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The New Mexico Defense Lawyers Association is the only New Mexico organization of civil defense attorneys. We currently have over 400 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, with significant discounts for DLA members;
- A newsletter, Defense News, the legal news journal for New Mexico Civil Defense 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.
MESSAGE FROM THE PRESIDENT

By Sean E. Garrett, Esq.
Conklin, Woodcock & Ziegler, P.C.

Dear Members of the NMDLA:

I hope your 2016 is off to a successful and productive start. In my first letter of the year, I deliver to you both bad and good news. First, the bad – the Board of Directors has elected me as the organization’s president for another year, so you will have to both see me and hear from me for another year.

In all seriousness, I am again honored to serve as president of the NMDLA in 2016. This year’s Executive Board will include Courtenay Keller as President-Elect and Cody Rogers as Secretary/Treasurer. We will, as always, be supported by a hard-working and dedicated Board of Directors.

As for the good news promised in the first paragraph, there is much to report for 2015 and the coming year. At our 2015 Annual Meeting, we honored Mark Riley and Tomas Garcia as the Outstanding Civil Defense Lawyer of the Year and Young Lawyer of the Year, respectively, and we thanked 30 years of past-presidents for their service to the organization. This year’s Annual Meeting is already calendared for October 14, 2016, once again at Hotel Andaluz in Albuquerque. We hope you will put this exciting event on your calendar and we look forward to seeing all of you there.

Last year, the NMDLA organized two full-day CLE programs, in addition to offering CLE credits for attendance at the Annual Meeting. In 2016, we endeavor to double that number. This year, we hope to bring you four full-day CLE programs, including two of our most popular: the biennial Women in the Courtroom and the annual Civil Rights Seminar. Women in the Courtroom will be held on August 5, 2016, and the Civil Rights Seminar will be held on December 2, 2016, both at the Jewish Community Center in Albuquerque. Please calendar these informative and well-attended CLEs and keep your eyes open for other NMDLA offerings. Of course, if you are willing to assist in chairing or speaking at a CLE, please let me or any other Board member know.

In other exciting news, Santa Fe will host the DRI Southwest Region meeting chaired by Bryan Garcia, DRI Southwest Region Director, on August 12 & 13. Please like the NMDLA page on Facebook or follow us on Twitter at @DLA_NM for updates on all of our events.

On behalf of the NMDLA Board, I wish you a great 2016.

Sean E. Garrett
Conklin, Woodcock & Ziegler, P.C.
2015-2016 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 accomplishments. As part of that continuing effort, we ask each of you to bring your accomplishments to the 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.

When you submit your success, we will publish the information and case details to our website’s library of defense verdicts, and send an email notification to all DLA members. Also, the NMDLA website’s home page highlights our most recent submissions.

Successes may be submitted in the member-only section of NMDLA’s website, www.nmdla.org. If you need password assistance, contact us at nmdefense@nmdla.org.
A Bench Perspective: An Interview of United States Magistrate Judge Steven C. Yarbrough

By Justin D. Goodman, Esq.
Stiff, Keith & Garcia, LLC

Judge Yarbrough is a native New Mexican, who was born “down the road” at Presbyterian Hospital and raised in Corrales. He graduated from Cibola High School in 1986, received a wrestling scholarship, and attended Stanford University. He graduated from Stanford with a double major in quantitative economics and psychology.

Judge Yarbrough then moved to New Zealand to coach the National Wrestling Team. He was excited to return to New Mexico for law school and graduated from the University of New Mexico School of Law in 1995. Upon graduation he had the opportunity to clerk for United States District Judge Bruce D. Black. After completing his clerkship, Judge Yarbrough became an Assistant United States Attorney in Las Cruces. He then transferred to the U.S. Attorney's office in Tucson, Arizona, before joining the U.S. Attorney's office in Albuquerque.

As an Assistant U.S. Attorney, Judge Yarbrough was involved in a wide variety of cases including white-collar matters and several significant public corruption cases. After U.S. Attorney Kenneth J. Gonzales was nominated by President Barack Obama to serve as an Article III Judge, Judge Yarbrough served as acting U.S. Attorney for New Mexico until he was appointed as a United States Magistrate Judge on May 7, 2014.

Justin D. Goodman (JDG):
Why did you apply to become a Magistrate Judge?

Judge Steven C. Yarbrough (JSY):
First, there are the obvious reasons - being a judge is a good job. Being the one who decides issues is also generally better than being the one who has issues decided for him or her. I do not have to bill hours or deal with difficult clients – things about which I sometimes hear attorneys in the private sector complain.

Second, it is a great job in that I am being paid to try and make the right decision. I am going to make mistakes, but I get paid for doing my best to apply the law fairly and to try and get it right. That is a good job assignment.

Third, I liked the idea of getting to spend most of my time focusing on legal issues. My least favorite part of my job as First Assistant and Acting U.S. Attorney at the United States Attorney’s Office was dealing with administrative issues. Addressing personnel issues and budget issues is not as appealing to me as addressing legal issues.

Finally, I saw the position as an opportunity to grow. Although I oversaw both the criminal and civil divisions at the USAO for a number of years and was closely involved in a few criminal and civil cases during that time, I generally did not have time to get into the weeds on cases. One great thing about civil practice is the
opportunity to learn about all kinds of things that have nothing to do with the law. In addition to the law, you learn about medical procedures, how various things are built, and a wide variety of other non-legal issues. So I liked the idea of becoming more well-rounded and learning areas that were out of my comfort zone.

JDG: Have you always wanted to be a judge?

JSY: The first thing I wanted to do was to be a trial attorney. I think most people who have done a lot of trial work will tell you the preparation is not so much fun, but there is nothing better than actually being in the courtroom. When the bell rings… it is kind of like any sport. I wanted to get in the courtroom and do trial work. I think probably most attorneys would agree, being a judge is a pretty good job. Of course, you cannot just walk in and be a judge; you have to “pay your dues” first. I guess I started thinking about it later in my career -- probably after I had ten or fifteen years of experience. I applied for it thinking, “Well, it would be great if I could get it,” but not really expecting to get it. So I was really excited when I got the job and feel very fortunate to have been selected.

JDG: What was it like putting the black robe on for the first time?

JSY: It was pretty neat. On the other hand, I felt a little bit silly because here I am wearing a robe at work. Although it always seemed natural when other judges wore robes, it seemed like an odd thing to be wearing when I first put it on. When you are actually sitting in the robe, it is kind of like, “well, this is a weird thing to be wearing”; but there was also the part of me that thought, “Alright, I’m about to step out and this is my first trip as a judge. I hope I do not screw it up.” The first time you do anything, especially when it is so public and people are evaluating your performance, you want to do a good job and so a lot of my thought was, “I want to do a good job.”

As a new judge, I always try to remind myself to “keep my eye on the ball,” stay focused on the things that are important, try to be fair and not let the whole idea of being a judge make me feel too self-important. It is not about being a judge. It is about trying to do the right thing and making all the right decisions. It gets back to your question of why I ended up wanting to do it. I think for me, one of the reasons I went to the U.S. Attorney’s office was that, especially as a criminal prosecutor, you are getting paid to do the right thing and that is great. Not that many attorneys have that luxury. My client is the public. Most attorneys are dealing with clients where they represent the interest of that client, and while they do it ethically, they are representing the interest of that client and do not have as much discretion. So, one of the great things about being a judge is that you are getting paid to do the right thing. It is not, “Am I on this side?” or “I am on that side?” or “Where am I politically?” I want to do what is right and, to get paid to do that is pretty cool. That is probably the biggest reason why I got into the job I did at the U.S. Attorney’s office and also the reason I wanted to be a judge.

I want to get it right. As a judge, I realize that a lot of people are depending on me to get it right and that our whole system depends on judges getting it right. I know I do not always get it right though. And that is why I do not mind if I get appealed. And if I get flipped on appeal because I got it wrong, that is better than getting it wrong and not having it reviewed. As the judge, I do not want to be making mistakes, but I have a little bit of security in the knowledge that if I make a mistake I am not necessarily the “last word.” My goal is to try to step back and really take the idea of “blind justice” to heart. I want to make sure that I am “weighing the scales evenly.” So, that is a goal I always try to keep in the back of my mind. I realize that everyone comes to things with biases and preconceived ideas and so I want to be conscious of that in myself. Even though I know I am going to have some of my own biases, I want to step back from them, let them go, and make the decision based on the rule of law.

JDG: What most do you enjoy about being a Federal Magistrate Judge?

JSY: Well, it is hard to say what I enjoy most, but toward the top of the list is the constant learning process. Getting a case and not just learning about a different area of law but also learning about a different industry -- whether it is a medical issue or construction issue or whatever. Interacting with the attorneys has been great and I do a lot of settlement conferences. That has been interesting. I have a psychology major with a focus on decision sciences, which addresses how various things such as biases and risk-aversion or risk-seeking personalities...
affect decisions. So, I am glad I am able to finally use some of the stuff that I studied as an undergraduate. It is the same thing with the other degree I have, quantitative economics, as numbers and economics often come into play as part of damage discussions. I have enjoyed getting to know attorneys who are part of a whole segment of the Bar that I did not really deal with much when I was at the U.S. Attorney’s office. I also like being in the courtroom. It is not the same thing as being a trial attorney but, to some degree, you also have to think on your feet. Although I can tell you that getting to ask whatever question comes to mind as a judge is easier than having to field whatever question the judge thinks up. Although I am not a trial attorney anymore and it is not exactly the same type of experience, as a judge, I am still in the courtroom and have to think on my feet and work things out on-the-spot.

**JDG:** Is there anything in particular that you are looking forward to experiencing as a Magistrate Judge?

**JSY:** Yes. The easy answer to that is presiding over a trial. So, I have not yet presided over a trial. As a magistrate judge, I will never preside over a trial of a felony case because I do not have the jurisdiction to do that, but I will be able to preside over trials of Class A and Class B misdemeanors on the criminal side. On the civil side, as you know, sometimes the parties consent to have a magistrate judge act as the presiding judge and I am really enjoying those cases. Eventually I will have trials in those cases and I am looking forward to being part of a trial while sitting in a different seat. I would not expect it to have happened yet because I have just been on the Bench for a little over a year. It takes a while to get those trials all teed up. But presiding over a trial is one experience I have not had as judge that I am looking forward to.

**JDG:** What advice would you give to attorneys appearing in your Court?

**JSY:** Well, probably like any judge would want to say, be prepared. Think through the issues, what I might ask, and what your responses might be. What I try to do is, at the beginning of a hearing, give the attorney some sense of where I am after having read the briefs and what I am thinking, where I am leaning, the issues that I am struggling with, and the areas that I am still uncertain about. If I am feeling like I am likely to make a decision one way or the other based on the briefs, a lot of times I will signal that to the attorneys as well and so then that will give them a chance to either talk me into keeping that opinion or talk me out of that opinion. I try to do that because I think, from the attorney’s perspective, it is nice to know where the judge is so that is not guesswork. Also, it is most helpful for me if attorneys address the issues I need them to address. So, at the beginning, I try to give the attorneys some sort of indication of where I am so the attorney can take that cue and address those things that I am having the most trouble with, rather than just following whatever script they had in mind. That script might not relate to something that I am having an issue with or that I need argument on.

**JDG:** What do you believe lawyers should do to make things run more efficiently in Federal Court?

**JSY:** I think the New Mexico Bar is pretty good about talking to each other and communicating with each other and working out as many issues as they can ahead of time, which I think is important. There have been a lot of occasions where I have a hearing and it seems like the issue could easily be resolved between the attorneys had they just talked to each other because the reasonable solution to the problem is obvious and does not require much compromise by either side. So, I think having that conversation is one way attorneys can promote efficiency. Also, when I am having the Rule 16 Conferences or status conferences, some issues can be addressed and resolved informally at those conferences without the need for extensive briefing. To the extent a simple issue can be brought up early and cut off future litigation, that promotes efficiency. Most of the time I have Rule 16 Conferences and status conferences over the telephone just because I do not want, especially with out-of-town attorneys, I do not want to make them drive hours for a ten-minute conference. I try to do that type of thing for the sake of efficiency as well. But, I would have to say overall that the Bar here is pretty good and, so far, from my perspective, things have been running pretty efficiently.

**JDG:** How do judges who have practiced on one side of the Bar overcome the perception of bias?
JSY: I think the simplest way is to just be fair – to let everybody know that you are hearing both sides and that you are not just jumping to conclusions based on whatever preconceived notion you have going into it. As far as writing opinions, I try not to write opinions that are “snarky”. For the same reason, I do not want attorneys to write briefs that take “pot shots” at someone, which do not really enhance their argument. If you are evenhanded and fair I think that you will come across as evenhanded and fair. But certainly if you come into the job from one side there is going to be an initial presumption that you are biased toward whatever side you previously worked for. But I think that over time, a judge who is fair and is objective is going to overcome that presumption because people are going to see the work that the judge has done.

Attorneys are going to talk to others to learn about you. New Mexico is a pretty small community and so word gets around pretty quickly. If a judge has issues or if a judge seems biased one way or the other, that gets passed around pretty quickly. So, I try to step back and reflect to make sure I am being unbiased and objective. One advantage for me, probably, is that I come in from the U. S. Attorney’s office and so I am not perceived by the Civil Bar as strongly as being associated with one side or the other. I was not in either “camp” prior to coming to the bench. So, that is probably helpful to me. But I think that people still make assessments about a new judge. So, I guess the simplest answer is to just do what I was saying, which is to try and make the right decision.

I find that if you listen to the parties and you really consider their argument and you really make a conscious effort to step back and try to look at things from both sides, people are going to perceive you as fair even if you rule against them. I think some people are very black-and-white. I have never been a black-and-white person. Usually when I come out on one side of an issue, I can at least see where the other side is coming from. I always try to step back and look at things from both perspectives. I also really look to see what case law is out there and then try to make the right decision. Sometimes as a judge, you make a decision that is not consistent with whatever your world view is, or is different than what you would do if you were king. But you have got the Supreme Court and you have got the Tenth Circuit. You often have a line of precedent. The Supreme Court or the Tenth Circuit is essentially telling me, “This is the way it is and you may disagree, but you are going to follow the law.” Part of my job is to follow the law even when I disagree with it. It is important for me to feel that I made the right decision for the right reasons. I think it is also important to check myself to be sure that I am not being result-driven.

JDG: What advice would you give to young lawyers who are going to take the Bar in the next year?

JSY: So as far as the practical advice for taking the Bar I would say to try not to let yourself get caught up in all the pressure where it is a miserable experience for you. I know people think that I am weird when I say this, but I really enjoyed studying for the Bar. I just looked at it as a regular job with the benefit of a lot of autonomy and a very flexible schedule. I would get up in the morning and take some practice tests. Then I would go back and try and figure out why I missed the question I missed. So I looked at it as a real learning opportunity. I really enjoy the law and I really enjoy all the different principles and concepts and the different subject areas. So I think if you are looking at it as a learning opportunity, as a chance to really learn all these different areas and then have everything come together, that you will have a better experience. You remember better if you approach it as something you are going to enjoy, as a learning experience rather than as a high-pressured situation. If you are focused on, “Oh, I do not want to fail,” rather than, “I want to learn something,” you are not going to do as well.

A lot of things that would otherwise be enjoyable are made not very fun because they are done under pressure. To the extent that you are able to control how you are reacting to that pressure mentally, I think you can learn more and study better. If you do not look at it as a pressure situation and look at it as an opportunity to learn, you will do better. The worst case scenario is that you have to take the Bar again. No one wants to fail the Bar, but given all of the other bad things that could happen in life, even the worst case scenario has to be put in perspective. So that would be my advice as far as approaching and studying for the Bar. As far as what worked for me, I would just do a bunch of practice tests and then go over the answers.
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that I missed. That gave me a pretty good sense of where I was strong and where I was weak and what I needed to focus on.

**JDG**: What changes have you seen in the practice of law during your time in the profession?

**JSY**: Well, there are certainly fewer trials. You do not see nearly as many trials as you used to and there are lots of reasons for that. We have an expensive legal system. It is a great legal system and I think probably the best legal system in the world, but it is not perfect. It is too expensive for most people and for a lot of people, justice might be denied just because of the sheer cost of litigation. That is always a concern for me. When dealing with discovery and various other issues I always try to keep in mind concepts of proportionality. I try not to lose sense of the practical side of things. I try to step back and look at the goal of our justice system – the big picture. If the courts become so expensive that they are not accessible to the public, then it is not a very good system for the public. The reason the courts are here and the reason that we attorneys do what we do is to help resolve conflicts. We help implement a system that maintains an orderly society where the law is disbursed evenly.

I think that things have gotten more and more expensive over the years and that is unfortunate for people who need legal help; they often do not have access to the legal system because it is so expensive. And money really drives the system. You see attorneys working zillions of hours who are miserable because they are working so many hours. The focus can be too much on, “What is your revenue?” and “How many hours are you billing?” The focus is not so much on, “How efficient are you being?” and not always on, “What is the client getting?” Although they wouldn’t be as rich, I think attorneys would generally be happier if there was less focus on revenue. In answering the question of, “Am I serving my client?” I think attorneys have to find the right balance. You do not want to cut corners so that you do not do a good job for your client but, on the other hand, you do not want to do so much that your client cannot afford to pay you. You do not want your bills to be so high that your client is ultimately worse off.

**JDG**: What is your caseload?

**JSY**: At one point there were six magistrate judges in Albuquerque and when I came it was down to two. All together, I typically have between 200 and 220 cases assigned to me. I haven’t had to worry about being able to occupy my day. I know from a litigant’s perspective, you do not want things to be tied up in the court. So, I really try to get things turned around as quickly as I can, which is still not nearly as quickly as I would like. One of the benefits now of having a full staff of magistrate judges in Albuquerque is that the criminal duty can be spread out because it is difficult to get a lot of civil work done when you are on criminal duty. You are in court on a criminal docket much of the morning and then much of the afternoon is tied up handling warrants or other criminal matters that come in. Now that criminal duty is going to be spread out between more judges, I think that we are going to have the ability as a group to address the civil matters more quickly.

**JDG**: Do you have any tips for New Mexico lawyers about maintaining a work-life balance?

**JSY**: That is a tough question. Keeping a balance is something I, like most people, struggle with. Attorneys have a lot of work pressure and so they need to make a point of pausing and reflecting on occasion to make sure they are not losing sight of family and other things that are really important in life. I realize when you have a judge ordering you to file a brief by the next day, you have trial coming up, and other deadlines to meet, this is much easier said than done. I also realize that when you are in a business you hate to turn down a case because you want to ensure that you have future income. I also get that as attorneys, we do not have a very flat work curve. Nonetheless, in an effort to keep life in perspective it helps to try and control your workload so that you are not setting yourself up to miss the things in life that really make it worth living.

In asking whether “I work to live or live to work?” I think most of us would rather “work to live.” Work is a very important part of our lives and, in our profession, defines us to some degree, so that our work is part of us. But while it is important to work hard and do a good job, work should not totally define a person. If you work too little, do a poor job, and have a bad reputation, you are going to be an unhappy person. If you work too much to the exclusion of other things in life, you are going to be an unhappy person. So I think everyone just needs to try and find whatever balance in between those points that maximizes...
their overall long term happiness. I also think it is important to realize that you are probably going to be more productive and more effective if you do take time to exercise, go outdoors, and socialize. Studies show that not only does this make you a happier person, it makes you a more productive person. For me, spending time laughing with my kids, wife, and friends helps me avoid feeling rundown - and it also ultimately makes me better at my job. When I was in trial I would sometimes work long hours to the exclusion of everything else. But you can only run on adrenaline for so long. I don’t think a person can effectively do that day-in and day-out for years. I have not worked a lot of 40-hour weeks since I became an attorney and so I am probably not the best model for what I am saying, but I do try to have a balance. I think we often fail to realize that we have more control over our lives than we think – we just need to be proactive about exercising that control. One way to do that is by making a conscious effort not to load so many things on our plates.

JDG: What can you tell us about “summary” jury trials in federal court?

JSY: I have not heard of anyone doing any here. I would think that by agreement of the parties you could do that. And there really is the phenomenon of the vanishing trial. On one hand, that is too bad because that is really why a lot of us go to law school and that is a great part about being an attorney – getting to go to trial. The whole idea is that the truth gets fleshed out through that adversarial process of trial, but that does not happen if there is no trial. A lot gets decided on settlements that are driven by reasons of finances, exposure and timing. Someone will often pay out some money even though that person feels doing so is not just. Or someone might take less money than they think is just because they do not want to be involved in litigation for two or three years. Even a short trial is very expensive and so, to economically justify going to trial, there has to be a lot of money at stake or a big principle at stake. On the civil side it makes sense to me that there are not as many trials because logically it does not make sense to spend more money going to trial than the amount at stake.

On the other hand, that is too bad because trials serve an important purpose. My philosophy in settlement conferences has not been to try to force people to settle. While most cases should and do settle, if someone really wants to go to trial that is okay with me; that is the way the system is designed. If someone really wants to get their “day in court,” they should get their day in court. But I also talk about the reality of the situation, which is that you may get your day in court and, even if you win, pay more in attorney fees than you recover or than you could have earlier paid to settle the case. If someone insists on their day in court, I want that person to go forward with his or her eyes open knowing that they might win in principle, but lose in practice.

Given how expensive trials are, I do think it makes sense to think about potential alternatives to a full trial. But even summary trials are going to happen after a lot of discovery expenses are incurred. I agree though, as the system becomes less and less accessible to the ordinary person for financial reasons, I think it is important to think of ways to make the system more accessible.

JDG: What, if anything, about being a judge has come as a surprise?

JSY: There is much more transference than I thought there would be. For instance, there is a direct application in some areas such as police excessive force cases and habeas petitions. When dealing with Fourth, Fifth, Sixth, and Eighth Amendment issues, my criminal background probably left me better prepared than a more extensive civil background would have. My criminal background also gave me the opportunity to have significant trial experience and to become more familiar with the Rules of Evidence. That experience helps me in settlement conferences because I am used to looking at evidence and automatically thinking about what might or might not get admitted and how things are likely to play out at trial. So going into this job I did not realize how much crossover there was between the criminal and civil side and how much having that criminal experience carries over to help me out on the civil side. But for the most part, there have not been any surprises. I appeared in front of magistrate judges both on the civil side and the criminal side before becoming a magistrate judge and so I had a pretty good sense of what I would be doing going into this job.

JDG: Thank you, Your Honor, for taking the time to speak with me.

JSY: I was happy to do it.
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Consider a fact pattern as seemingly improbable as it is shocking. A vehicle pulls into a parking lot in a shopping center. The vehicle is driven by a woman who has a medical condition that results in seizures and has been warned by her physician to avoid driving. This woman also happens to be driving a vehicle whose accelerator is known to become stuck. As the vehicle pulls into the parking lot, the accelerator becomes stuck, and the vehicle races forward toward one of the businesses in the shopping center. The woman then contemporaneously experiences a seizure. The vehicle crashes through the floor-to-ceiling glass entry of a business located inside of the shopping center, killing three people and injuring several others.

Such a fact pattern is not a hypothetical pulled from a first year torts class. Rather, these are the underlying facts of Rodriguez v. Del Sol Shopping Center Associates, L.P., 2014-NMSC-014, 326 P.3d 465 (hereinafter Rodriguez II), a case that recently had a profound impact on the duty analysis under New Mexico law. The new duty analysis articulated in Rodriguez II, which precludes courts from considering foreseeability in determining duty, presents several challenges for litigants. This article examines the history of Rodriguez II, the New Mexico Supreme Court's new analysis, and what practitioners need to know when attempting to challenge the existence of a legal duty at the summary judgment stage.

History of Rodriguez

Based on the incident described above, several suits were filed by two sets of Plaintiffs against the owners and operators of the Del Sol Shopping Center in Santa Fe. The Plaintiffs argued that the owners and operators failed to adequately post traffic signage and erect physical barriers between the parking lot and shopping center. In separate cases, two district courts heard and granted motions for summary judgment in favor of the owners and operators. Each district court held that the owners and operators had no legal duty to protect Plaintiffs inside the building from criminally reckless drivers, because the sequence of underlying events that fateful day in Santa Fe was unforeseeable as a matter of law. The Plaintiffs appealed, and the cases were consolidated by the Court of Appeals.

In examining the case, the New Mexico Court of Appeals chronicled New Mexico precedent regarding duty analysis. In particular, the Court of Appeals highlighted the historically varying and inconsistent positions courts had taken with respect to the role of foreseeability in the determination of duty. The early beginnings of foreseeability as part of a duty analysis is often traced back to Justice Cardozo's much studied opinion in Palsgraf v. Long Island Railroad Co., a case with a fact pattern as seemingly extraordinary and unforeseeable as Rodriguez. In Palsgraf, Justice Cardozo believed foreseeability and legal duty were directly correlated. Similarly, in examining New Mexico's treatment of the relationship between foreseeability and legal duty, the Court of Appeals in Rodriguez I noted the case of Romero v. Giant Stop-N-Go of New Mexico, Inc., which, similar to Palsgraf, took the position that foreseeability was a "critical and essential component of New Mexico's duty analysis." Romero had examined foreseeability by reference to "what one might objectively and reasonably expect, not merely what might conceivably occur." In its discussion in Rodriguez I, the Court of Appeals contrasted Romero's...
emphasis on foreseeability with the New Mexico Supreme Court’s opinion in Edward C. v. City of Albuquerque, which indicated that foreseeability is but one factor to consider when determining duty, not the principal factor.10

The Court of Appeals further noted that both of the lower courts had relied on Romero’s duty analysis approach and placed much emphasis on foreseeability. The Court of Appeals cited commentary from one district court’s memorandum opinion granting summary judgment, which seemed to highlight the rather improbable set of circumstances of this particular case:

[A] finding of foreseeability would require anticipation of a remarkable confluence of events. Defendants would have had to foresee that a woman, diagnosed with a seizure disorder and advised by her doctor not to drive, would nevertheless decide to drive, that her vehicle would malfunction and the stress of the malfunctioning vehicle would cause her to suffer from a mini-seizure, which would result in her vehicle swerving, jumping a curb, crossing a ten foot covered sidewalk and missing a concrete pillar, and crashing through the front window of a business.11

It was apparently this type of factual minutia, which varies from case to case, that concerned the Court of Appeals; specifically, it expressed concern with tasking district courts with the responsibility to examine a potentially infinite number of factual scenarios in determining the existence of a legal duty.12 Out of such concern, the Court of Appeals in Rodriguez I broke from this foreseeability-driven analysis and adopted the more policy-driven approach found in Edward C.13 Using Edward C. as guidance, the Court of Appeals ultimately opted to consider duty based on three factors: 1) the nature of the activity in question, 2) the parties’ general relationship to the activity, and 3) public policy.14

In the Court of Appeals’ examination of the first two factors, it emphasized the unforeseeable and remote nature of a runaway vehicle crashing into a business, which the Court believed militated against the duty to prevent such harm.15 In order to evaluate the public policy factor, the Court of Appeals looked for guidance from “legal precedent, statutes, and other principles comprising the law,”16 The Court of Appeals seemed to struggle with the public policy factor, namely because it was unable to discern any policy articulated by the Legislature or other governmental entity, or any statute, code, or regulation, that it could rely on for direction.17 As such, the Court of Appeals looked to previous New Mexico case law, as well as case law from other jurisdictions. However, this attempt to glean policy reasons from the holdings of past precedent, either for or against the existence of duty, hinged heavily on the foreseeability of the events those cases examined.18 After a rather exhaustive review of precedent, the Court of Appeals ultimately affirmed the lower courts’ grants of summary judgment, holding that the owners and operators of Del Sol were not assigned the duty to prevent the tragedy that occurred on its premises due to what the Court of Appeals believed to be “extraordinary events.”19

The New Mexico Supreme Court eliminates foreseeability as a consideration in the determination of duty

After the Court of Appeals’ decision, Plaintiffs appealed to the New Mexico Supreme Court. From the outset of its opinion, the Supreme Court acknowledged that New Mexico courts had often taken and employed varying, and sometimes conflicting, approaches to the duty analysis.20 Acknowledging its previous holding in Edward C., which the Court of Appeals had relied on to the extent it indicted that foreseeability was but one consideration in determining the existence of a legal duty, the Supreme Court took a markedly different approach in an apparent attempt to finally simplify and clarify the role of foreseeability in the duty analysis.21 The Supreme Court expressly held that foreseeability is not a factor to be considered when determining the existence of duty in a particular class of cases.22 Instead, courts are required to articulate specific policy reasons, unrelated to foreseeability considerations, if deciding that a defendant does not have a duty or that an existing duty should be limited.23 With its holding, the Supreme Court also reaffirmed its adoption of the Restatement (Third) of Torts, which eliminates foreseeability from the legal duty analysis and advocates that only in “exceptional cases” may a court decide a defendant has no duty or that a duty should be modified.24

10 2010-NMSC-043, ¶ 18, 148 N.M. 646, 241 P.3d 1086, rev’d, Rodriguez II.
12 See Rodriguez II, 2014-NMSC-014, ¶ 15, 116 N.M. 626, 866 P.2d 354, which held that “[t]he existence and scope of duty, as questions of law, should not be scrutinized with such specificity that the factual issues of negligence is subsumed.”
14 Id. ¶14.
15 See id. ¶¶ 15-17.
16 Id. ¶18 (internal citations omitted).
17 See id. ¶ 21.
18 See id.
19 Id. ¶ 29.
20 Rodriguez II, 2014-NMSC-014, ¶ 3.
21 See id.
22 Id. ¶ 1.
23 Id. ¶ 1.
24 Id. ¶ 1, 13 (internal citation omitted).
Understanding and Adapting
Continued from Page 13

Similar to the Court of Appeals, the Supreme Court expressed concern that a determination of no duty based on a remote risk invites a court to weigh the particular facts of a case.25 The Supreme Court explained that in the context of duty, foreseeability is a question of fact for the jury to consider.26 The Supreme Court devoted much of its opinion to explaining what it considered a flawed foreseeability-driven analysis employed by the Court of Appeals. The Supreme Court criticized the Court of Appeals’ examination of the nature of the activity and the parties’ relationship to the activity, finding that such an analysis amounted to evaluating the remoteness of the events leading to the harm – which essentially was tantamount to answering the question of foreseeability, which in turn is not a policy argument.27 This type of exercise, the Supreme Court believed, inevitably requires factual examinations that should be undertaken by the jury and not judges.28

The Supreme Court’s opinion also addressed the Court of Appeals’ focus on whether there were any laws, codes, or ordinances addressing safety issues at play in Rodriguez as a guide for evaluating policy.29 The Supreme Court discounted such a focus. As opposed to the Court of Appeals, the Supreme Court believed the lack of any relevant promulgations by the Legislature was in no way dispositive; rather, the Supreme Court felt it indicated nothing more than the fact that the Legislature had yet to address such issues.30

Ramifications of Rodriguez and tips for practitioners

With the Supreme Court’s holding in Rodriguez II, there are a number of implications and challenges that now arise for practitioners. In one sense, the Supreme Court clarified and standardized duty analysis in New Mexico. By eliminating foreseeability as a factor, the inquiry as to existence or modification of duty, at least at the summary judgment stage, has arguably become more narrowed. However, despite pointing out where it felt the Court of Appeals’ policy analysis was misguided, the Supreme Court’s opinion offered little specific or substantive guidance as to what it deemed legitimate policy arguments.

Therefore, given the narrow bounds of a strictly policy-driven inquiry, the question then becomes, “How can practitioners best frame policy arguments at the summary judgment stage, and what are those ‘exceptional cases’ where such policy arguments may prevail?”

25 See id. ¶¶ 18, 19, 22.
26 Id. ¶ 4.
27 Id. ¶¶ 12-13.
28 Id. ¶¶ 13-14.
29 Id. ¶ 17.
30 Id.

The Restatement (Third) of Torts provides some guidance in this regard. It suggests several valid policy arguments when evaluating the existence or modification of a duty, including the following:

1. Social norms of responsibility;
2. Whether negligence-based liability may interfere with important principles reflected in another area of law;
3. Whether there exist any relational limitations between owners/occupiers and classes of persons on the property (e.g., visitors as opposed to trespassers);
4. Whether courts are likely to encounter any administrative difficulties adjudicating certain categories of cases; or
5. Whether courts should defer to discretionary decisions of another branch of government.31

Therefore, practitioners contemplating moving for summary judgment should evaluate if any of these policy arguments can be made in the context of his or her particular case.

Another suggestion gleaned from the Restatement (Third) of Torts, as well as from the Supreme Court’s Rodriguez II opinion, is for practitioners to frame a no-duty argument as categorical, articulating the policy or principle at stake, as opposed to emphasizing the particular facts of any given case.32 The Restatement (Third) of Torts and the New Mexico Supreme Court seem to be concerned that foreseeability cannot be determined on a categorical basis, which explains why they have discounted it as proper means of a court’s examination of duty.33 While arguments highlighting why the particular facts of one’s case fall within a class of cases in which policy warrants a finding of no duty may be effective, practitioners should be mindful to avoid presenting the court with a fact-intensive inquiry. Likewise, policy arguments that do not require a court to begin weighing facts should be primary and forefront for any no duty argument. The Court of Appeals recently reinforced this notion in National Roofing, Inc. v. Alstate Steel, Inc., suggesting that cases which require no fact-specific analysis are ideal candidates for dismissal under the Rodriguez II analysis.34 By the same token, any argument as to the remoteness or improbability of a particular set of facts, no matter how compelling, should be avoided because it is an argument that the Supreme Court has explicitly indicated courts can no longer consider as part of a duty analysis.

31 RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7, cmts. c-f.
32 Id. § 7
33 See id. See also Rodriguez II, 2014-NMSC-014, ¶ 9.
34 See 2015 N.M. App. LEXIS 124, ¶13.
While the Supreme Court’s silence as to which policy arguments may be deemed acceptable creates some uncertainty for practitioners, it also provides an opportunity for creativity and ingenuity in formulating arguments, which should only encourage practitioners to challenge duty where they deem appropriate. After all, it is only through such efforts that future cases will further define the parameters of Rodriguez II and the type of policy arguments that courts will ultimately accept under the new Rodriguez II duty analysis. Until then, however, there may very well be fewer premises liability cases decided at the summary judgment stage. Therefore, for those movants seeking summary judgment based on a lack of duty, it will be crucial to articulate narrow and focused policy arguments that ideally are not fact-intensive and, importantly, are wholly unrelated to foreseeability considerations.

35 It appears this is already happening to some extent. See Nat’l Roofing, Inc. v. Alstate Steel, Inc., supra, at *13 (holding that cases alleging negligence or strict liability and arising only from physical harm to another constitute one class of cases in which policy considerations warrant denying duty).
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Revised Rule Denies Many Litigants the Right to Peremptory Excusal

By Geoffrey D. White, Esq.
Butt Thornton & Baehr, PC

Minor revisions and major additions to Rule 1-088.1 NMRA, the rule governing peremptory excusal, went into effect on December 31, 2015, that have curtailed your clients’ statutory right to excuse a state district judge without cause.¹ And be careful which judges you excuse and how often, because the Chief Justice of the Supreme Court could unilaterally strip your clients of this important, legislatively granted right.

Significantly, the rule now denies peremptory excusal to any party added more than 120 days after the first judge has been assigned to the case. The amended rule also imposes a rebuttable presumption of aligned interest on certain categories of parties, limiting those litigants to one peremptory excusal to be shared by all. Those newly added categories are:

- Parties represented by the same attorney or law firm.
- Parties who have filed joint pleadings.
- Parties related by blood or marriage.
- Businesses and their owners, parents, subsidiaries, officers, directors, and major shareholders.
- Government agencies and their subordinate agencies, commissions, boards, or personnel.

The revised rule permits the assigned judge to grant such litigants more than one right to peremptory excusal, should the judge determine the parties are “sufficiently diverse from one another.” Rule 1-088.1(A) NMRA. However, the judge’s power to grant additional excusals is discretionary, whereas the presumption of aligned interest is mandatory under the new rule language. Id.

The right to peremptory excusal is granted by statute. NMSA 1978, Section 38-3-9 (1985) states in pertinent part:

A party to an action or proceeding, civil or criminal . . . shall have the right to exercise a peremptory challenge to the district judge before whom the action or proceeding is to be tried and heard, whether he be the resident district judge or a district judge designated by the resident district judge, except by consent of the parties or their counsel. After the exercise of a peremptory challenge, that district judge shall proceed no further. Each party to an action or proceeding may excuse only one district judge pursuant to the provisions of this statute.

NMSA 1978, § 38-3-9 (1985). The new Rule 1-088.1 is, at its heart, the Supreme Court’s answer to the question of what constitutes “[e]ach party to an action” under Section 38-3-9.

The rule change has been in the works since no later than 2013, when the Supreme Court issued its opinion in Quality Automotive Center v. Arrieta, 2013-NMSC-041, 309 P.3d 80. That matter arose out of the use of peremptory excusal by a late-added party in a case involving multiple business defendants owned by family members, all represented by the same counsel.

In Arrieta, the underlying case had been proceeding for about seven months before the late-added defendant filed its notice of excusal. Id. ¶¶ 5, 11. In addition, the initially served defendant had requested affirmative relief from the court. Id. ¶¶ 5, 7. The trial judge challenged the propriety of the late excusal, and the defendants petitioned the Supreme Court for a writ of mandamus, which the high court denied. Id. ¶¶ 12-15.

The Supreme Court nonetheless issued an opinion in which it affirmed the trial court’s standing to challenge whether a notice of peremptory excusal was timely and correct. Id. ¶ 24. The high court also concluded Rule 1-088.1 needed to be amended to eliminate the potential for abusive judge-shopping. Id. ¶¶ 33-35.

In September 2013, the Supreme Court published a proposed revision to Rule 1-088.1. The high court withdrew that proposal in response to numerous public comments

1 The revised Rule 1-088.1(A) is reprinted at the end of this article.
and, in early 2015, published a proposed version of the rule similar to the one it ultimately adopted.

Fifteen members of the bench and bar offered comments for publication on the early 2015 version of Rule 1-088.1. Of the fifteen who offered comments for publication, six – or 40 percent – expressed concern about the provision denying peremptory excusal to any party added more than 120 days after the first judge has been assigned to the case. Those concerns ranged from the potential for litigants to manipulate excusal rules by waiting to name additional parties, to the fundamental unfairness of granting a right to initially named parties, but denying that right to litigants who, through no action of their own, are not joined until after the deadline has passed.

The New Mexico Defense Lawyers Association opposed any change to Rule 1-088.1. “The NMDLA does not believe a sufficient need has been either demonstrated or articulated to warrant the changes being proposed,” wrote NMDLA President Sean E. Garrett of Conklin, Woodcock & Ziegler, P.C. In contrast, plaintiffs’ attorney Randi McGinn offered the following assessment: “The change in the recusal rule is long overdue and will prevent the abuse and delay caused by multiple parties who are working in concert, consecutively striking all judges in a district. This is a great change!”

Time and use will determine whether the new Rule 1-088.1 meets its goals of fairness to litigants and efficient judicial administration. For now, defense practitioners should be aware of the categorical exclusions noted above.

In addition, potential for abuse lurks within the new excusal rule. For instance, any party (or the trial court on its own motion) may object to a notice of excusal as untimely or invalid. Rule 1-088.1(H). The excused judge is required to rule on any such objections. Id. This provision permits gamesmanship by opposing counsel who believe their chances for success – in the case at bar or, perhaps, in other matters pending before the same court – are improved if they make the judge aware he or she has been challenged, and by whom.

In addition, another new provision permits the Supreme Court to deny a litigant the right to make peremptory excusals if the Chief Justice unilaterally concludes the litigant’s counsel, or counsel associated with the litigant’s attorney in a law firm or public agency, have used peremptory excusals too often or for the wrong reasons. Rule 1-088.1(F). It is not clear how this provision can be read in harmony with Section 38-3-9, which grants the right to excuse a judge without cause to the litigant, nor to the litigant’s attorney. Punishing a litigant today for perceived misdeeds by his or her counsel yesterday does not appear to further the Legislature’s ends in granting the right to excusal without cause.

In sum, the new Rule 1-088.1 is a judicially imposed limitation on a right granted by the Legislature and includes a somewhat Orwellian provision that empowers the Chief Justice to unilaterally deny a statutory right to parties represented by counsel the judicial branch disfavors.

The “New” RULE 1-088.1. PEREMPTORY EXCUSAL OF A DISTRICT JUDGE; RECUSAL; PROCEDURE FOR EXERCISING

A. Limit on excusals or challenges. No party shall excuse more than one judge. A party may not excuse a judge after the party has attended a hearing or requested that judge to perform any act other than an order for free process or a determination of indigency. For the purpose of peremptory excusals, the term “party” shall include all members of a group of parties when aligned as co-plaintiffs or co-defendants in any of the following situations:

(1) the parties are represented by the same lawyer or law firm;
(2) the parties have filed joint pleadings;
(3) the parties are related to each other as spouse, parent, child, or sibling;
(4) the parties consist of a business entity or other organization and its owners, parents, subsidiaries, officers, directors, or major shareholders; or
(5) the parties consist of a government agency and its subordinate agencies, commissions, boards, or personnel.

If the interests of any parties grouped together as one party under this rule are found to be sufficiently diverse from one another, the assigned judge may grant a motion to allow separate peremptory excusals for the party or parties whose interests are shown to differ.

B. Mass reassignment. A mass reassignment occurs when one hundred (100) or more pending cases are reassigned contemporaneously.

C. Procedure for exercising peremptory excusal of a district judge. A party may exercise the statutory right to excuse the district judge before whom the case is pending by filing a peremptory excusal as follows:
A plaintiff may file a peremptory excusal within ten (10) days after service of notice of assignment of the first judge in the case. A defendant may file a peremptory excusal within ten (10) days after the defendant files the first pleading or motion pursuant to Rule 1-012 NMRA.

Any party may file a peremptory excusal within ten (10) days after the clerk serves notice of reassignment on the parties or completes publication of a notice of a mass reassignment.

In situations involving motions to reopen a case to enforce, modify, or set aside a judgment or order, if the case has been reassigned to a different judge since entry of the judgment or order at issue, the movant may file a peremptory excusal within ten (10) days after filing the motion to reopen and service of the notice of reassignment, and the non-movant may file a peremptory excusal within ten (10) days after service of the motion to reopen.

Regardless of the other limits contained in this rule, no peremptory excusal may be filed by any original or later-added party more than one hundred twenty (120) days after the first judge has been assigned to a case.

D. Notice of reassignment. After the filing of the complaint, if the case is reassigned to a different judge, the clerk shall serve notice of the reassignment to all parties. When a mass reassignment occurs, the clerk shall serve notice of the reassignments to all parties by publication in the New Mexico Bar Bulletin for four (4) consecutive weeks. Service of notice by publication is complete on the date printed on the fourth issue of the Bar Bulletin.

E. Service of excusal. Any party excusing a judge shall serve notice of such excusal on all parties.

F. Misuse of peremptory excusal procedure. Peremptory excusals without cause are intended to allow litigants an expeditious method of avoiding assignment of a judge whom the party has a good faith basis for believing will be unfair to one side or the other, and they are not to be exercised to hinder, delay, or obstruct the administration of justice. If it appears that an attorney or group of attorneys may be using peremptory excusals for improper purposes or with such frequency as to impede the administration of justice, the Chief Judge of the district shall send a written notice to the Chief Justice of the Supreme Court and shall send a copy of the written notice to the attorney or group attorneys believed to be improperly using peremptory excusals. The Chief Justice may take appropriate action to address any misuse, including issuance of an order providing that the attorney or attorneys or any party they represent may not file peremptory excusals for a specified period of time or until further order of the Chief Justice.

G. Recusal. Nothing in this rule precludes the right of any party to move to recuse a judge for cause. No district judge shall sit in any action in which the judge’s impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in any such action. Upon receipt of notification of recusal from a district judge, the clerk of the court shall give written notice to each party.

H. Objections to the validity of a peremptory excusal; excused judge to rule. An objection to the timeliness or validity of a peremptory excusal may be raised by any party or by the court on its own motion. The excused judge shall rule on the timeliness or validity of any such objection. If the excused judge determines that the excusal has met the applicable procedural and legal requirements in this rule, the judge shall proceed no further. If the excused judge determines that the excusal has not met the applicable procedural and legal requirements in this rule, the judge may proceed to preside over the case.
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Negligence/Federal Employers’ Liability Act (FELA)

NM Bar Bulletin – August 5, 2015
Vol. 54, No. 31

Noice v. BNSF Ry. Co.
2015-NMCA-054, 348 P.3d 1043
No. 31,935 (filed February 10, 2015)

Lenard Noice was a locomotive engineer for BNSF Railway Company (BNSF). Mr. Noice was killed after he fell off a train while the train’s conductor was driving at an excessive speed. Mr. Noice’s Estate filed suit against BNSF for negligence under the Federal Employers’ Liability Act (FELA). BNSF filed a motion for summary judgment arguing negligence based solely on speed was precluded under the Federal Railroad Safety Act (FRSA). The District Court granted the motion, and the Estate appealed. In reversing the District Court’s decision, the Court of Appeals determined that the FELA is a general negligence statute that neither prohibits nor requires specific conduct by a railroad. The Court relied on holdings in other jurisdictions that refuse to include speed as a preclusion under the FRSA. Specifically, the Court followed the holding in Earwood v. Norfolk Southern Ry. Co., 845 F.Supp. 880 (N.D.Ga. 1993), that because the FRSA does not address the standard of care required of employer railroads, FELA claims could be based on allegations of unsafe speed, and FRSA speed regulations were not directed at the issue of employee safety. The Court concluded there was no clear and unambiguous indication in the FRSA that Congress intended to eliminate workers’ remedies under FELA.

Tort Claims Act/Duty to Defend

NM Bar Bulletin — August 12, 2015
Volume 54, No. 32

Loya v. Gutierrez
2015-NMSC-017, 350 P.3d 1155
No. 34,447 (filed May 11, 2015)

The issue was whether a tribal police officer, who was a commissioned deputy county sheriff, was entitled to a defense and indemnification under the New Mexico Tort Claims Act. Jose Loya was arrested by Officer Glen Gutierrez in the Pueblo of Pojoaque for reckless driving. At the time of the arrest, Officer Gutierrez was a Pueblo of Pojoaque police officer carrying a deputy’s commission card issued to him by the Santa Fe County Sheriff’s Office. Mr. Loya filed a civil rights suit against Officer Gutierrez under 42 U.S.C. § 1983 (1986) for false arrest, malicious prosecution, and excessive force. Officer Gutierrez requested that the County of Santa Fe provide him a defense under the Tort Claims Act, however the County refused, stating Officer Gutierrez was not a “public employee” under the Act. Both Officer Gutierrez and the County filed motions for summary judgment, and the District Court ruled in favor of the County. Officer Gutierrez appealed to the New Mexico Court of Appeals, which affirmed the District Court’s decision.

In reversing the District Court’s decision, the New Mexico Supreme Court looked into the Tort Claims Act’s definition of a “public employee,” which was defined as a “person acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation.” The Court determined that Officer Gutierrez was a “public employee” as he was enforcing...
state law, not tribal law, when he arrested Mr. Loya and charged him in state court for violating state law. The Court also determined that Officer Gutierrez was acting as a state officer rather than a tribal officer. Moreover, the Court determined Officer Gutierrez was acting in an official capacity as a duly-sworn sheriff’s deputy by virtue of his issued deputy’s commission card, and prosecuted Mr. Loya in state court for the state traffic offense. Although the County argued sovereign immunity, the Court pointed out that the lawsuit filed by Mr. Loya against Officer Gutierrez was for violations of federally protected constitutional rights under Section 1983, not tort liability. The County also argued that Officer Gutierrez was an independent officer, however the Court determined that, as a commissioned deputy, Officer Gutierrez was acting under the authority given to him by the Santa Fe County Sheriff. Therefore, Officer Gutierrez was a “public employee” under the Act, and the County of Santa Fe was obligated to provide him a defense.

Employment Law/Due Process

NM Bar Bulletin — August 26, 2015
Vol. 54, No. 34

Wood v. City of Alamogordo
2015-NMCA-059, 350 P.3d 1185
No. 33,554 (filed February 24, 2015)

Charles Wood was employed as Captain of Operations with the City of Alamogordo, Department of Public Safety. Mr. Wood was accused of domestic abuse, and during the investigation he was told by Sam Trujillo, the City’s Director of Public Safety, that if Mr. Wood was arrested he would be terminated. Mr. Trujillo also told Mr. Wood of the benefits of taking early retirement versus termination. Mr. Wood decided to retire, but filed a Complaint under 42 U.S.C. § 1983 for violation of his civil rights for failing to provide fair pre- and post-termination procedures. The City and Mr. Trujillo filed for summary judgment arguing that Mr. Wood failed to show a violation of his civil rights. The District Court granted the motion, and Mr. Wood appealed.

In affirming the District Court’s decision, the Court of Appeals held that procedural due process does not require an unbiased decision maker at the initial termination phase. The Court referred to McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), where a demonstration of the decision maker’s bias is not tantamount to a demonstration that there has been a denial of procedural due process. The Court noted that to require pre-termination decisions to be made by an outside party would be burdensome for an employer, and may be unreasonably invasive for the employee. Finally, the Court noted that the law was not clearly established that Mr. Wood was entitled to an unbiased pre-termination decision maker. Therefore, summary judgment was proper.

Easements

NM Bar Bulletin — August 26, 2015
Vol. 54, No. 34

Mayer v. Smith
2015-NMCA-060, 350 P.3d 1191
No. 32,338, (filed March 2, 2015)

Janeka Mayer erected a fence using trees within a twenty-foot easement preventing her neighbors from using the easement. The neighbors filed an intervenor action against Ms. Mayer to enforce their rights to use the easement. The District Court allowed Ms. Mayer to keep the fence, and the neighbors appealed. In reversing the District Court’s decision, the Court of Appeals looked into whether the easement was ambiguous, and, finding it was unambiguous, easement law demands that the intent of the parties prevail. The Court of Appeals determined that the District Court’s use of extrinsic evidence was inappropriate to limit the intent of the easement. The Court of Appeals also noted that the easement clearly set out the width, length, location, and purpose of the easement, specifically creating a twenty-foot easement. Moreover, the Court of Appeals noted that the District Court erred in relying on historic use in creating a list of permissible uses on the easement. Although the Court of Appeals noted that historic use is valid, there was no case law that considers historic use determinative in defining the scope of an express and unambiguous easement. Therefore, the easement was valid and enforceable.

Negligence/Expert Testimony

NM Bar Bulletin — September 2, 2015
Vol. 54, No. 35

Firstenberg v. Montribot
2015-NMCA-062, 350 P.3d 1205
No. 32,549 (filed March 5, 2015)

Arthur Firstenberg sued his neighbors, Raphaela Montribot and Robin Leith, alleging nuisance and prima facie tort, based on allegations that his neighbor’s use of electronic devices aggravated his pre-existing electromagnetic sensitivity (EMS) (sensitivity to electromagnetic radiation). Mr. Firstenberg claims that his neighbors’ use of cell phones, Wi-Fi, and dimmer switches adversely affected his health. After an evidentiary hearing on the admissibility of expert testimony, the District Court determined that Mr. Firstenberg failed to provide admissible evidence showing a causal connection, and
granted summary judgment in favor of the neighbors.

In affirming the District Court’s decision, the Court of Appeals determined that the testimony of Mr. Firstenberg’s treating physician and neurotoxicologist was inadmissible under State v. Alberico, 1116 N.M. 156, 861 P.2d 192, because the testimony failed to demonstrate that admissible scientific evidence supported his theory of general causation. The Court also noted that the physician’s testimony was presented without any attempt to apply the Alberico factors to establish admissibility. Moreover, the Court noted that it was Mr. Firstenberg’s burden to show that his physicians were qualified to present scientific evidence showing the cause of his EMS. Finally, the Court stated it was Mr. Firstenberg’s burden to show that the studies his physician’s relied upon provided reliable scientific authority, and in failing to do so constituted inadmissible hearsay. Therefore, the District Court’s granting of the motion for summary judgment was proper.

Employment Law/Covenant Not to Compete

NM Bar Bulletin — September 9, 2015
Vol. 54, No. 36

Kidskare v. Mann
2015-NMCA-064, 350 P.3d 1228
No. 33,475 (filed March 25, 2015)

A dentist was found by the district court to have violated a covenant not to compete (“covenant”) in his employment contract with his former employer, Kidskare, P.C. On appeal, Dr. Mann raised four claims of error: 1) Kidskare lacked standing to enforce the covenant; 2) the covenant was unenforceable as written and was not amenable to the modification made by the district court; 3) Kidskare waived its right to enforce the covenant; and 4) Kidskare’s prior breach of the covenant rendered the covenant unenforceable. As part of the employment agreement, upon termination of the contract, the dentist agreed he was not to provide the same type of dentistry within one-hundred miles of any KidsKare office for one year, and his practice could not consist of more than 10 percent Medicaid or child patient services if that practice was within one hundred miles of a KidsKare office or within one hundred miles of an area that provided a substantial number of patients to a KidsKare office. Four days after his final day of employment, the dentist opened an office three miles from the office where he had practiced. The district court concluded the covenant was reasonable as to the twelve month time period, but the 100 mile restriction was overbroad and unenforceable as written. The court reformed the distance provision by reducing the radius to thirty miles. After a trial on the merits, the court found the dentist breached the covenant and entered judgment in favor of KidsKare in the amount of $88,639.40 plus $44,140 in attorney’s fees and post-judgment interest at a rate of 8 3/4%.

The Court of Appeals held the covenant was amenable to modification by the district court because the contract explicitly provided for amendment of any unenforceable provision. The Court of Appeals affirmed the trial court, remanded the case, and awarded attorney’s fees to KidsKare for the appeal because the employment contract provided for reasonable attorney’s fees and costs for any action by KidsKare to enforce its rights.
Qualified Immunity

NM Bar Bulletin — September 9, 2015
Vol. 54, No. 36

**Benavidez v. Shutiva**
2015-NMCA-065, 350 P.3d 1234
No. 33,300 (filed March 31, 2015)

After being arrested and charged with leaving the scene of an accident, resisting arrest, assault on a peace officer, and assault, Plaintiff sued the deputies and sheriffs involved in his arrest, Cibola County Sheriff’s Department, and Cibola County, alleging violations of the United States and New Mexico Constitutions as well as common law tort claims. The district court granted Defendants’ motion for summary judgment on the basis of qualified immunity. The Court of Appeals affirmed in part and reversed in part.

Plaintiff’s arguments on appeal included 1) Defendants arrested him without probable cause; 2) Defendants filed charges against him without probable cause; 3) Defendants used excessive force in the use of handcuffs during the arrest; and 4) Defendants retaliated against him for exercising his free speech rights during the arrest. The Court of Appeals found Plaintiff’s arrest was supported by probable cause because it was reasonable to believe Plaintiff assaulted a police officer. The Court also found Plaintiff’s malicious prosecution claim, based on the Fourteenth Amendment, was properly dismissed. Additionally, the Court concluded 1) the district court properly granted summary judgment as to the malicious prosecution claim based on the charge of leaving the scene of an accident; 2) there were disputed issues of material fact precluding summary judgment as to the malicious prosecution claim based on the resisting arrest charge; and 3) summary judgment as to the malicious prosecution claim based on the assault on the motor home driver was improper because there was no probable cause supporting the charge. The Court also concluded there was a question of fact as to excessive force in handcuffing sufficient to preclude summary judgment. Lastly, the court affirmed the district court’s grant of summary judgment as to Plaintiff’s First Amendment retaliatory arrest claim on the basis of qualified immunity.

Res Judicata

NM Bar Bulletin — September 9, 2015
Vol. 54, No. 36

**Turner v. First New Mexico Bank,**
2015-NMCA-068, 352 P.3d 661
No. 33,303 (filed March 17, 2015)

In this case, the Court of Appeals determined whether res judicata (claim preclusion) barred the filing of a second lawsuit when a virtually identical lawsuit was previously dismissed “without prejudice.” The district court ruled the second suit was barred and the Court of Appeals affirmed. Plaintiffs filed a complaint, and in response to a motion by Defendant, the district court judge ordered Plaintiffs to make a more definite statement. Plaintiffs filed an amended complaint. Defendant then filed a motion to dismiss for failure to state a claim pursuant to Rule 1-012(B) (6) NMRA. The district court granted the motion and dismissed each count without prejudice. No appeal was taken from the order of dismissal. Instead, Plaintiffs filed a new compliant and the case was assigned to a different district court judge. The parties and counts I and III of the new complaint were identical to those in the original case. Count II was virtually identical. Defendant filed a motion to dismiss the second complaint on the basis that the dismissal of the first complaint was binding in the case under res judicata and collateral estoppel (issue preclusion) and for the additional reason that the second complaint failed to state a claim upon which relief could be granted. The case was dismissed with prejudice and Plaintiffs appealed. The Court of Appeals held claim preclusion was properly applied.

New Mexico Tort Claims Act

NM Bar Bulletin — September 30, 2015
Vol. 54, No. 39

**Montaño v. Frezza**
2015-NMCA-069, 352 P.3d 666
No. 32,403 (filed March 19, 2015)

This was one of three cases before the Court of Appeals involving the claimed medical negligence of then Texas-based physician Dr. Eldo Frezza. Plaintiff had traveled to Lubbock, Texas to undergo bariatric surgery by Dr. Frezza at the Texas Tech University Health Sciences Center. She had been told by her insurer that Dr. Frezza was the only bariatric surgeon for whom it would provide coverage. For approximately six years, she traveled to Lubbock for follow-up care and treatment by Dr. Frezza for complications from the surgery. Eventually, testing by another doctor revealed gastrointestinal bleeding caused by an “eroding permanent suture.” Plaintiff filed suit against Dr. Frezza for medical malpractice and violation of the NMTCA by both Dr. Frezza and her insurer. The issue in this case was whether Dr. Frezza should enjoy the immunity granted by the Texas Tort Claims Act (TTCA) when he is sued by a New Mexico resident in a New Mexico court. The Court of Appeals held that under principles of comity, Dr. Frezza is entitled to immunity, but only so far as that immunity is consistent with the New Mexico Tort Claims Act (NMTCA). The Court of Appeals also held the district court’s order...
was too broadly worded, affirming in part and vacating in part the district court’s ruling and remanding for further proceedings.

**Whistleblower Protection Act**

NM Bar Bulletin — October 14, 2015
Vol. 54, No. 41

Flores v. Herrera
2015-NMCA-072, 352 P.3d 695
Nos. 32,693/33,413 (filed April 7, 2015)

During her term as Secretary of State, Defendant terminated the employment of James Flores and Manny Vildasol. Separately, they sued Secretary Herrera claiming that, by terminating their employment, Herrera violated the Whistleblower Protection Act ("Act"), NMSA 1978, §§ 10-16C-1 to -6 (2010). The lower court dismissed Mr. Flores’ lawsuit and an interlocutory appeal was filed by Ms. Herrera regarding the district court’s denial of her motion to dismiss Mr. Vildasol’s lawsuit. The issue on appeal was whether Ms. Herrera could be sued pursuant to the Act in her “individual capacity.” The court of Appeals held Ms. Herrera’s status as a former officer did not exclude her from the purview of the Act. The Court further concluded she could be sued pursuant to the Act in her individual capacity. The Act does not limit actions against officers to those who are presently in office at the time the action is filed.

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