight into what may constitute prejudicial midtrial media coverage that may warrant the voir dire of a jury in any case.

The Supreme Court, in an opinion by Justice Bosson, holds that Section 8-3.6(e) of the ABA Standards for Criminal Justice, Fair Trial and Free Press is the standard for New Mexico for a request to voir dire the jury following potentially prejudicial publicity that arises mid-trial. The ABA Standards set out three steps: (1) the Court determines whether the publicity is inherently prejudicial (this analysis includes: (a) whether the publicity goes beyond the record or contains information that would be inadmissible at trial; (b) how closely related the material is to matters at issue in the case; (c) the timing of the publication during trial and (d) whether the material speculates on the guilt or innocence of the accused. If the Court finds the publicity inherently prejudicial the Court is to proceed to the next step. (2) The Court canvasses the jury as a whole to assess whether any of the jurors were actually exposed to the publicity. If so, the Court goes to the next step. (3) The Court conducts an individual voir dire of the jury to ensure that the fairness of the trial has not been compromised.

Also to be considered is (1) the prominence of the publicity including the frequency of coverage, the conspicuousness of the story in the newspaper, and the profile of the media source in the local community; and (2) the nature and likely effectiveness of the trial judge's previous instructions on the matter, including the frequency of instructions to avoid outside materials, and how much time has elapsed between the trail court's last instruction and the publication of the prejudicial material.

In *State v. Holly*, the Court upheld Defendant's conviction even though midtrial media coverage of Defendant's former high school basketball star acclaim was printed in local newspaper, above the fold with headline that read "Holly Pleads Guilty to Charges." Id. Defense counsel's request to voir dire the jury *two days after the publication* was denied. Id. The Court found that two days after the exposure was too late and that jurors should be questioned as soon as possible after potential exposure to assess any prejudice.

Although this case deals with a criminal jury trial and applies a standard titled "Criminal standard," the Court's dicta may apply to Civil cases where midtrial media may become an issue. In paragraph 24 of this opinion the Court notes, "Trial Courts should employ the ABA standard set forth in this opinion when alerted to mid-trial publicity." This dicta may mean that this standard can or should apply in any case, including civil cases, when there is midtrial publicity that can effect the jury; perhaps even more so in cases where punitive damages are at issue.

Benefits of Volunteering

- Network with civil defense attorneys from all areas of New Mexico.
- Get involved in a committee or task force that interests you and develop leadership skills and peer recognition.
- Share your volunteer contributions for NMDLA with your clients such as published articles or information about your participation as a speaker at a legal seminar.
- Hone speaking skills at seminars and other meetings.
- Meet experienced attorneys and leaders of the defense bar.
- Camaraderie, Collegiality, Friendships.
- Professional Development and Growth.
- Get your name and your firm's name out in front of your peer group.
- Gain recognition from the NMDLA Board as a future leader of NMDLA.
- Obtain practice tips and case referrals through meeting with other defense attorneys.

How to Become a Volunteer

- Contact one of the Committee Chairs and get involved in their committee.
- Contact the NMDLA President and she can guide you to the volunteer activity that best suits your interests and time schedule.
- NMDLA offers volunteer opportunities that range from welcoming members and judges at the annual meeting to finding a speaker for a one hour lunch program to chairing a seminar.

There are opportunities for all time schedules and levels of experience! Contact NMDLA for more information at nmdefense@nmdla.org.

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Implementing Section 111 of the Medicare, Medicaid & SCHIP Extension Act of 2007

by Tiffany L. Roach and Allison L. Biles - Modrall, Sperling, Roehl, Harris & Sisk, P.A.

On December 29, 2007, President George W. Bush signed into law the "Medicare, Medicaid, and SCHIP Extension Act of 2007," ("The Act"). Pub. L. No. 110-173. This law, effective beginning July 1, 2009, amends Section 1862(b) of the Social Security Act and alters the reporting requirements of the Medicare Secondary Payer provisions, found at 42 U.S.C. § 1395y(b). Generally, the Medicare Secondary Payer ("MSP") provisions prohibit Medicare from making a payment to a Medicare beneficiary if a payment has been made or can reasonably be expected to be made by a primary plan. In certain circumstances, however, Medicare will pay as a secondary payer. There are two types of primary plans, (1) a group health plan ("GHP"), or (2) a non-group health plan ("NGHP"). A GHP is a health plan an individual is entitled to that is directly linked to an employer. An NGHP is either (1) a workers' compensation plan, (2) an automobile or liability insurance plan (including a self-insured plan), or (3) a no-fault insurance plan. The Act requires primary plans to repay Medicare for making secondary payments.

SECTION 111 REPORTING[1]

42 U.S.C. § 1395y(b)(2)(B)(ii) requires repayment by a primary payer for payments made by Medicare as a secondary payer. The Act amended this repayment requirement by adding new reporting provisions and penalties for failure to comply with the statute. *See* 42 U.S.C. § 1395y(b)(7) & (8). The purpose of the Section 111 MSP reporting process is to enable Center for Medicare and Medicaid Services (CMS) to pay appropriately for Medicare covered items and services furnished to Medicare beneficiaries by determining primary versus secondary payer responsibility. The entities responsible for reporting under 42 U.S.C. § 1395y(b)(7) & (8) are referred to as Responsible Reporting Entities ("RRE's").

GHP REPORTING REQUIREMENTS

The GHP RRE is an entity serving as an insurer or third party administrator for a group health plan, and in the case of a group health plan that is self-insured and self-administered, a plan administrator or fiduciary. Section 111 Reporting for GHP's began on January 1, 2009. *See* 42 U.S.C. § 1395y(b)(7). Pursuant to Section 111 Reporting Requirements, a GHP RRE must identify all time periods during which its plan was the primary payer and Medicare made payment. Such information must then be submitted to the Secretary of Health and Human Services ("Secretary"). GHP reporting is to be conducted electronically on a quarterly basis.

NGHP REPORTING REQUIREMENTS

The NGHP RRE's are (1) liability insurance (including self-insurance), (2) no fault insurance, and (3) workers' compensation laws or plans, including the fiduciary or administrator for such laws, plans, or arrangements. *See* 42 U.S.C. § 1395y(b)(8). The RRE must report the identity of a Medicare beneficiary, whose illness, injury, incident, or accident was at issue, as well as such other information specified by the Secretary to enable an appropriate determination concerning coordination of benefits, including any applicable recovery claim. *See* 42 U.S.C. § 1395y(b)(8)(a)(2). Reporting will be completed electronically after the claim is resolved through a settlement, judgment, award, or other payment, regardless of whether or not there is a determination or admission of liability. Furthermore, responsibility as a primary payer arises even if liability for a medical expense is contested.

TYPES OF REPORTS

There are two types of reports that must be submitted to Medicare through CMS: (1) Ongoing Responsibility for Medicals ("ORM"), and/or (2) Total Payment Obligation to the Claimant ("TPOC"). ORM is defined as the RRE's responsibility to pay on an ongoing basis for the injured party's (Medicare beneficiary's) medicals associated with a claim. TPOC is the dollar amount of a settlement, judgment, award, or other payment in addition to or apart from ORM. One of the important distinctions between these two types of reports is their effective dates.

A TPOC date can be defined in one of three ways: (1) If there is a written agreement and no court approval is required, the TPOC date is the date the agreement was signed, (2) If there is a written agreement and court approval is required, the TPOC date is the date of court approval, (3) if there is no written agreement, the TPOC date is the date the payment was issued (or the date the first payment was issued if there will be multiple payments). Only if a TPOC agreement, judgment, settlement, award, or other payment has a TPOC date on or after January 1, 2010 will it be subject to the reporting requirements of Section 111.

The obligation to report ORM occurs when the RRE assumes liability for ongoing medical payments. The obligation to report ORM activity continues until the RRE no longer has a

responsibility to pay for ongoing medical payments and submits a report indicating that its ORM has terminated. The basic rule for ORM reporting is that if ORM was assumed prior to July 1, 2009 and continues through July 1, 2009, the RRE must report. More specific rules apply in various situations. Please see the CMS website, published User Guide, and Alerts for further details.

REGISTRATION AND TESTING

Electronic registration of each RRE is required and must be completed by September 30, 2009. RRE's must register on the Coordination of Benefits Secure Website available at http://www.section111.cms.hhs.gov. You can review the requirements for registration at http://www.cms.hhs.gov/MANDATORYInsRep/Downloads/RegistrationOverview.pdf. Once an RRE registers it will be assigned a representative to be its main contact for reporting issues and to assist the RRE in the testing process. Each RRE is required to pass a testing process prior to sending production files for Section 111.

PENALTIES FOR NON-COMPLIANCE

Those who violate the Section 111 reporting provisions will be subject to a civil penalty of $1,000 per claim for each day of noncompliance in addition to any other penalties prescribed by law.

RECOVERY OF MEDICARE'S CONDITIONAL PAYMENT

Immediately upon taking a case, an attorney must determine if a Medicare beneficiary or someone eligible to receive Medicare benefits is involved. If the claimant is a Medicare beneficiary or is eligible to receive Medicare benefits then identifying information for the claimant must be submitted to Medicare so that Medicare will be able to recover its conditional payment. Medicare's conditional payment becomes subject to repayment when the primary plan makes payment to the beneficiary. Medicare can initiate recovery of its conditional payment as soon as it learns that payment has been made or could be made under worker's compensation, liability insurance, or no-fault insurance plans.

Medicare has a direct right of action to recover its conditional payment not only from any primary payer, but also from any entity, including a beneficiary, provider, supplier, physician, attorney, State agency, or private insurer that has received a primary payment. *See* 42 C.F.R. § 411.24(g). Once a beneficiary or other party receives a primary payment, the beneficiary or other party must reimburse Medicare within 60 days. *See* 42 C.F.R. § 411.24(i). For services for which Medicare has made a conditional payment, Medicare is subrogated to any individual, provider, supplier, physician, private insurer, State agency, attorney, or any other entity entitled to payment by a primary payer. *See* 42 C.F.R. § 411.26. Moreover, Medicare has the right to join or intervene in any action related to the events that gave rise to the need for services for which Medicare made a conditional payment. *See* 42 C.F.R. § 411.26(b). Furthermore, Medicare can collect interest on conditional payments and can seek double damages. *See* 42 C.F.R. § 411.24(c)(2).

AMOUNT OF MEDICARE RECOVERY WHEN A PRIMARY PAYMENT IS MADE AS A RESULT OF A JUDGMENT OR SETTLEMENT

Generally, Medicare will reduce its recovery to take account of the cost of procuring the judgment or settlement if costs are incurred because the claim is disputed and those costs are borne by the party against which Medicare seeks to recover. *See* 42 C.F.R. § 411.37(a). Thus, in structuring a settlement, attorneys should note that Medicare will be reimbursed no matter the amount of the settlement.

QUICK REFERENCE TO SECTION 111 REPORTING

- An entity must determine if the claimant involved in a lawsuit against them is a Medicare beneficiary
- If the claimant is a Medicare beneficiary, the entity must determine, if and when, it was a primary payer and Medicare made a conditional payment
- If such conditional payment was made, the entity is an RRE, and must report
- An RRE must report a settlement, judgment, award or other payment once a TPOC date has occurred. Reporting of TPOC information is required for TPOC dates that occur on or after January 1, 2010
- An RRE must report its ongoing responsibility for medicals (ORM) after it assumes such responsibility and continue such reporting through termination of such responsibility. Reporting of ORM information is required to be reported if ORM responsibility begins on or after July 1, 2009 or if ORM responsibility began prior to that date but continues through July 1, 2009 or the claim is subject to reopening on or after July 1, 2009.
- Once a beneficiary receives payment from a primary payer, he or she has 60 days to reimburse Medicare for any conditional payments made. If such payment is not made, Medicare has a direct right of action against the primary payer and any entity that received payment from a primary payer
- If an RRE violates a reporting requirement it can be subject to stringent penalties
- Remember, all RREs must register and test prior to reporting with CMS

1 The Secretary of Health and Human Services has decided to implement the Act by publishing reporting instructions on the CMS website at http://www.cms.hhs.gov/MandatoryInsRep. Please consult the CMS website regularly for any changes or updates to the implementation process of the Act. You will also find a User Guide in addition to other documents to address questions relating to the reporting process.

Federal Court Rule Changes

Effective December 1, 2009 as noted on the United States District Court - District of New Mexico website.

Effective December 1, 2009, the Federal Rules for deadlines and how they are computed will change. Currently, a deadline that is set for 10 or fewer days is computed by excluding weekends and holidays. If a deadline is 11 or more days, the time is computed by using only calendar days. Under the new rules, deadlines will be calculated using calendar days only. In addition, deadlines of less than 30 days will change to multiples of seven days, as follows:

- 5-day deadlines become 7-day deadlines;
- 10- and 15-day deadlines become 14-day deadlines;
- 20-day deadlines become 21-day deadlines; and
- 25-day deadlines become 28-day deadlines.

If a deadline happens to fall on a weekend or holiday, it will be extended until the next working day. Per Fed. R. Civ. P. 6(d), three days for service will continue to be added to the deadline calculation. *See Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a).*

Here are some examples of the revised deadlines.

BEFORE	**AFTER**
Preliminary Hearing w/in **10 or 20 days** (Fed. R. Crim. P. 5.1(c))	Preliminary Hearing w/in **14 or 21 days** (Fed. R. Crim. P. 5.1(c))
7 days to correct or reduce a sentence (Fed. R. Crim. P. 35(a))	**14 days** to correct or reduce a sentence (Fed. R. Crim. P. 35(a))
20 days to answer (Fed. R. Civ. P. 12)	**21 days** to answer (Fed. R. Civ. P. 12)
10 days to appeal class-action certification ruling (Fed. R. Civ. P. 23(f))	**14 days** to appeal class-action certification ruling (Fed. R. Civ. P. 23(f))
10 days to object to Report and Recommendations (28:636(b)(1)(c))	**14 days** to object to Report and Recommendations (28:636(b)(1)(c))

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