DLA NEW MEXICO
Defense Lawyers Association

DEFENSE news

The Legal News Journal for New Mexico Civil Defense Lawyers

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IN THIS EDITION

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 our members include, but are not limited to:

- Exceptional continuing legal education opportunities, including online seminars, and self-study tapes, with 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, 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.

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A Message from the President

by Bryan Garcia, Narvaez Law Firm, P.C.

Fellow DLA Members:

The New Mexico Defense Lawyers Association is in fine shape and we are financially sound. I personally thank each of the Board Members, and particularly our Executive Director, Kendra Yevoli, and the Executive Committee Members for their tireless efforts in returning to this point.

The DLA has just completed its first highly successful CLE for the year. Special kudos go to Board Member Mark Riley for creating an innovative and enlightening jury focus panel program. I would also like to thank all of the program participants for a job well done. There are several other quality CLE programs for the rest of year, including *Women in the Courtroom III, Day of Discovery with James McElheney*, and the *Civil Rights Seminar.* If you haven't attended a DLA program lately, I highly encourage you to do so. We are also resurrecting the Annual Meeting this fall. In the next few weeks, you will see a call for nominations for the *Defense Lawyer of the Year* and the *Young Defense Lawyer of the Year.*

I am also pleased to announce that the final touches are being completed for the new DLA website. The website will be unveiled by July 1, 2010. We will send an email alerting the membership when the website is up and running. The hallmark of remodeling will be usability. A key feature of the website will be that some of our CLE programs will be available via video streaming for self-study credit. The website will also have current and back copies of the *DLA Newsletter* available. Some of the more recent versions will be word searchable. The website will continue to have recent trial decisions. Please submit your trial results so that we can continue to build this database of information.

Finally, we have been asked by Justice Chavez, along with our New Mexico Trial Lawyers Association colleagues, to participate in a short survey regarding discovery and discovery abuses. Although the details remain to be finalized, you can expect to see an email with a link to a survey. It should take less than ten minutes to complete. I have a wager with the Trial Lawyers president that the DLA members will participate in a higher percentage. Please help me win this bet!

I encourage each of you to join a committee or write an article for the *DLA Newsletter.* I thank each of you for your commitment to the New Mexico Defense Lawyers Association. I welcome any questions, comments or observations from my fellow defense bar colleagues as to how we can best serve you.

Bryan Garcia
Narvaez Law Firm, P.C.
NMDLA President

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 and publication of peer accomplishment. As part of that continuing effort, we ask each of you to bring your accomplishments to DLA's attention. Submissions might include a good result at trial, a favorable appellate decision, a successful motion at the trial court level, or a recommended expert or mediator.

Email your information to nmdefense@nmdla.org, with the subject line "DLA Sharing." 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, and it will take input from all members to make it a real success.

Interview of The Honorable Linda M. Vanzi, New Mexico Court of Appeals

Interviewed by Agnes Fuentevilla Padilla, Butt, Thornton & Baehr, P.C.
and Harriett J. Hickman, Gallagher, Casados & Mann, P.C.

Judge Vanzi received her law degree from the University of New Mexico in 1995 and has a B.A. in English and French from Marymount College in Tarrytown, New York. She served as judicial clerk to the Honorable Edwin L. Mechem, United States District Judge, before going into private practice. She served as a Second Judicial District Court Judge from 2004-2008, when she was appointed to the New Mexico Court of Appeals.

PADILLA: **Judge Vanzi, you earned the 2006 Outstanding Judge of the Year award and the 2007 Outstanding Trial Judge award. Why did you want to leave the District Court bench when you were so successful there to move to a Court of Appeals position?**

VANZI: I think it's because I wanted to do more on a bigger scale. You know, I really loved the District Court work. And I love the interaction with the lawyers and just all of the cases that came through, but I thought that being on the Court of Appeals I'd have an opportunity to be a little more thoughtful about the work I was doing. One of the things that sometimes got frustrating on the District Court was the number of cases we each had. With that many cases you just don't have the time to be as fully as prepared as you would like to be. And, no matter how hard you work, there's only so many hours in a day. It's very busy in the Court of Appeals as well. I was under the misimpression that we could take as long as we wanted to write opinions, and that's not true. But I can spend more time with cases, and I can spend more time researching the law and I can be more thorough. So I think that's probably the main reason I wanted to be on this court.

HICKMAN: **What do you miss about not being on the District Court bench?**

VANZI: And I know Court of Appeals judges who were former District Court judges joke about this but I now have to get at least one other person to agree with me. When I was on the District Court I just walked into court and gave my decision. I miss the instant gratification of giving parties a quick ruling and they leave court knowing where they stand. I also miss the daily interaction with lawyers. I try to stay as involved in the legal community as I can but I still don't have that face-to-face interaction that I had when I was on the District Court.

The Honorable Linda M. Vanzi

PADILLA: **Well, let's ask the flip side then. What don't you miss?**

VANZI: What don't I miss. I think just the volume of work on the district court. The number of foreclosures, the number of cases of debt and money due - those types of cases that were more about pushing paper through the system than about law. I don't much miss that aspect. Going back to what I miss, I do miss trials. I think one of the best things about being a District Court judge was being part of our jury system. Watching great lawyers - and I presided over several trials with really good lawyers on both sides in trials - was an amazing opportunity. But let's see, what else do I not miss. The unnecessary fighting that you sometimes see between counsel. It didn't happen often but when it did, it was no fun.

PADILLA: **So, what advice would you give a civil defense lawyer with regard to getting caught up to an extreme in that adversarial relationship?**

VANZI: I think it's an interesting question. We must always strive to be as professional as we can and avoid the bait when opposing counsel tries to cause conflict. I know - easier said than done. It's also interesting to think about this question from the appellate perspective. I know that we view things in more of a vacuum here. But, I know what happens on the District Court level, and I know the needling that can go on and the reality of the adversarial process. When I see cases here, I can often tell what the lawyers have gone through below. It makes sense to me. My advice, though, from the appellate court view is that we don't live what happened below and so we aren't witness to a lot of what goes on. What matters here is the record

that gets made, and that you are true to the facts, the rulings and the law. We're less interested - and we don't get as caught up - in the personalities of the parties.

PADILLA: So how do you perceive the nastiness in the briefing? Does it influence your decision at all?

VANZI: No. No, because we really do have to look at the record. There has been the rare occasion where parties are unprofessional in their briefs but I just turn the pages until I get to the issues which is why the litigants are really up here. Fortunately, our Rules of Appellate Procedure are pretty confining. By the time you are done with your statement of the case, your issues, and the law, there's usually not much space left to argue about how awful opposing counsel is. Anyway, to be true advocates, counsel should be focusing on making their case to the appellate court.

HICKMAN: Based on the briefs that you've seen, that you've read so far, what advice would you give attorneys about what they're including or not including in their briefs, or what they should be doing when they're presenting their briefs.

VANZI: I think that the most important thing is simply to follow the Rules of Appellate Procedure. And, be clear about what you are appealing. Finally, don't appeal every issue under the sun because that's not very effective. Pick the one, two, three issues that are the most important and keep your focus. And then, just be very clear with regard to your analysis, the law, and make sure that you cite to the record. I think one of the mistakes that happens, especially if you have trial counsel also writing the appellate brief is they were so buried in the case below that they make assumptions about what the appellate court knows. We don't always look, especially if they are huge records, we don't look at the whole record. We look at what you are citing to, to the issues that are relevant. We haven't lived the case that you have or that even that the District Court judges lived with you. I recommend giving your brief to somebody else who has not been part of the case, have them read it and see if it makes sense. See if that story can be told through the eyes of someone who knows absolutely nothing. Then, if that reader comes back to you and asks, "Why are you talking about this?" or "what's the relevance of this section?" you can make the necessary edits. It may have been something completely relevant to you, but you haven't translated that in your papers. I think that that's probably the best advice I can give. Just have somebody else read your brief for clarity before you send it up.

PADILLA: What about in oral argument? What advice would you give about what should be presented and what should be assumed?

VANZI: Let me start by saying that I have heard complaints over the years, even before I was on this court that the Court of Appeals never gives oral argument. "They just don't ever give it, so don't bother asking for it." I don't think that that's true now. There are many judges here who believe we should always grant oral argument when a party requests it. Of course, if you don't ask, you're not gonna get it. As far as advice about what should be presented, it's not much different than what I would advise when making an argument in District Court. Don't read your brief. Invite questions. And be willing to ask the Court if there is something in particular that they would like addressed. A lot of times oral argument is granted because there's something there that's not being answered in the briefs. Ask the Court and really try to focus on their concerns.

HICKMAN: What do you think has been your biggest challenge since coming to the Court of Appeals?

VANZI: Other than commuting to Santa Fe on the Railrunner for a year? This is really different work. I have to say…I will admit that this was a big change. Going from the quick pace of District Court to having to really slow down was a bigger issue than I thought it would be. You know, writing is a very different thing than issuing oral decisions, and appellate writing is very different than even the type of opinions I would write on the District Court. I remember Judge Bustamante saying to me very early, don't try to rush this stuff out. You need to write and then sit on it. My inclination was, hey, there are people out there waiting for their opinions so let's get these decisions out. Timeliness is important but so is getting it right. So, I think that the biggest challenge has just been learning to be still with a project and the process, and trying to get out a good and clear opinion that will make sense to the lawyers, the parties, and the larger audience who may be impacted by the decision in the future.

PADILLA: What was it like for you to have one of your District Court decisions reversed by the Court on which you now sit?

VANZI: First of all, I know what decision you are talking about and I have to admit that I haven't read the opinion. But, this is why we have levels of courts. It wasn't the first time I'd been reversed and the bottom line is that as a District Court judge, you do the best you can with limited help and under lots of time constraints. That's why our constitution provides for levels of review. So, yeah, I know, it was a huge case with a huge verdict. But decisions in every case are important to the person who is

affected by it. A reversal is a reversal. As a judge, you want to get it right every time but that doesn't always happen.

PADILLA: You're just in such a unique position to have been there, and now you're here. It seems interesting.

VANZI: It is interesting. And when a case gets reversed, I have that sinking feeling wondering what the District Court judge who is getting it back on her docket is muttering under her breath.

PADILLA: What are some of the key lessons that you've learned, both as a litigator and as a trial judge, that you still use or that you still apply frequently as an appellate judge?

VANZI: Key lessons...I think first and foremost integrity in our work is really important. Being honest with the courts and with our clients is also key. As lawyers, we zealously advocate for our clients, but I think we have to do it in certain, very practical and very fair and honest ways with each other. You know, I started out as a federal law clerk and most of my practice was in federal court. It seems that most of the federal judges demand a very high level of professionalism and integrity from the lawyers. They don't take a lot of slack from people. And I always tried to carry that through into my own practice when I actually went out and practiced law. I think sometimes people think they can slide a little bit more in the state courts which is not helpful to their clients or the profession.

HICKMAN: Why is it that attorneys think they can slack off in state court and not federal court? Is it that the federal judges just come down harder than the state court judges?

VANZI: I don't know if that is just a perception or if it's true. But I do think many lawyers believe that federal judges demand a higher level of practice. It could be also that federal judges are more willing to sanction bad behavior than state court judges. I don't know what the reason for that is but it is a question that lawyers often ask state court judges when they are on CLE panels. At the end of the day, though, it's imperative that we do the very best job that we can.

PADILLA: If you had to identify one or more mentors that you've had in this process of going from law school to litigator to trial judge to appellate judge, who would you say was somebody you really turned to?

VANZI: I think there are several people. Judge Mechem absolutely. He was an amazing judge and an amazing human being. He taught me a lot, not just about lawyering but about people and politics and just being human. He had been governor and state senator and a federal judge and he brought all of that life experience to bear on his work and interactions with people. Maureen Sanders has been a mentor since my first day in law school. She is always there, she is honest and she is a great friend. It goes without saying that most of the faculty at the law school were and continue to influence me. Barbara Bergman, Leo Romero, Fred Hart, Michael Browde, Ted Occhialino, Ruth Kovnat - how can they *not* have an impact! You've got me started now because as I think about it, a lot of amazing people - Luis Stelzner, Joe Goldberg, Wendy York, Phil Davis - so many people from both the defense and plaintiff's bar have been role models for me. I've been incredibly lucky to have had access to such remarkable people.

HICKMAN: Why does it take so long for civil cases to go through the Court of Appeals?

VANZI: I think that there is a misperception that we move very slowly over here. But that is a misperception. We get cases delivered every month. We have clearance rates that are set by the legislature that we must meet. Right now, we have to issue as many decisions as the number of cases that come in which is over a thousand cases a year. Every month, each judge gets three or four cases to author, and he or she is also assigned as a participant on six or seven other cases. So we are constantly putting work out. We have a goal of getting a decision filed within six months of it being assigned to an author at the very latest. But, we often issue opinions much sooner than that. You asked specifically about civil cases, though, and those tend to sit on the ready list for a longer time because of the large number of criminal cases and CYFD cases that we have.

PADILLA: Did you have a criminal law background at all? How was that learning curve different?

VANZI: I didn't have a criminal law background but that hasn't seemed to present much of an issue. On this court, it's always a learning process. Anyway, a lot of the criminal cases mostly involve a limited constellation of constitutional issues. Every once in a while I may get stumped but it's mostly pretty straightfoward stuff. There's much more variety in the world of civil law, and the types of civil cases we get up here than there are criminal issues.

HICKMAN: Are there more civil cases heard than criminal cases?

VANZI: In terms of oral argument? I would say, yes, that's probably true. And I think part of the reason for that is the criminal lawyers tend mostly to be attorneys from the appellate PD's office and the AG's office are so backed up. I think the last thing they have time for is to prepare for oral argument. In the year I have been here, I've only sat on oral argument in one criminal case while I have sat on

several that are civil cases. In some respects, the civil cases may have more issues that are better addressed on oral argument than criminal cases.

PADILLA: When did you move into the new Court of Appeals building near the law school?

VANZI: We moved in late November, early December, and there's seven judges in Albuquerque, three in Santa Fe now, although we do arguments in both places and in the schools. We just did an oral argument in the high school in Santa Fe which was a great success.

PADILLA: What a great opportunity.

VANZI: Yeah, it's been really terrific. We've had our first arguments here in the new state-of-the-art courtroom, and we are encouraging lawyers to come and use it any time. We have two classrooms in the back and we encourage students, associates, anyone interested to watch the arguments here. The law school is posting all the briefs for cases scheduled for oral argument on their website which is a great service to the legal community.

PADILLA: When you go out into the community to high schools, do you have a teaching component with that?

VANZI: We do and that has been mostly with the help of local bar associations. For example, the argument we just did at the Santa Fe High School had tremendous involvement by the First Judicial District Bar Association. Several attorneys went to the school days before the argument and spent hours talking to the kids. We had picked a criminal case with a somewhat juicy constitutional search and seizure issue that the students might be interested in. And they were! The attorneys also explain what will happen although before the start of an argument, we still explain to the students that this is actually court in session. It's being recorded…

PADILLA: It's not moot court.

VANZI: …Right, this is not moot court. It's not a joke. You can't talk or text or make faces. We do a full argument in front of them, and then the judges retire to try to reach a decision which we do in these cases in the schools. That way, the students will know what our decision is before they leave. Unfortunately, that didn't happen in Santa Fe. As it turned out, we needed to do more research on the issue being decided. But while we are deliberating, the lawyers and the judge's law clerk who is bailiffing the argument have an opportunity to talk to the students. The kids love that part. Once the judges return and issue their decision - if we have one - we spend another hour or so with the students. In the last year we have done arguments in schools in Roswell, Hobbs, Santa Fe, and Grants. We are planning another one in Roswell and Hobbs, as well as in Espanola and Albuquerque. It is a wonderful way to see students get involved and allows us the chance to work with the lawyers in the community.

HICKMAN: Does it give them a real idea of what an attorney does, other than what they see on TV?

VANZI: Exactly. Most of the comments we hear are in the vein of "this wasn't like it was on TV." And the students don't complain. They don't say, this was so much more boring than TV. I've been so impressed by how attentive they are, and how thoughtful their questions have been. I asked the Santa Fe students, how many of them have parents who are lawyers. And very few of them did. They were just interested in the process and how our ruling might affect them. In other words, how does this translate to them as young people in the schools. Yeah. It's great. I loved doing argument in schools. Judge Sutin has been the champion of this project for a long time and it has really paid off for all of us - students, lawyers, and judges.

PADILLA: This building is very nice.

VANZI: Well, it's such a great building, and we want to use it in conjunction with the legal community and the law school. For once, we actually have a space where we can do that. So, it's really exciting to have it in this location.

PADILLA: It sounds like the students are really going to benefit.

VANZI: The students are already benefitting. Judges Bustamante and Sutin are teaching an appellate practice class here. We have started monthly brown-bags with the first year law students, judges, staff attorneys and law clerks. We hosted the first faculty colloquium of the year in our conference room on Wednesday. And, of course, we have the students making use of the courtroom - to watch real arguments or to practice for their moot court teams. Students do externships with us and are here all the time. And I think ultimately for the lawyers who want to participate in oral argument, or use our mediation facilities, or just want access to the court, they will find that our doors are always open.

PADILLA: Judge, Vanzi, thank you for taking the time to meet with us.

New Mexico "Indemnification" Law in the Wake of *City of Albuquerque v. BPLW Architects & Engineers, Inc.*

by Courtenay L. Keller, Riley & Shane, P.A.

This article reviews New Mexico "indemnification" law in the wake of: *City of Albuquerque v. BPLW Architects & Engineers, Inc.*, 2009–NMCA–081,146 N.M. 717, 213 P.3d 1146.

INTRODUCTION

It is well settled New Mexico law that, in the insurance context, the duty to defend is broader than the duty to indemnify. While in theory defense and indemnification are separate duties, the reality in the insurance context is that once coverage (indemnification) is triggered, the duty to defend is presumed. This article addresses several consequences of treating design professionals and contractors as insurers under indemnity and defense clauses in construction contracts. *BPLW* establishes that New Mexico Courts will not distinguish between insurance contracts and other types of contracts when construing indemnification agreements for the purpose of determining whether a contractual duty to defend has been triggered. Now, under *BPLW*, in the construction contracting context, the duty to defend is triggered if "the allegations in the complaint fall within the terms of the contract."

BACKGROUND FACTS

In 1998, the City of Albuquerque entered into an architectural services contract with BPLW Architects & Engineers, Inc. (BPLW) for the design of the rental car facility at the Albuquerque International Airport. While BPLW was initially responsible only for the design of the facility, the contract provided that the City could require BPLW to perform construction services if needed. Pursuant to this provision, BPLW took full responsibility for the construction administration services for the project and oversaw the construction of the facility it had designed.

The project was completed and the City took possession of the facility in 2001. Two weeks after the facility opened, a pedestrian named John Pound was extensively injured when he fell off a curb after exiting one of the facility buildings. Discovery revealed that the curb was adjacent to a handicap ramp and was graduated in height ranging from approximately eleven inches where the curb met the top of the ramp, to less than one inch at the base of the ramp. According to BPLW, the curb was known as a "header curb" which had been built in compliance with a standard design specification for header curbs provided by the City. The portion of curb where Pound fell was apparently located near the door to one of the facility buildings, was approximately a foot high, and was neither marked to indicate that there was a sharp change in elevation nor blocked by any type of barrier to prevent a person from stepping off the curb. Pound alleged that the placement of such a high curb in a pedestrian pathway was the cause of his fall.

Pound filed suit against the City alleging that the curb "was excessively high and that the City had 'failed to properly construct the curb and adjacent pavement,' had 'failed to correct a hazardous condition, specifically the excessively high curb,' and had 'failed to inspect and/or maintain the curb and adjacent pavement where' he had fallen." Subsequently, Pound filed an amended complaint adding BPLW as a defendant alleging it had negligently designed the curb and had "failed to use reasonable care in the inspection and supervision of the construction of the curb."

THE INDEMNIFICATION AGREEMENT

The contract between the City and BPLW contained an indemnification clause which provided that BPLW

> agrees to defend, indemnify, and hold harmless the City . . . against all suits . . . brought against the City because of any injury or damage received or sustained by any person . . . *arising out of* or resulting from *any negligent act, error, or omission of [BPLW]* . . . arising out of the performance of this Agreement.

(Emphasis added). The only limitation on the above duty was that

> [n]othing in the Agreement shall be construed to require [BPLW] to (defend) indemnify and hold harmless the City . . . from and against liability . . . caused by or resulting from in whole or in part the negligence, act or omission of the City . . . [1] arising out of the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by the City . . . or [2] the giving or failure to give directions or instructions by the City . . . where such giving or failure to give directions or instructions is the primary cause of bodily injury to persons or damage to property.

When the City's tender of the defense to the suit was denied by BPLW, the City filed a cross-claim against BPLW alleging that BPLW had a contractual duty to defend and indemnify the City for "any cause of action arising out of BPLW's performance of the contract." The City and BPLW ultimately settled the claims brought against them by Pound, leaving only the cross-claim between the City and BPLW to be litigated.

The City filed a motion for partial summary judgment addressed to the issue of whether BPLW owed a duty to defend the City under the contract. The district court granted the City's motion having found that BPLW had a duty to defend because the claim "arose from" BPLW's design and construction of the facility. The district court awarded the City approximately $90,000 in attorney fees for the expenses the City incurred defending the

suit. BPLW appealed. The Court of Appeals affirmed the District Court's ruling.

THE COURT'S ANALYSIS

The Court of Appeals reviewed the issue *de novo* because there were no material facts in dispute and the parties agreed resolution depended solely on the legal question of "when a contractual duty to defend is triggered and [] the interpretation of the indemnity clause between BPLW and the City."

A. There is no distinction between insurance contracts and other types of contracts when determining whether the duty to defend has been triggered: *the duty to defend arises from the terms of the contract and the allegations of the complaint.*

The parties disagreed on the proper analysis to determine whether the duty to defend was triggered in this case. The City drew from the insurance context and argued that the duty to defend is triggered if "the allegations in the complaint fall within the terms of the contract".[1] BPLW argued that rules governing insurance contracts are inapplicable to other types of contracts.[2] However, the Court rejected the notion that "the rules comparing the complaint's allegations with the contract" apply only to insurance contracts and expressly held that "a contractual duty to defend is triggered by the allegations in the complaint." Ultimately, the Court declined to "create a new rule for determining when a non-insurance contractual duty to defend arises" because "[i]n both types of contracts, the duty to defend is a contractual obligation that the parties have bargained for as a part of their agreement." Thus, under *BPLW*, "regardless of the type of contract containing it, the duty to defend arises when the language of a complaint states a claim that falls within the terms of the contract." [3]

The *BPLW* Court acknowledged the distinction between insurance contracts and the type of contract at issue in this case. The Court noted that "the primary purpose of an insurance contract is to defend and indemnify an insured" whereas the primary purpose of the contract between the City and BPLW was for construction services, not indemnity. Unfortunately, this acknowledgment was superficial insofar as the opinion contains no discussion concerning the significance of the different types of contracts, the practical implications of treating the two very different types of contracts in the same way, and the resulting morass of complications which will result from the blurring of this line.

B. BPLW's duty to defend extended to the City's own alleged negligence because the City's negligence, according to Pound's claims, "arose from" BPLW's Negligence.

The City argued the indemnity clause required BPLW to defend the City for any cause of action that "arises from the negligent act, error, or omission of BPLW", even if the complaint alleged that the City itself was negligent. BPLW argued the indemnity clause does not require BPLW to defend the City for the City's own negligence and that such a requirement would violate New Mexico's public policy prohibiting indemnity agreements in construction contracts because it would require an indemnitor to indemnify an indemnitee for the indemnitee's own negligence. See NMSA Section 1978, Section 56-7-1 (1971) (amended 2003 and 2005).

It was undisputed that Pound's allegations against the City alleged that the City itself was negligent in two respects: "(1) the City negligently constructed the curb and (2) the City negligently failed to maintain and make safe the area where Pound fell." BPLW argued these allegations of direct negligence against the City did not trigger the duty to defend. The Court, however, concluded these claims "arose from" BPLW's alleged negligence and, therefore, the duty to defend was triggered.

First, the Court noted there was no language in the contract expressly limiting BPLW's duty to defend to only complaints

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- Contact one of the Committee Chairs and get involved in their committee.
- Contact the NMDLA President who can guide you to the volunteer activity that best suits your interests and 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.

that contain no allegations of negligence against the City. Thus, the Court went on to construe the contract language which provided the duty to defend applies to "all suits against the City *arising out of a negligent act, error, or omission of BPLW arising out of the performance of the agreement*." (Emphasis added). The Court concluded that language meant that "BPLW has a duty to defend the City, *even if only the City is alleged to be negligent,* as long as the cause of action arises from the alleged negligent act, error, or omission of BPLW." (Emphasis added). This conclusion resulted from the broad construction of the phrase "arising out of" as meaning "'originating from,' 'having its origin in,' 'growing out of[,]' or 'flowing from.'" The Court then reasoned that because BPLW was responsible for the design and supervision of the construction of the curb, all of the allegations regarding the design and construction of the curb which were directed at the City, necessarily arose from BPLW's allegedly negligent performance of the contract.

As to the more specific claim that the City had failed to properly maintain and make safe (fix) the premises (dangerously high curb), the Court concluded this allegation also *arose out* of BPLW's allegedly negligent performance of the contract because "had BPLW designed and constructed the curb in such a way as to avoid the dangerous condition, then there would not have been any dangerous condition for the City to make safe."

The Court did note the contract expressly recited specific acts of negligence by the City for which BPLW would not be required to indemnify the City. Based on these express exceptions, the Court reasoned that BPLW was required to defend the City against all suits, including causes of action alleging the City was itself negligent, unless those acts were included within the limited express exceptions, as long as the suit arose from BPLW's performance of the agreement.

By way of explanation, the Court noted that its analysis was supported by the fact the subject contract language tracked the 1971 anti-indemnity statutory language verbatim. Section 56-7-1 mandated that

> any indemnity agreement in a construction contract that requires an indemnitor to indemnify an indemnitee for the indemnitee's own negligence is "against public policy . . . void and unenforceable" unless the agreement specifically provides that the indemnity does "not extend to liability . . . arising out of . . . the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by the indemnitee, or the agents or employees of the indemnitee."

The Court construed this statutory language as allowing an agreement that an indemnitor must indemnify an indemnitee for the indemnitee's own negligence as long as the indemnitee's negligence does not arise out of "preparation or approval of drawings . . . specification by the indemnitee". The Court concluded that the parties intended that BPLW would indemnify and defend the City for the City's own negligence because otherwise, "the exclusionary language would not have been necessary."

Finally, the Court rejected BPLW's argument that requiring it to defend the City for the City's alleged negligence violates public policy by noting the 2003 amendment to Section 56-7-1 which eliminated the exclusionary language which was required by the 1971 version of the statute and was included in the subject contract. The Court determined its ruling in BPLW was consistent with the current version of the statute which provides that

> "[a] construction contract may contain a provision that, or shall be enforced only to the extent that, it: (1) requires one party to the contract to indemnify, hold harmless or insure the other party to the contract ... against liability ... only to the extent that the liability ... [is] caused by, or arise[s] out of, the acts or omissions of the indemnitor or its officers, employees or agents[.]

Section 56-7-1(B)(1). That is that both the current version of the anti-indemnification statute, and the version in effect at the time the contract was executed, have the effect of ensuring that an indemnitor only has to indemnify for causes of action that *arise from the indemnitor's own negligent conduct*. This, the Court concluded, was consistent with the "public policy promoting safety in construction projects" because each party to the contract is held accountable for injuries caused by its own negligence.

In the wake of this ruling we are left to ask if it ever is possible for an owner's alleged negligence *not to* "arise from" the subcontractor's alleged negligence in the context of a construction contract. Will there *always* be a colorable argument that, but for the allegedly negligent work of the subcontractor, the owner would not be facing claims of negligence regardless of the basis for those claims? Regardless of the merits of such "but for" arguments, this issue may likely become the trial within the trial whenever an indemnification clause is present in a construction contract.

C. The exclusionary language contained in the indemnity clause does not relieve BPLW of its duty to defend.

Finally, the Court rejected BPLW's argument that the exclusionary provisions contained in the contract's indemnity clause relieved it of its duty to defend. According to BPLW, the City's design specifications caused the curb to be unreasonably high, not any design defect in BPLW's construction and design of the curb. BPLW reasoned that it did not owe a duty to defend the City because the curb was built and designed in accordance with the City's standard design specifications for header curbs and because the plans were approved by the City prior to construction of the facility.

However, the Court rejected this argument because Pound's claims did not arise from the design specifications for a header curb, rather, the issue raised in the Complaint was the *location* of the header curb. Indeed, the Court noted there was no indication that BPLW was required to place a header curb in the specific location where the curb was actually constructed and it was BPLW's option, in the process of designing the rental car facility, to install the header curb in the particular location where Pound fell. As a result, the Court concluded that because BPLW, not the City, was responsible for the placement of the curb in a particularly dangerous location, the alleged failure to comply with the specifications falls within BPLW's duty to defend the City.

Similarly, there were no allegations in the complaint that Pound's injuries arose from the City's approval of BPLW's design for the rental facility. Instead, all of the allegations against the

City "relate to the design and construction of the facility." Because BPLW designed and constructed the facility, the Court concluded the allegations against the City arise from BPLW's performance of the contract and are subject to BPLW's general obligation to defend the City.

For purposes of determining whether BPLW had a duty to defend, it appears the Court relied on the specific allegations contained in the Complaint and the absence of a claim that there was a defect in the City's design specifications for header curbs. There remains a question concerning the extent to which the City did, in fact, direct the location of the header curb and to what extent its involvement in such decisions would have impacted the duty to defend analysis. Again, based on the above logic, are there any circumstances under which any claims against the City would not have "related to" the design and construction of the facility?

PRACTICAL IMPLICATIONS

The district court's grant of partial summary judgment dealt only with the duty to defend, not the duty to indemnify. The Court noted the resolution of issues involving the duty to indemnify depended upon resolution of disputed material facts at the district court level. Thus, the Court of Appeals did not address the issue of whether BPLW also owed a duty to indemnify. As a result, the Court did not reach the practical implications which arise from the *BPLW* holding.

The primary problem with *BPLW* is that it stands for the proposition that contractual indemnitors owe a duty to defend akin to the duty owed by liability insurers. The opinion does not take into account the complex process by which liability carriers contract for, obtain premium for, and discharge their duty to defend without creating a conflict of interest with their own insureds. Carriers typically avoid such conflicts because they are not often a party to the underlying dispute. Practice indicates that declaratory judgments are often sought within the same action, or sometimes in a separate action. In contrast, in the construction contracting context, the subcontractor or design professional may be charged with the duty to defend the owner or general contractor as well as defending itself concerning claims involving breach of duties of care and damaged property or resultant injuries. The *BPLW* opinion provides no guidance as to how the contractor agreeing to defend can discharge the same duty to defend while also defending itself from the claims in the case. Indeed, trial courts may be compelled to referee the difficult issues concerning which attorneys represent the indemnitee and on what claims.

Moreover, indemnity and defense are connected concepts in the liability insurance arena. The duty of any given insurer to indemnify is a function of policy coverages, definitions, limitations, and exclusions contained in the policy. Liability policies are not subject to the anti-indemnity statute because under fundamental insuring concepts, the insurer is assuming the duty to indemnify as a matter of contract in return for a premium. The entire purpose of the contract is the insurer's assumption of the obligation to indemnify. The corresponding duty to defend is closely tied contractually to the express duty to indemnify as stated and assumed in the insuring agreement.

In contrast, the commercial reality is that in most construction contracting situations, owners and/or general contractors rarely provide consideration for these types of indemnity agreement clauses. Rather, the consideration for the typical construction contract includes the cost of labor, materials, overhead, profit, and tax. The contrast is significant because in the liability insurance context, the insured is paying tens of thousands of dollars, perhaps hundreds of thousands of dollars annually in exchange for the duty to defend and indemnify. These types of contracts, unlike liability contracts are subject to the anti-indemnity statute. The objective behind the anti-indemnity statute applies to both the duty to indemnify assumed by the subcontractor/architect/designer and the duty to defend. In effect, equating the subcontractor's duty to defend the general contractor with the duty of a liability insurer to defend its insured effectively defeats the anti-indemnity statute because it forces the subcontractor to defend the general against claims brought directly against the general contractor for its own negligence. As a practical matter, the *BPLW* approach may have the effect of indemnifying the owners and under certain circumstances the general contractors from their own negligence. Does it seem reasonable to equate the "duty to defend" in the liability insurance context to the construction contracting context where subcontractors often enter into contracts of adhesion in which they are paid nothing in exchange for these "standard" indemnity clauses?

In treating a construction contract like a general liability insurance policy, the *BPLW* opinion oversimplifies the concepts of indemnity and defense and appears to have confused the fundamental concept that the duty to defend depends upon and necessarily arises from the duty to indemnify, both logically and procedurally. This logical progression is often, effectively, reversed in the liability insurance setting because the basic purpose of the contract is indemnification. That is, if the Complaint contains facts which *tend* to bring the claim within the policy's coverage, then the duty to defend is triggered and the insured is not first compelled to establish a duty to indemnify before being afforded a defense. The application of the duty to defend analysis utilized in the insurance context in the construction contracting context may allow an owner or general contractor to obtain a defense before the necessity of establishing a duty to indemnify.

Further, the fundamental differences between construction and insurance contracts create a complex and complicated set of problems. The actual discharge of an insurer's duty to defend, as noted above, is quite complicated when the scope of indemnity is in dispute. Will liability carriers for the indemnitors now have to hire separate counsel to discharge these conflicting duties? While this arrangement goes hand-in-hand with discharge of the duty to defend in the insurance arena, it is not what was contemplated by the parties to a construction contract where the consideration for the contract did not include amounts commensurate with the inherent risk of defending not one, but two or more parties, as is the case in a liability insurance policy. Moreover, typical commercial general liability policies contain a host of standard exclusions concerning defective workmanship and employees' work related injuries, just to name a few. There is a fundamental fallacy in the analysis which assumes coverage is automatically afforded by a commercial general liability policy to the contract indemnification clauses commonly seen in the construction contracting setting. The specter

of a court enforcing the duty to defend clauses in design and construction contracts may leave subcontractors themselves paying for the costs of defense, a cost few individuals or small companies will be able to afford.

Finally, another practical result of *BPLW* is the necessary involvement of the district court in having to sort through the morass of complexities. The manner in which a liability carrier handles these issues may now have to be managed by the district courts. For example, the district courts may have to (1) decide if the contractor agreeing to defend will have to actually defend the owner/general contractor for their own negligence; (2) on what specific counts the defense will be and (3) whether separate counsel will have to be appointed; and (4) who will have the right to direct the separate counsel. Indeed it is fundamental that the beneficiary of the defense will hold the right to control that attorney and will compel that attorney to make or aid the liability case against the very subcontractor who is paying for the defense of the general contractor. The job of the tendered defense attorney who has to evaluate, investigate, defend, and argue construction defects based upon work scopes, design issues, and competing duties between the general contractor, the owners, design agents (architects and engineers), and other subcontractors will also be more complicated.

The practical effect of this rule of law is that it effectively turns private contractors into insurance companies without regard to the significant differences between the types of contracts and complexities which will necessarily arise from this lack of distinction.

In practice, in the construction contracting arena, indemnification clauses are usually pursued by asserting cross or counter claims and by litigating the issues of duty to indemnify and defend after resolution of the underlying matter based on the actual evidence. (In fact, that's what I believe happened in BPLW). By treating subcontractors and design professionals as insurers, the BPLW ruling effectively reverses the usual order of things. That is, by concluding the duty to defend can be triggered by the facts alleged in a complaint, and compelling a contractor to tender a defense before the factual issues are resolved, a significant burden is going to be placed on the contractor to fund a defense of the owner and/or general contractor throughout the underlying action. The burden of a concurrent defense will be placed on the subcontractors who are not equipped like an insurer to fund and coordinate such situations.

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[1] In the insurance contract context, the "duty to defend arises out of the nature of the allegations in the complaint," and is determined "by comparing the factual allegations in the complaint with the insurance policy." If a complaint "states facts that bring the case within the coverage of the policy," then the duty to defend will be triggered. However, "[i]f the allegations of the complaint clearly fall outside the provisions of the policy, neither defense nor indemnity is required." ¶9 (citations omitted).

[2] On this point, BPLW relied on three Florida cases and argued that in the context of non-insurance contracts, "a contractual duty to defend is triggered only when vicarious liability is alleged in a complaint." *See, Metro. Dade County v. CBM Indus. of Minn., Inc.,* 776 So.2d 937, 939 (Fla. Dist. Ct. App.2001) (finding duty to defend where complaint stated a cause of action for vicarious liability); *SEFC Bldg. Corp. v. McCloskey Window Cleaning, Inc.,* 645 So.2d 1116, 1117 (Fla. Dist. Ct. App.1994) (refusing to find duty to defend where complaint alleged only active negligence of indemnitee); *Metro. Dade County v. Fla. Aviation Fueling Co.,* 578 So.2d 296, 298 (Fla. Dist. Ct. App.1991) (finding duty to defend where complaint alleged vicarious liability). The *BPLW* Court concluded the Florida cases were distinguishable because they "were decided on the ground that the indemnity agreements in question expressly precluded indemnity for the indemnitee's own negligence." Moreover, the BPLW Court concluded the Florida cases did not actually "hold" that a duty to defend can only be triggered if the allegations of a complaint allege vicarious liability. *But see, SEFC Bldg. Corp.,* 645 So.2d at 1117 (refusing to find duty to defend from the indemnitee's own negligence where an indemnity agreement did not expressly state "such intent in clear, unequivocal terms").

[3] The question remains, had the BPLW contract contained express provisions like those seen in the Florida cases, would there have been a different result.

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To be recognized for annual contributions, contact nmdefense@nmdla.org.
** A special thank you to these firms who provided additional contributions in fall 2009.*

Coming Soon . . .

Please look forward with us to the unveiling of the new website by July 1, 2010!

Dogs Who Bite

by Dr. Jeff Nichol, Doctor of Veterinary Medicine, Albuquerque, NM

Violence, fear, and physical injury are without question, the most difficult challenges you and your dog will ever face. This is very hard; all of us are emotional creatures. We bring dogs into our lives because they share so many feelings with us. But when it goes wrong, it goes horribly wrong.

Aggression is the most important problem we manage in the practice of behavior medicine. Many people still love their aggressive dogs; others want to immediately eliminate that "vicious" animal from their lives. Huge mistakes are made. In their attempts to make things better one person may inadvertently pander to a controlling canine personality. Another dog owner facing the same problem may return the hostility. None of these emotion-charged responses improves anybody's lives. Biting is the most serious of all behaviors.

The purpose of this article is to provide some basic information. I will explain why different types of aggression occur and some Dos and Don'ts of avoiding injury in the immediate term. I will also review a few methods of management for the various types of aggression.

However, this is a hugely complex area of behavior medicine with at least thirteen different diagnoses. Every individual case is different.

WHY AGGRESSION OCCURS

WHAT IS A DOG?

Our civilized society is founded on rules of safe conduct. We have no tolerance for anyone trying to hurt us and we'll do whatever it takes to protect ourselves and those we love. It is not acceptable for a dog to be a danger to people.

But canine aggression is not a black and white subject. The belief, held by many people, that every biting dog should be destroyed is a gross oversimplification. It is not true that any dog should tolerate anything from anybody anytime. Aggression toward an intruder or attacker is considered an act of canine heroism. A mother dog protecting her young against predators is natural. Biting is a context-specific behavior.

Our relationships with our dogs are actually pretty complicated. Dogs are considered man's and woman's best friends because we have so much in common with them. Dogs in their natural pack environment care for their young in an extended family-like a community. When sick or injured they call out to their comrades for aid-just like we do. They have hierarchy systems. They have deference for their leaders. They hunt in a group. They are loyal to their comrades and they are affectionate. No wonder we bond so heavily with dogs. They're just like us. Sort of.

Studies of pet owners (people like you and me) have shown that we have healthier, more satisfying lives. We are more relaxed and stable. We live longer. In fact, we connect so deeply with our dogs that 75% of us regard them as children-like little people in dog suits. That's powerful stuff. It also creates trouble because for all of the similarities, there are some very important differences between humans and dogs.

HUMAN-CANINE RELATIONSHIPS

Most dogs live with their people in relative harmony. We think we're communicating with them only when we speak to them. In reality they are watching us almost continually and picking up signals we don't know we're sending.

Our dogs are picking up subtle signals from us during nearly every waking moment. We don't realize it because most of it is unconscious body language. Dogs filter this information through their canine brains and respond. These pets are happy because they think their person is giving them behavioral cues almost all the time. Most owners are oblivious but if their dogs are well behaved anyway it really doesn't matter.

Some dogs interpret human communication very differently. They read the signals but they get it wrong. If the human sends even stronger, misinterpreted signals, the dog can react badly. This miscommunication sometimes leads to disaster. You are your dog's leader and it is your responsibility to learn to speak his language.

This is challenging. Dogs expect the same things from us as they do from each other. Communication between them is partly verbal but almost entirely body language signals. A shift of the rump, a turn of the neck, a furrowed brow, or the way the tail hangs all have important meanings. If you lean over your dog, hug him, grab his snout, or make direct eye contact he will feel dominated. If your dog pushes ahead of you or sleeps on your bed she may believe that she outranks you. You and your dog may think you understand each other and you could both be wrong.

IT CAN BE HARD FOR A DOG TO LIVE WITH HUMANS

Before getting more specific I'd like you to understand the bizarre pressures we put on our dogs. While it's true that they have evolved over their thousands of years with us, they are still largely instinct driven. I believe that most pet dogs could survive if released into the wild. Not only is your dog likely to know how to stalk and kill prey, she also knows how to ingratiate her way into a pack first. She could fit into the dominance structure, learn a job, and pull her weight with the group. She could run with the pack and go several days without a meal if food were scarce. The Call of the Wild isn't really fiction.

Now take those canine social skills and force them into the confines of an apartment or house with a small yard. How does she communicate by urinating? How can she establish a relationship with another dog with the totally artificial barrier of a leash or wire fence? Where does her territory begin and

end? A huge number of the abnormal behaviors we treat are anxiety based. There's no mystery in that.

None of the above is meant to excuse canine aggression. Dogs have no business hurting people or each other. We humans have a responsibility. We invented this contrived existence of ours and we have chosen to bring our dogs along. We are obliged to make it right.

THE 13 SEPARATE KINDS OF AGGRESSION

There are about thirteen recognized diagnoses for aggressive behaviors in dogs. While there are specific definitions for each of these categories there is a lot of overlap. In addition, many aggressive dogs have other behavior problems at the same time.

DOMINANCE AGGRESSION

Dogs are social creatures who believe that they have a legitimate place in the dominance hierarchy of their pack. Those with dominance aggression feel that they have the right to push other dogs around (sometimes this includes humans). While these dogs can be dangerous, they are often some of the more treatable biters.

The first signs of dominance aggression are usually seen at around 18-36 months of age. Ninety percent of them are male, although a female dog with this problem may show signs at a younger age. If you punish any dominant aggressive dog, he will worsen.

If you try to control a dominant aggressive dog, you are putting yourself at risk of getting bitten. Your dog observes you almost continually. Without realizing it you are sending him body language signals that he will interpret in a canine context. Very few humans speak "dog" and they send messages that can easily be taken the wrong way by a dominant dog who doesn't speak "human". This language barrier has caused a lot of bites.

Treatment involves desensitization and counterconditioning. It can take a long time. Some of these dogs do much better if we use medications also. We have other tools. Head halters can remind a dominant dog of his appropriate role relative to his person. The place for you to begin is with safety. "Dominance gestures" that can trigger dominance aggression are: leaning over the dog, clamping the muzzle closed, staring, rolling the dog on his/her back, rushing at the dog, and speaking aggressively. Improvements with dominant aggressive dogs come with healthy leadership, not by intimidation.

FEAR AGGRESSION

This problem is "interactive". Fearfully aggressive dogs lose control of themselves when they feel threatened, but they are OK if no one makes the mistake of setting off their terror. They don't go looking for trouble.

Fear aggression can be difficult to recognize in your own dog. To many people it seems like vicious behavior. It can seem quite predictable because dogs like this growl or bite almost as a "default" behavior. Something (often a seemingly inconsequential event) triggers their fear and they automatically do what they have done hundreds of times in the past-they protect themselves. No one is happy.

A common sign is urination and/or defecation during the fearful episode. It's easy to confuse this form of aggression with some of the others because it is sometimes seen with other causes of aggression.

Children, especially toddlers, are particularly at risk. A loving child will want to pet and hug dogs, sometimes chasing them. No one would see the logic in a big dog being afraid of a tiny child-and this is where we meet disaster. No dog with a history of biting should **ever** be mixed with children.

Treatment for fear aggressive dogs starts with teaching them to relax. There are other techniques that can help, depending on the individual. Many frightened dogs can learn to replace their fear responses with a different activity like following a command from their person. Preventing bites requires careful observation. This type of dog can move from apparent tranquility to aggression in a few seconds. Invite your dog to come to you and always leave her an escape route. Speak quietly and don't glare.

FOOD RELATED AGGRESSION

Dogs and humans are different about food. At least in cultures where people are well fed, they don't mind eating with others. But all dogs seem to believe that there will be a famine-in about 20 minutes. Only the aggressive, competitive eater will survive. Hence there are lots of overweight dogs.

All of that is actually normal canine behavior. But dogs who growl, especially those who bite when a human approaches their food, can be dangerous. Some food aggressive dogs snarl while eating even when a person is some distance away. Others will try to growl and eat at the same time. If a dog like this perceives a threat to his food, he will bite. The same can occur with rawhides, bones, or treats.

Food aggression can be easily confused with possessive aggression. The difference is that dogs who growl and bite over perceived threats to their food are neurochemically different. They aren't aggressive about anything else.

This problem is usually deeply rooted. The simplest management is to always feed a food-aggressive dog in an isolated setting. Never give him a treats or chew toys because you may risk a hostile event. Children should not be allowed to carry food if they are around a dog with this problem. There are behavior modification methods for this and there are drugs that can help.

INTERDOG AGGRESSION

These are dogs who don't play nice with their friends which, based on our human social model, many dogs don't anyway. Remember that dogs are a different species. Much of what goes on between them looks rather rude to us but is actually quite healthy for them. We should let them interact in their own way, but they must not be allowed to hurt one another.

The dominance hierarchy is often a factor with interdog aggression. The aggressor may treat another dog harshly when there is no legitimate reason for it. Altercations may result from competition for perceived scarce resources like food, toys, or sleeping areas or male dogs competing for a female in heat.

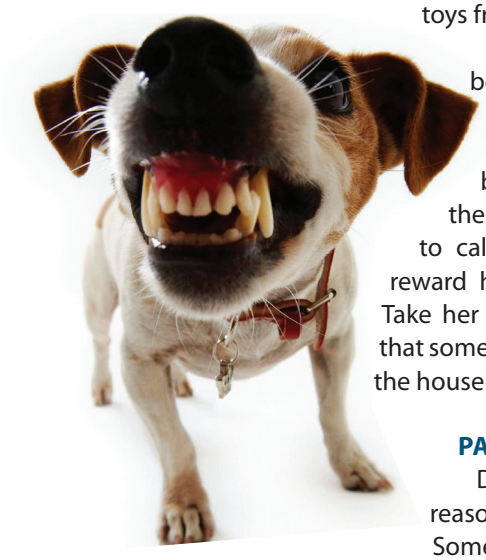
Dogs with this problem may attack another dog when the victim has done nothing to threaten the aggressor. Usually interdog aggression occurs between males or between females. The problems start around 18-24 months of age, when dogs reach social maturity. If you're observant you will notice that the violence is preceded by staring, bumping, or mounting.

Some of these dogs are receptive to treatment. Start by making sure that everybody is spayed or neutered.

True security comes from everyone knowing his or her role in the show. You can employ a head halter to help even the king of the hill understand that he/she still works for the true master of the universe (that's you). Remember, **never** try to break up a fight with your hands.

MATERNAL AGGRESSION

This problem is actually an outgrowth of normal behavior. Every mother has a right to protect her babies but hormone fluctuations and stress can create real problems. These ladies cross the line when they aggressively guard their puppies or toys from a long distance.



Moher dogs are best left alone while in this state. If you need to clean the bedding or handle the puppies, it's best to call the mamma and reward her for being calm. Take her on a leash walk so that someone else can handle the housekeeping.

PAIN AGGRESSION

Dogs with pain have reason to be grumpy. Some types of pain are intermittent; others are felt continuously. Either way biting can occur without warning. The owners of these dogs may not know their pet is in discomfort. Often, the person who is bitten is a child who played too roughly or tripped over an arthritic older dog.

The good news is that there are many treatment choices. If the cause of the pain cannot be corrected, there are still some excellent ways to help. In addition to medications, acupuncture, physical therapy, glucosamine/chondroitin, and other supplements, it is usually possible to improve the quality of life and the behavior of many of these dogs.

PLAY AGGRESSION

Dogs who start by having a good time, and then turn nasty, can be scary. This problem begins with rough play that escalates to growling and possible biting. It is essential to recognize the difference between normal play and aggression. Dogs who play in healthy ways often have a high pitched yap while the aggressive ones may snap and growl in a low-pitched drawn out way. Raised hair over the neck and shoulders can be another indicator. Be careful. The transition from fun to danger can happen fast. A dog like this may try to grab a person's arms or clothing and even chase them and bite from behind.

There can be important reasons for play aggression. Puppies who were separated from their littermates too young may never have learned how to play appropriately. Some youngsters are subjected to overly rough play like face slapping that is really more like agitation. It can be frustrating to teach a dog like this to play appropriately because they have learned to associate the excitement of play with aggression.

Only play with toys-**never** your hands. Make sure that it is the person who is in control-not the dog. It is essential to abruptly stop the play session at the earliest sign of aggression. Keeping play low key and gentle is best. Rough and tumble recreation should be avoided for the life of the play aggressive dog.

Other techniques are important too. The concept of earned privileges works well for these dogs because they must demonstrate a relaxed demeanor to be allowed to play. Teaching a dog to bring a toy on command can be fun and rewarding all by itself. A head halter will remind the play-aggressive dog of his place in relation to his person.

POSSESSIVE AGGRESSION

A very specific diagnosis regarding nonfood objects, possessive-aggressive dogs will not relinquish an item without growling, snapping, or worse. Dogs who are also attention seeking may steal items and offer them to their person later for play. This behavior is much easier to manage if it's recognized early. Many puppies show the first sign of possessive aggression when they are under one year of age.

For safety **never** challenge a dog like this by forcing compliance. Tensions can escalate to the point of dominance struggles. Only carefully administered counterconditioning can help.

Treatment for possessive aggression should be carried out cautiously to avoid a struggle. This type of dog will worsen if results are expected too soon. The first step is to teach deference, meaning that the owner is truly the boss. This alone takes time. Your dog must also learn to relax so he can learn some new and different skills. If anxiety becomes a factor, positive changes become even more difficult. Each of these steps is supported by written protocols. It's pretty straightforward but it takes time and patience.

The final step is called counterconditioning. The dog is initially taught to relinquish objects that have no meaning to him. As he does as he is told, and rewarded for it, items of increasing importance are used. All the while we respect the dog's dignity and avoid dangerous standoffs.

PREDATORY AGGRESSION

This may be the most frightening form of aggression because these dogs instinctively target very young or old helpless creatures. Some are predatory toward joggers, bicyclists, and skateboarders. It is fairly easy to recognize this behavior. A predatory dog will hunker down quietly, staring and salivating, as she stalks her prey.

The classic predatory aggressive dog is attracted to small critters that have intermittent random movements. Young or ill

animals, human infants, and geriatric people can behave this way. When wild dogs hunt for food they generally inflict one deadly bite, then shake their prey. If your dog acts like this, you may have a very serious problem.

Not all dogs who chase and bite are predatory. Those with territorial aggression may also pursue joggers and bicycles, but the element of stealth is missing with these dogs. An accurate diagnosis is important.

There are essential precautions that absolutely **must** be followed to keep the weak and defenseless safe. You have no business keeping a predatory dog in your home unless he can always be fully supervised in the presence of an infant.

PROTECTIVE AGGRESSION

Most of us feel safer knowing our dog will look out for us in a crisis. But some dogs take it way too far. Protective aggressive dogs bark and snap at people or dogs at long distances when there is simply no threat at all. This is highly unsettling for other people; it can also be dangerous.

This behavior can be manifest in many ways. A person or dog approaching a car or the front door of a house is subjected to explosive snarling and attempts to bite. A mildly raised voice or hugging the dog's owner may elicit canine violence. Protective aggressive dogs make inappropriate decisions about when to protect. Instead of having the good judgement to stand between their person and a questionable individual, dogs with this behavior problem growl, snap, and lunge.

These dogs can be treated but they should never be considered 100% reliable no matter how much progress they make. It is the responsibility of the owner to leash or confine a protective-aggressive dog when there is any potential for an inappropriate confrontation.

TERRITORIAL AGGRESSION

If you're like me you want your dog to bark when someone drops by unexpectedly. But territorially aggressive dogs don't stop barking when told. They are out of control. Their job should be to listen and follow orders.

This behavior is similar to protective aggression. While the territory for many dogs is clearly defined by the boundaries of the car, the home, or the yard, for others it's not so simple. Some dogs who aggressively and unnecessarily attack "trespassers" move their boundaries with them wherever they go.

Territorial behavior is normal for most social creatures. A problem exists when a dog becomes dangerous over nonexistent threats or in places that aren't really his to protect in the first place. Some dogs show aggression toward just people, dogs, or other species, but any or all of the above can be at the receiving end of territorial aggression.

Like protective aggression this behavior is potentially dangerous. These dogs should be well confined or controlled until behavior modification has yielded reliable results. They will **never** be completely dependable but many of them can get much better.

REDIRECTED AGGRESSION

Dogs are mighty intense when they are enraged and right in the middle of biting or attacking. Anyone, human or canine, who interrupts an actively aggressive dog can be unintentionally bitten. People or dogs who attempt to break up a fight or an attack are victims of redirected aggression.

This problem is more than just being in the wrong place at the wrong time. People who put their hands in the middle of a dogfight are almost guaranteed to get bitten. In the fury of the moment, with teeth flying, anything that gets in the way gets hurt.

Specifically, redirected aggression occurs when an interrupted, frustrated, actively hostile dog feels that he absolutely must carry out his assault. If you stop him from biting one individual, he will turn and choose you. You can make your mistake by interfering either physically or verbally. Not all dogs who are actively biting will redirect their aggression. But beware. Dogs on the attack can be dangerous to you.

Management of redirected aggression starts with preventing the original event. Dogs who attack cats, people, or other dogs need behavior modification that is appropriate to that specific type of aggression. But until the behavior has improved the dog should be isolated from opportunities for aggression.

IDIOPATHIC AGGRESSION

This is very different from other forms of canine aggression and can be easily misdiagnosed. The simple definition of the term idiopathic is a problem caused by unknown factors. This behavior disorder is, however, quite specific. The aggression is sudden and completely unpredictable. It's as though someone threw a switch. These dogs are violent with no warning and for no apparent reason. Some of them actually twitch and foam at the mouth. It has been called rage. The age of onset of the aggressive behavior is usually 1-3 years of age.

Before labeling any aggressive dog as idiopathic it is essential to carefully evaluate for every other possible cause. Many misdiagnosed dogs are actually dominant aggressive. Some have epilepsy. A few may be obsessive-compulsive. Almost all of these can be helped.

Dogs with true idiopathic aggression are heartbreakers. Since every neurologic test and other method of assessment comes up negative, idiopathic aggressive dogs are essentially untreatable. There are a few drugs that can be tried but dogs like this are difficult to keep in their homes because their outbursts cannot be foreseen.

SUMMARY

It is essential to everyone's safety that you **never consider any dog with a biting history as cured.** Even with the major improvements we have seen in so many cases, **a previous biter can always bite again.** No matter how much your dog loves you and wants to please you, he or she could repeat a serious mistake.

Canine aggression is a major public health concern as well as a legal issue. There are significant misunderstandings among the public and the legal profession regarding causation of animal bites. This article is only a very brief and simple overview of a complex issue.

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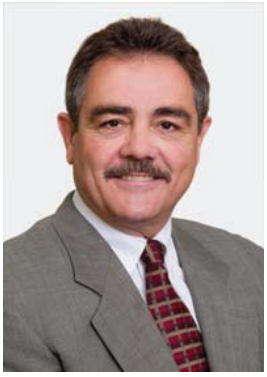

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The Effective Use of Paralegals

by Linda Murphy, Paralegal - Butt Thornton & Baehr, P.C.

The practice of law requires a team effort to be successful. The "team" usually consists of an attorney, a paralegal, and legal assistant or legal secretary. All three positions are required for the management and success of the practice. The practice with defined roles for each position reflects professionalism and garners the confidence of the client.

Work performed by a paralegal allows the attorney to offer legal services more economically while maintaining the quality of the legal service provided through delegation of certain tasks which would be handled otherwise by the attorney. Delegation of tasks to a paralegal will allow the attorney time to focus on those specific areas in the practice which require more of their time and expertise.

Authority for work performed by paralegals is identified in Rule 20-101 through Rule 20-115 NMRA. In summary, the paralegal services being billed to the client are for substantive work under the direct supervision of an attorney, which requires a level of judgment and familiarity with legal processes.

Defense litigation provides an environment rich in opportunities for use of paralegal services in order to ease the demands and intensity of this area of the law. Depending on the size and staffing of the practice, such paralegal services may include, but not be limited to:

- **Case management,** including case review and analysis to provide input for coordination of assignments, monitoring of deadlines, and participation in discussions of strategy and case budgets.
- **Client contact,** i.e., telephone, conferences, interviews, written correspondence. When the attorney is not available, clients should feel comfortable in knowing they may contact the paralegal in their absence.
- **Drafting pleadings and preparation of related exhibits.** In some offices, paralegals also draft motions and briefs.
- **Drafting client reports and summaries.**
- **Drafting correspondence.**
- **Document analysis,** which may include indexing and organizing, or focusing on particular case issues. This analysis may also include the identification of documents protected under privilege for further review by the attorney.
- **Legal research.**
- **Internet research,** related to people, places, and things. The inclusion of the internet in the practice of law enhances such areas as medical conditions, medications, background investigations, and specific issues related to the case.
- **Preparation of case notebooks, hearing notebooks, discovery notebooks.** The advantage of the case notebook is that it contains the key documents of the case and is updated as the case progresses. The attorney may refer to it instead of the paper file. It can also be converted to a hearing notebook and deposition notebook as needed, providing a continual resource tool for the progression of the litigation. Should the case go to trial, the case notebook can easily be converted for that purpose. The case notebook contains copies of court orders, complaint, answer, discovery responses, witness lists, exhibit lists, key documents, and case summaries.

Work performed by a paralegal allows the attorney to offer legal services more economically while maintaining the quality of the legal service provided through delegation of certain tasks which would be handled otherwise by the attorney.

- **Coordination of depositions,** establishing the specifics from the attorney for arranging, i.e., time allotment, location, type of deposition (regular, duces tecum), if a subpoena is required, if there is a client representative who will be attending, etc. The paralegal may also be responsible for ensuring that the Errata Sheet for the transcript is signed and forwarded to the court reporter in a timely fashion.
- **Investigation and background checks.** This is very beneficial from a defense perspective, as plaintiff(s) tend to be very selective in what information they disclose in the discovery processes. Getting a head start on background information assists in deposition preparation and case strategy. Some defense attorneys are conducting background investigations on their own client for the same reasons in order not to be "surprised" during the litigation process.
- **Collection and compiling of information to make an independent decision.** It is a matter of "connecting the dots" to reach a conclusion. At some point in the case, the paralegal will be the first to identify patterns developing, which may be advantageous to the next step in the litigation.
- **Compilation of witness information** to determine their role in the litigation and any documents which relate to their involvement in the case. A "witness profile" may be prepared for each person identified. Each profile contains the witness' contact information,

DOB, SSN, driver's license number, as well as the list of documents associated with them which either reflects their name or those documents which they have signed. Witness profiles are kept in the case notebook (or in a separate notebook) as another resource should someone's name surface during the litigation. The witness profile will cross reference information on how the witness was disclosed and by whom, including their knowledge of the subject of the litigation.

- **Conducting witness interviews.**
- **Discovery processes.** Drafting of outgoing discovery; drafting of discovery responses; managing e-discovery, tracking documents being produced. For responses to discovery, the paralegal's role includes contact with the client to assist them in gathering the appropriate information and documents requested. Setting deadlines for the client to respond allows sufficient time for drafting and finalizing by the due date. Preparing a list of documents produced becomes a valuable tool when supplementing or continuing the discovery process, or just to review if a document has been produced and when.
- **Preparation of summaries** from document review and analysis, identifying inconsistencies and observations, and cross-referencing key information (depositions, medical records, employment records, etc.). Each summary prepared should cross-reference elements of the case.
- **Document management** (review, indexing, organizing, Bates labeling, etc.). There are various options for document management, depending on the needs of the case.
- **Coordination of experts.** Once the expert has been retained to work on a case, the paralegal may handle all communication as delegated. It is efficient to track documents forwarded to the expert for reference as needed, both for the expert and for the attorney, to ensure the expert has received the documents on a timely basis.
- **Trial preparation** (research, exhibits, pleadings, trial notebooks, witness notebooks, etc.). If the paralegal has been involved in the organization of the case throughout, then the final trial preparation will be expedited.
- **Attendance at trial and client support.** The paralegal is the attorney's assistant in all matters at trial, as well as supporting the needs of the client. At a bare minimum, the paralegal may coordinate the appearance of witnesses, track exhibits entered, have documents available for the day's activities, keep the trial table orderly and neat, file the necessary fees with the court, etc. Paralegals may also assist with Power Point and video presentations. If in the event of a jury trial, the attorney may wish to have the paralegal contact the jurors after the trial has ended for interviews.
- Supervision of legal assistant or legal secretary. In some office settings, the paralegal may have joint responsibility for office management, as well.

With all of the above options for using a paralegal in the defense practice, it is hard to imagine practicing law without one. The use of paralegals facilitates completion of tasks, keeps the practice organized and efficient, and saves legal fees for the client. In the day-to-day practice of law, it is a win-win situation for all involved.

Upcoming Events

2010 CLE Schedule

- **Women in the Courtroom III,** August 27, 2010,
  S. Carolyn Ramos, Esq., Chair (followed by wine tasting reception)
- **Annual NMDLA Meeting,** October 14, 2010, Hyatt Regency,
  Nancy Franchini, Esq., Chair
- **Day of Discovery,** November 18, 2010, with special guest speaker,
  James McElheney, Esq.
- **Civil Rights 2010,** December 2010, Stephen French, Esq., Chair

2010 Legislature Wrap-Up

by Ann M. Conway, Keleher & McLeod, P.A.

This past year's legislative session was the 30 day budgetary session. Like many other states, New Mexico faced serious budgetary issues and these issues took center stage. Very few bills were introduced that did not relate to taxation, budget cuts and capital outlay adjustments. Although 30 day sessions are generally limited to budget matters, it has not been unusual in the past for the governor to place additional items on the "call" thus making them part of a 30 day session. In the past, some of these issues involved areas that might impact members of the New Mexico Defense Lawyers Association. However, this past session there were no bills introduced that would have directly affected the substantive law, other than House Bill 60. This bill was introduced to amend the current definition of "healthcare providers" under the New Mexico Medical Malpractice Act. Currently the Medical Malpractice Act defines a "healthcare provider" as "a person, corporation, organization, facility or institution licensed or certified by the state to provide health care or professional services." Plaintiff's medical malpractice attorneys have challenged the ability of a corporation to invoke the protections granted to a healthcare provider under the Act on the basis that a corporation is not "licensed or certified by the state". Although a great deal of work was done behind the scenes by interested parties to reach a compromise on this bill, the efforts were unsuccessful and the bill died in its first committee.

Workers Comp Update

by Carlos Martinez, Butt Thornton & Baehr P.C.

In the March 13, 2010, edition of the New Mexico *Bar Bulletin*, the case of *Judy Chavez v. City of Albuquerque and Risk Mgmt. Div.* was reported. This was an appeal from a decision by Judge Victor Lopez, who allowed the Worker to change health care providers over the objections of the employer. Judge Jonathan Sutin of the New Mexico Court of Appeals wrote the opinion with Chief Judge Fry and Judge Vanzi concurring.

The Employer had clearly made the initial selection of health care providers. The Worker then changed health care providers to Dr. Ernesto Garza. Unfortunately, Dr. Garza died after a lengthy illness. The Worker had been seen by Dr. Garza's partner, Dr. Tiernan. She was also seen by Dr. Thomas Whalen at the Worker's request, although there was a dispute as to whether that was a one-time visit or a subsequent referral. The Worker's attorney then referred the Worker to Dr. John Henry Sloan, who saw the Worker over a period of time, but the Worker became disenchanted with Dr. Sloan, although she had no specific complaints about the quality of his care.

The position taken by the Employer was that the Worker had already changed doctors once, if not three times, even assuming that the Worker would be entitled to a change of health care providers after Dr. Garza's death, that choice was Dr. Sloan and, that absent proof that Dr. Sloan's care was unreasonable, the Worker could not change again. The Worker was attempting to change health care providers to Dr. Carlos Esparza.

A hearing was set before Judge Victor Lopez, but due to a miscommunication between the security guard at the Workers' Compensation Administration and the attorneys as to which courtroom Judge Lopez was using, the parties on both sides waited in the wrong courtroom for 15 minutes and then finally figured out which courtroom Judge Lopez was using. When they arrived in Judge Lopez's courtroom, he indicated he did not have time to take testimony. The only evidence that was introduced at the hearing was introduced by the Employer, which consisted of documentation reflecting that the Worker had chosen Dr. Sloan as her health care provider and the referral to Dr. Whalen. The Worker's attorney did not dispute that he had made the referral to Dr. Sloan. Despite what appeared to be case law in support of the Employer's position, Judge Lopez found that the Worker had the right to choose yet once again and change health care providers.

The Court of Appeals reversed Judge Lopez's decision, finding that, while the Employer had made the initial selection of health care providers, the Worker had exercised her right to change health care providers and had, in fact, changed to Dr. Sloan. Additionally, Judge Sutin found that there was no evidence introduced at the hearing the Dr. Sloan's medical care was unreasonable and, therefore, the Worker did not have the right to change physicians again.

This case shows that if you are attending a hearing on a dispute regarding health care providers, you need to make sure that you have documentation or testimony supporting your position. Unfortunately, it is very difficult to prevail in an objection to changes in health care providers if a change is being made by the worker. It must be established somehow that the medical care that will be provided by the new doctor would be unreasonable. Conversely, once the worker has made a change of health care providers, the worker cannot simply change health care providers again merely because the worker does not like the opinion of the doctor whom the worker has chosen.