DLA NEW MEXICO
Defense Lawyers Association

DEFENSE news

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IN THIS Edition

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2022 NMDLA BOARD OF DIRECTORS

New Mexico Defense Lawyers Association (NMDLA) 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.

The opinions expressed in our published works are those of the author(s) and do not reflect the opinions of NMDLA or its Editors.

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MESSAGE FROM THE PRESIDENT

By Christina L. G. Brennan
Brennan & Sullivan, P.A.

Dear DLA members,

This year has been a year of getting back to a "new normal." It was not easy to adjust to the pandemic and it is not easy to readjust since the easing of COVID restrictions. Together with my colleagues at NMDLA, we are taking this year to renew and readjust, too.

We kicked off this year with DLA's annual Insurance Bad Faith Seminar, led by Amy Headrick and Jeffrey Mitchell. Attendees were able to either get an introduction or refresher (depending on their experience) on the basic principles of bad faith litigation from Alicia Santos. The seminar also included several speakers discussing the latest trends in insurance bad faith. Sonya Burke provided a detailed presentation regarding the defense of hail-damage-related-bad-faith claims. Dan O'Brien led a roundtable discussing recent appellate cases, including a review of the *Crutcher v. Liberty Mutual Ins. Co.* decision. There was also a panel, led by Courtenay Keller and featuring Alicia Santos and Justin Goodman, discussing the recent surge in *Hovet* cases in third-party lawsuits. A big thanks to each of our speakers for volunteering their time and effort.

We also presented a series of free, one-hour lunchtime CLE webinars to our membership on subjects not usually covered in our traditional NMDLA programing, such as valuation of life-care plans and accident reconstruction. If you have not joined one of these events yet, I recommend you do. It is a great way to get value out of membership and brush up on topics for your practice area.

Our recent webinar on medical damages discussed economic theory of determining "reasonable value" when large medical losses are at issue in a case. When comparing hospital prices in the United States, New Mexico is the fourteenth most expensive state according to 2019 Johns Hopkins study.[1] To solve the problem of medical-billing markups, the field of health economics has developed standard methods for calculating the value of medical services. These methods can be as precise as a zip-code-by-zip-code analysis, or as wide-ranging as a multi-state evaluation. I would like to extend a special thank you to our speakers, John Schneider and Cara Scheibling of Avalon Health Economics, for such an engaging presentation.

We have also presented a series of traffic accident/reconstruction webinars. Most popular vehicles from 2000 to present have event data recorders (EDRs) that contain a myriad of information that can be used to create highly detailed video reconstructions of accidents.

Coming up this summer is the return of social activities. We have a happy hour planned in Santa Fe for June 16, 2022 at the Cowgirl Café. We anticipate having another one in Albuquerque on June 24, 2022. These events are free, but please pre-register on our website.

Many of us have missed the camaraderie of our colleagues. This will be a welcome change from the past two years. In that regard, I would also like to highlight our revamped NMDLA social media pages. NMDLA has a LinkedIn, Facebook, and Twitter feed to keep our membership informed and to continue conversations sparked by our CLE programs. Please add NMDLA to your social media feeds to keep up to date on events and programming.

Christina L. G. Brennan
Brennan & Sullivan, P.A.
2022 NMDLA President

[1] Johns Hopkins Univ. Cost & Policy in Healthcare Rsch. Grp., *Hospital Prices in the United States: An Analysis of U.S. Cities and States* (Sept. 10, 2019), https://npr-brightspot.s3.amazonaws.com/legacy/sites/wusf/files/201910/hospital_prices_in_the_u.s._report.pdf.

"Down the Down the Rabbit Hole": Developing Professional Opinions

By Terence Kadlec
Director Specialty Practices, Envista Forensics & Bruce Barnes, Technical Director, Envista Forensics

Personal vs. Professional Opinions

Everyone has one – an opinion that is. On the face of it, an opinion seems so basic, so understood. An opinion is a view, judgment or appraisal formed in the mind about a particular subject. One thing everyone does not have is a professional opinion. Personal opinions are born from beliefs, personal biases, past experiences, moral compass and/or politics. Professional opinions are formed from data, science, evidence, principles, education, training and/or relevant experience. There is a definitive difference between the two definitions. While personal opinions are more subjective, professional opinions must be objective. Let's go down the rabbit hole to discuss how professional opinions are developed, substantiated and founded.

The Certainty of an Opinion

For this exercise, we must consider how an expert develops a professional opinion under the premise of certainty. If we were to put certainty on a scale from 0 to 100, with nonsense at 0% fact at 100%, equilibrium happens at the middle. The middle would be where a professional opinion "waffles" or "teeters both ways" or more simply, does not have any certainty in either direction. As engineering experts, professional opinions are based on many factors including science and evidence, so if the scale tips, it tips in the direction of certainty. If certainty is greater than 50%, an expert could form an opinion stating the certainty of that professional opinion as being "more likely than not." A professional opinion at this level would be admissible in court. Whereas anything less than certainty (~50%) would be considered unfounded or lacking merit., we'll call it "junk science." Absent of 100% certainty (which plays a greater role in criminal law than in civil litigation), professional opinions are weighed by the preponderance of evidence. The goal of any expert should be to separate fact from fiction, setting aside personal opinions and presenting professional opinions based on facts, evidence and analyses supported by testing through a scientifically supported methodology, such as the scientific method.

Scientific Knowledge vs. Junk Science

The purpose of validating professional opinions at the very beginning of an investigation foreshadows what happens months or years later, when the expert presents such opinions to the trier of fact. A landmark case, Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993), played a crucial role in establishing the admissibility of experts and their opinions, which subsequently led to the Daubert standard that we know today. Subsequent cases also elevated the current Daubert standards for expert witness testimony, including General Electric Co. v. Joiner, 522 U.S. 136 (1997) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). In consideration of Daubert, the allowance for an expert to testify and subsequently offer opinions was established.

An expert may provide testimony of their professional opinions in conjunction with their qualifications, which are based on education, training, experience, skill and knowledge. The Federal Rules of Evidence, Rule 702, Testimony by Expert Witnesses (FRE 702), states that an expert may testify only if, "(a) the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, (b) the testimony is based on sufficient facts or data, (c) the testimony is the product of reliable principles and methods and (d) the expert has reliably applied the principles and methods to the facts of the case."

In conjunction with FRE 702, the Daubert standard determines a conclusion is qualified as scientific knowledge if, "the proponent can demonstrate that it is the product of sound, 'scientific methodology' derived from the scientific method." Effectively, the justices on the case aimed to bar "junk science" while promoting the scientific method. The five critical factors at play include:

1. Whether the theory or technique in question can be, and has been tested
2. Whether it has been subjected to peer review and publication

3. The theory or techniques known or potential error rate
4. The existence and maintenance of standards controlling the theory or techniques operation
5. Whether theory or technique has attracted general acceptance within the relevant scientific community

It is clear that the legal system aims to hold experts accountable for their professional opinions with the intent to eliminate junk science and promote greater certainty.

Substantiating Opinions with the Scientific Method

The scientific method is a technique used in the development and testing of scientific hypotheses. In the forensics world, the scientific method is generally used to determine causation or extent of damage following a catastrophic event or allegation of defect. An opinion is developed through the following steps:

1. What happened?
2. What question needs to be answered? What has been alleged?
3. Inspect and evaluate whether reported damage, defect or other.
4. Develop an "if, then" question.
5. Experiment/Test. Compare the physical evidence to the hypothesis. If necessary, form new hypothesis and repeat step until certainty is reached.
6. Explain why hypothesis is correct through tests/evidence.
7. Present the professional opinion.

In parallel to the scientific method, is the industry standard published by the American Society of Testing and Materials (ASTM), ASTM E620 – Standard Practice for Reporting Opinions of Scientific or Technical Experts. A review of ASTM E620 reveals the parallel sections that hold experts accountable in forming and presenting professional opinions. Such includes, evaluating the facts, using logic and reasoning and presenting scientifically supported opinions and conclusions.

The Foundation of a Professional Opinion

One of the most crucial parts of a building is its foundation. A building will not stand without a structurally sound and supported foundation. There are parallels here to presenting a professional opinion, the building represents the professional opinion. The term "foundation" in the legal system shows up with regards to both evidence and experts. For instance, before evidence can be admitted at trial, the foundation for admitting such evidence must be laid by the party offering it. Further, the foundation must also be laid for the qualification of a witness who will testify as an expert.

As it relates to expert opinions, the "foundation" includes the first five tests of the scientific method, observe, question, research, hypothesize and experiment/test. Without developing a hypothesis, testing the hypothesis and comparing physical evidence to the hypothesis, how can a professional opinion be presented? They can't and they don't. Any such opinions that are not based on the foundational principles of the scientific method are unfounded and lack merit.

Professional opinions require review of evidence, the application of logic and reasoning, a thorough evaluation of facts and a foundation built on scientific knowledge and the scientific method. This approach affirms greater certainty and reliability of reporting, opinions and testimony by experts.

Negligent Entrustment of Chattel: *Morris v. Giant Four Corners, Inc.*

By Morgan E. Porter
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On July 19, 2021, upon certified question from the United States Court of Appeals for the Tenth Circuit, the New Mexico Supreme Court issued a slip opinion for *Morris v. Giant Four Corners, Inc.* The Supreme Court held a commercial gasoline vendor (gas station) may be liable to a third party under a theory of negligent entrustment for the sale of gasoline to an intoxicated driver.[1]

I. FACTS OF THE CASE.

In the early morning hours of December 30, 2011, Andy Denny's night of drinking led him to Tohatchi, New Mexico.[2] He had run out of gasoline and walked with his passenger to the gas station to purchase gasoline and continue driving.[3] Upon arrival, Denny found there were no gas cans available to take the gasoline back to the car, and instead bought a gallon of water, which he then emptied and filled with one gallon of gas.[4] The clerk had initially refused to sell the gallon of water and gasoline to Denny and his passenger because the two were intoxicated, but eventually allowed the transaction.[5] After purchasing the one gallon of gas and returning to the vehicle, Denny and his passenger brought the car back to the gas station to purchase an additional nine gallons of gasoline.[6] Once finished, the two left the gas station and Denny dropped off his passenger.[7] Denny then continued on the highway.[8] He eventually crossed the centerline, colliding with Marcellino Morris, who was killed.[9]

At the scene of the accident Denny blew a 0.080 BAC. Subsequently, a blood sample taken almost four hours after the accident showed an alcohol concentration of 0.176.[10] Denny was arrested for driving under the influence, vehicular homicide, and driving left of center.[11]

II. PROCEDURAL HISTORY.

The Wrongful Death action originated in the District Court of the Navajo Nation but was barred by the statute of limitations, a decision that was later affirmed by the Navajo Nation Supreme Court.[12] A parallel action was removed from the New Mexico Eleventh Judicial District Court to the United State District Court

1 *Morris v. Giant Four Corners, Inc.*, 2021-NMSC-028, ¶ 2, 498 P.3d 238.
2 *Id.* ¶ 4.
3 *Id.*
4 *Id.* ¶ 5.
5 *Id.*
6 *Id.*
7 *Morris*, 2021-NMSC-028, ¶ 6.
8 *Id.*
9 *Id.*
10 *Id.* ¶ 7.
11 *Id.*
12 *Id.* ¶ 3.

for the District of New Mexico.[13] A motion for summary judgment on the pleadings was granted and, although the District Court acknowledged that an owner or controller of chattel has a duty to not give control "of a dangerous instrumentality to a person who is not capable of using it carefully," the District Court declined to find a duty "to refrain from selling gasoline to an allegedly intoxicated driver."[14] The District Court also noted that the New Mexico Supreme Court would be better situated to resolve the question of law as no New Mexico statute or case imposed this duty.[15] On appeal, the United State Court of Appeals for the Tenth Circuit certified to the New Mexico Supreme Court the question of law at issue in this case.[16]

III. NEW MEXICO SUPREME COURT ANALYSIS.

Plaintiff argued that, under the doctrine of negligent entrustment of chattel, Defendant owed a duty to refrain from selling gasoline to a person it knew or should have known was intoxicated.[17] The Supreme Court discussed the duties arising from negligent entrustment of chattel as it "[was] a question previously unanswered by this Court."[18] Therefore, discussion was confined to duty based on policies or principles, but the Supreme Court declined to discuss foreseeability or weigh the evidence, as both of those questions involve discussion of facts to be decided by a jury.[19]

Under *McCarson v. Foreman*, negligent entrustment of chattel has been recognized as a cause of action in New Mexico.[20] General principles of negligence guide a claim for negligent entrustment of chattel and New Mexico courts have relied upon sections 308 and 390 of the Restatement (Second) of Torts to shape this doctrine.[21] Section 308 is titled "Permitting Improper Persons to Use Things or Engage in Activities" and states:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.[22]

And section 390, titled "Chattel for Use by Person Known to be Incompetent" provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Plaintiff argued that Sections 308 and 390 imposed a duty of care on "anyone entrusting chattel to another and does not limit liability to a specific category of chattel or type of entrustment."[23] Defendant disagreed, arguing that the expansion of negligent entrustment needed to be rooted in a specific, legal duty but, because "no New Mexico case applies negligent entrustment of chattel to the sale of gasoline[,]" that was not the case.[24]

The Supreme Court ultimately agreed with Plaintiff. There is a duty to refrain from selling gasoline to drivers that vendors know, or should have reason to know, are intoxicated.[25] In considering public policy, New Mexico statutes, case law of other jurisdictions, and general principles of the law, the Supreme Court noted that "the application of negligent entrustment of chattel to the sale of gasoline is consistent" therewith.[26] Particularly as it relates to New Mexico's strong "policy to address driving while intoxicated[.]"[27] In fact, according to the Supreme Court,

> [a] duty not to sell gasoline to an intoxicated person is consistent with liability for providing an intoxicated person with alcohol or a vehicle. Gasoline, alcohol, and the vehicle itself are all enabling instrumentalities involved in intoxicated driving. Gasoline is required to operate most vehicles today. Providing gasoline to an intoxicated driver is like providing car keys to an intoxicated driver.[28]

In addressing concerns that such a duty would be impose upon potential tortfeasors "unreasonable and uncertain duties," the Supreme Court explained that it believed that the duty was "clear" as "naturally limited."[29] This is because the ability to ascertain whether a person is intoxicated is something a layperson can do, so long as they have the "opportunity to observe that person."[30] And while there are valid concerns that a gas station employee may (1) not be able to view the purchaser of gas at the pump, (2) not be able to ascertain whether the purchaser

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13 *Morris*, 2021-NMSC-028, ¶ 3.
14 *Id.* ¶ 8.
15 *Id.*
16 *Id.*
17 *Id.* ¶ 19.
18 *Id.* ¶ 9.
19 *Morris*, 2021-NMSC-028, ¶ 46 (citing *Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 2014-NMSC-014, ¶¶ 4, 9, 326 P.3d 465).
20 *McCarson v. Foreman*, 1984-NMCA-129, ¶¶ 10, 13, 102 N.M. 151, 692 P.2d 537.
21 *Morris*, 2021-NMSC-028, ¶ 14.
22 Restatement (Second) of Torts § 308.
23 *Morris*, 2021-NMSC-028, ¶ 19.
24 *Id.* ¶ 20.
25 *Id.* ¶ 47.
26 *See id.* ¶ 24.
27 *See id.* ¶ 25.
28 *Id.* ¶ 33.
29 *Morris*, 2021-NMSC-028, ¶ 42.
30 *Id.* ¶ 44.

is the driver or the passenger, or (3) may not even interact with the purchaser as is the case at unattended gas stations, the Supreme Court felt such questions were "better described as questions of foreseeability and breach which are left for the jury in individual cases."[31]

IV. CONCLUSION.

The *Morris* decision is yet another example of the expansion of tort law in New Mexico. We can be certain that the plaintiffs' bar will use *Morris* as a sword to recover more for victims of drunk driving and to further expand the scope of negligent entrustment claims. The impact of *Morris* on litigation in New Mexico remains to be seen, but defense attorneys should bear in mind the gateway now opened for third-party recovery.

[31] *Id.* ¶ 46.

How to Highlight the Strengths of your Corporate Witness

By Sharon D. Stuart
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You arrived at your office this morning to be greeted by a 30(b)(6) notice of deposition in a big case pending in federal court. The notice contains numerous topics for examination and a voluminous document request. For months, you have anticipated receiving this notice, and while you had a general idea of the categories of testimony the plaintiff would request based on the issues in the case, you immediately see that this notice is broader than you expected, privilege issues are implicated, and the testimony of several witnesses may be required to satisfy the notice.

With proper 30(b)(6) preparation, you and your witness can shine.

You immediately get busy, notify your client, drill down on the substance of the notice in light of the facts and the law in the case, and begin analyzing who the most appropriate witnesses will be. You are well aware of how important a corporate representative's testimony can be — it can literally make or break the case for your client. You are also aware of the onerous burden rule 30(b)(6) places on the corporation. *See Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000) ("We understand that the burden upon the responding party, to prepare a knowledgeable Rule 30(b)(6) witness, may be an onerous one, but we are not aware of any less onerous means of assuring that the position of a corporation, that is involved in litigation, can be fully and fairly explored."). So, you need to be sure that you are taking the right steps to select, prepare and present your 30(b)(6) witness. The following are some pointers to help you make the most of this crucial part of your case.

Meet and Confer Under Amended Rule 30(b)(6)

Effective December 1, 2020, the U.S. Supreme Court approved the first-ever substantive amendment to Federal Rule of Civil Procedure 30(b)(6). The amendment is intended to address years of complaints by lawyers on both sides of the bar and to "facilitate [] collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1)." The amended Rule, with new portions italicized, provides:

> (6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. *Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination.* A subpoena must advise a nonparty organization of its duty *to confer with the serving party and to designate each person who will testify.* The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Based on the amended rule, one of the first steps the parties must take is to confer about the matters in the notice. Precisely what does this mean? It does not mean that the organization must let its opponent participate in the identification of the witnesses. To do so would contravene the longstanding law preventing the party issuing the notice from designating who

will testify on behalf of the organization. It also does not mean that the parties must confer about the number and description of matters for examination. Although this could be a helpful area for discussion to clarify the scope of a deposition and was considered by the Federal Rules Advisory Committee, it ultimately was not included in the amended rule. Nonetheless, you should consider addressing it with opposing counsel. The organization will be ultimately responsible for selecting and preparing the witness, and your client will benefit from an attempt to streamline the topics and to reach agreement on the length of the deposition. This is a good exercise if only to make a record about your attempts to achieve clarity as to the scope of the deposition prior to tendering your witness, in the event a dispute develops.

What it *does* mean is that the parties must confer "about the matters for examination." Because this is such a vague requirement, it runs the risk of not being helpful, unless you, as counsel for the organization, proactively deal with opposing counsel to pare down "overlong or ambiguously worded lists of matters for examination," ensure the deposition doesn't become a fishing expedition to develop new theories and get enough information about opposing counsel's objectives to make sure your witness is adequately prepared to address the topics in the notice. *See The U.S. Supreme Court Congressional Rules Package 2020.* The rule requires the noticing party to set out with reasonable particularity the matters for examination. If the notice is overly broad or ambiguous, or if the topics for examination are not meritorious, this is your chance to rein it in, refine the matters for examination, and designate the appropriate person. It is also your opportunity to work through logistical issues relating to the time and place of the deposition, the length of the deposition, and the number of witnesses. This is the first chance for you to help your witness by setting the stage for a successful deposition.

What if the Parties Cannot Agree on the Scope and Matters for Examination?

The federal rule has never provided a satisfactory remedy for obtaining relief from an improper 30(b)(6) notice, and the amendment did not improve that defect. If, after conferring on the 30(b)(6) notice, the parties cannot reach agreement, the organization must file a motion for a protective order, which does not guarantee adequate or timely relief. Thus, the earlier you can start addressing the topics with opposing counsel, the better. The amended rule encourages early discussion, in good faith, which should reduce the amount of motion practice related to 30(b)(6) depositions, but in the event a motion is needed, the more time you have to file and get it heard, the better.

The issues on which motion practice may be needed typically fall into four categories: relevance, overburden, overbreadth, and privilege. Courts have begun to render decisions addressing these issues based on the new rule. These cases do provide some takeaways. First, blanket objections are insufficient — the party seeking protection should specifically articulate the objectionable categories or topics and explain the basis for seeking the court's ruling preventing the discovery. *See generally Whatley v. Canadian Pac. Ry. Ltd.*, 2021 U.S. Dist. LEXIS 93915 (D. N.D. May 14, 2021) (analyzing objections of relevance, overburdensomeness, and "discovery on discovery" relating to a motion to quash 30(b)(6) deposition). Additionally, the duty to confer before filing a motion is real. *See, e.g., Buckley v. S.W.O.R.N. Prot. LLC*, 2021 U.S. Dist. LEXIS 216456 (N.D. Ind. Nov. 9, 2021) (awarding plaintiff costs for defendants' insufficient effort to confer before filing motion for protective order on 30(b)(6) notice).

Selecting a Corporate Representative

The rule requires that persons designated must testify about information known or reasonably available to the organization. The witness can be a current or former employee, and in some cases, a third party retained by the organization. The person chosen to testify does not need to have the most knowledge about a topic, but she must be able to provide complete, knowledgeable, and binding answers on the corporation's behalf. See Am. Bar Ass'n Civil Discovery Standards 19(b) and 19(f). Often, you will have a choice to make—of two witnesses with similar knowledge, which one will make the best witness? If there are areas where the better witness will need preparation, can you adequately educate him so that he can provide sufficient testimony to bind the corporation? It is usually wise to select the person who will best tell the company's story.

If no current employee has sufficient knowledge to answer the questions, do you need to designate a third party such as a former employee? See Wilson v. Lakner, 228 F.R.D. 524, 528 (D. Md. 2005) (a third party with experience as a deponent may be the corporation's best option in fulfilling its 30(b) (6) obligations). If you designate a third party, will the privilege apply to your communications with the witness under the applicable law?

Should you designate a corporate witness with extensive personal involvement with the facts? Doing so often blurs the line between corporate knowledge and personal knowledge, which can be troublesome, particularly where the witness is noticed in his personal capacity and then is designated as a corporate representative as to certain topics.

Can you limit the testimony to one witness and still satisfy the notice? The fewer witnesses you can designate, the better, to prevent the possibility for contradiction, limit the preparation time required, and limit the deposition (at least in federal court) to one seven-hour day, absent a court order. Fed. R. Civ. P. 30(b)(1).

Preparing to Prepare Your Witness

Preparing a witness who can gather and summarize everything that the company knows is one of the "obligation[s] that flows from the privilege of using the corporate form to do business." *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012). Not only is the best 30(b)(6) witness a well-prepared witness—it is the organization's obligation to make sure the witness is adequately prepared to speak on its behalf. Although "[a]bsolute perfection is not required of a 30(b)(6) witness," producing an unprepared Rule 30(b)(6) witness is tantamount to a failure to appear, possibly warranting sanctions under Federal Rule of Civil Procedure 37(d). *Oro BRC4, LLC v. Silvertree*

Apts., 2021 U.S. Dist. LEXIS 108678, *11 (S.D. Ohio, June 10, 2021) (awarding sanctions including attorney fees, costs, and a second deposition for defendant's failure to adequately prepare corporate representative); *Brazos River Auth. v. GE Ionics, Inc*., 469 F.3d 416, 433 (5th Cir. 2006) (the witness must be able to discuss what the employer reasonably should have known, as well as its subjective beliefs and opinions). The witness should be educated as to the categories of testimony and documents sought by the notice, defense themes, safe spaces to come back to during testimony, and how to address anticipated thorny issues and trick questions. The lawyer must carefully select the documents for the witness to review and go over each of them with the witness. If the witness is being tendered on subjects on which she does not have personal knowledge, the lawyer must educate the witness, including potentially assigning the witness homework and organizing meetings with knowledgeable people to educate the witness.

Research Opposing Counsel

To adequately prepare your corporate witness, you should find out everything you can about opposing counsel. If you have not participated in depositions with that particular lawyer, try to locate transcripts of representatives in other cases and talk to counsel who have defended depositions against her. What can you and the witness expect? What is the lawyer's style? Does the lawyer use the reptile method? Are there certain questions this lawyer always asks of corporate deponents?

Research Your Client

You should familiarize yourself not only with the documents pertinent to your case, but also your client's public information. Read the website. Read the most recent Annual Report and securities filings. It is likely that your opponent will. These documents often contain statements and other information that opposing counsel will use in the form of questions to seek agreement from the witness and then use those to trap the witness in an admission. By acquainting yourself with these documents, you can anticipate such questions and make sure your witness is ready for them.

Select Key Documents

Adequate witness preparation starts with adequate lawyer preparation. That means you must take the time to gather the documents responsive to the notice, analyze those documents, and select all key documents for the witness to review. Use the documents as a timeline or chronology that the witness can study. If circumstances warrant, such as if there are numerous dates or figures that a person simply can't remember, the witness may use those documents to prepare a note to use in the deposition. In some cases, you may need to prepare a summary of the case. Of course, either of these will be discoverable, so you should be ready to turn them over and prepare them with that in mind.

Preparing the Deponent

Witness preparation should start with an outline of the basic rules — we can probably recite these in our sleep: listen carefully; make sure you understand the question before trying to answer it; don't volunteer; don't speculate; do not be arrogant, condescending, flippant or sarcastic; avoid being emotional; and of course, tell the truth. Make sure the witness knows what to wear, where to be and when, and has any other logistical assistance needed.

Substantive preparation should include (1) the facts; (2) the company's positions on issues; (3) subjective opinions or beliefs of the organization; and (4) interpretation of facts and events. *See Krasney v. Nationwide Mut. Ins. Co*., No. 06-cv-1164, 2007 WL 4365677 (D. Conn. Dec. 11, 2007). Preparation should begin with an overview of the case, review of the complaint and answer, and review of the 30(b)(6) notice. If the witness is already familiar with the facts, preparation might start with you asking the witness questions, so that you can hear her unvarnished version of the case. Gauge any areas of weakness and do the legwork necessary to fill in the gaps — this may involve pulling additional records or speaking with additional persons with knowledge. The witness will likely need to do his own research. That work may involve contacting former employees or reviewing their files, since the corporation's knowledge does not end when an employee leaves. The deponent should familiarize himself with how the company maintains its files. This exercise is often time-consuming and difficult, but that does not excuse the failure to do it. *See Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co*., 201 F.R.D. 33, 37 (D. Mass. 2001) ("Even if the documents are voluminous and the review of those documents would be burdensome, the deponents are still required to review them in order to prepare themselves to be deposed.")

If the information is *reasonably* available, the organization has an obligation to gather it for the deposition. It is a good idea for you, as counsel, to track each step taken by the witness to prepare on each topic, so that you know exactly what has and has not been done. Keep detailed notes of any subjects on which the witness is deficient or as to which the organization simply lacks knowledge, so that you can demonstrate the organization's good faith in attempting to locate responsive information or ascertain that none exists. *See Fraser Yachts Florida, Inc. v. Milne*, No. 05-21168-CIV-JORDAN, 2007 WL 1113251 at *2 (S.D. Fla. Apr. 13, 2007) (the absence of corporate knowledge, by itself, may be relevant to the issues in a particular case).

If the witness has independent personal knowledge of the facts, prepare her to distinguish any answers based on her personal knowledge from those based on the organization's knowledge. It is critical that the record clearly differentiates between the two.

If you haven't already, this is the time to develop themes for the case. It will give context to your client's position, which is helpful to a witness who needs to know what the goal of her testimony is. It will also give the witness safe spaces to come back to in response to tough questioning. Finally, having your witness carry your theme is an important step in laying the foundation for your presentation to the jury if the case is tried.

Next, practice. Ask the questions you expect the witness to be asked in deposition, and talk through how to answer specific questions, especially the difficult ones. Make sure the witness can articulate the organization's interpretation of events and documents, as well as its position on the claims and defenses asserted. In most cases, a mock examination is helpful, not only to expose areas of weakness, but to help the witness get comfortable on the "hot seat" or on videotape. When facing an opponent that uses the reptile method, mock examination is imperative. In certain cases, you should hire a consultant to assist with witness preparation. If the deposition is to be conducted remotely, make sure to explain how it will work and how exhibits will be handled. Explain how objections at a deposition work, so the witness is not confused when you object during the deposition. For a comprehensive list of the expectations for corporate representatives, see the helpful opinion in *QBE Ins., supra*, in which the court laid out 39 guiding principles for 30(b) (6) deponents.

Privilege

If the witness' testimony relies on privileged documents or communications, the organization risks waiver. Depending on the jurisdiction, review of privileged materials in preparation for the deposition may waive privilege. Make sure to consider the applicable privilege law in your jurisdiction. Any reliance on privileged information should be evaluated extremely carefully and documented with the client. Under what circumstances must privileged information be disclosed? Courts often struggle to analyze privilege issues in connection with 30(b)(6) depositions. While the organization is not required to disclose the opinions and strategies of counsel, the corporate representative must usually testify to facts that the company learned through its lawyers' investigation. *SEC v. Merkin*, 283 F.R.D. 689, 697–698 (S.D. Fla. 2012). However, some courts hold that where the lawyers' investigation so intertwines facts with the lawyer's mental impressions that they cannot be readily separated, privilege protects the investigation, particularly if other avenues for obtaining the information exist. *See In re Cathode Ray Tube Antitrust Litigation*, 2015 U.S. Dist. LEXIS 147413 at *219-20 (N.D. Cal. Oct. 5, 2015). In any event, when preparing the witness, counsel should keep in mind the facts the attorney knows that need to be shared with the witness. Counsel should make sure the witness is careful not to stray from the facts into mental impressions and strategy of counsel.

In some cases, the person with the most knowledge about the case is a lawyer. Designation of a lawyer as witness can waive privilege or may run afoul of ethical rules resulting in disqualification as counsel, so this approach, while sometimes necessary, should be used with extreme caution. *See Cartier v. Bertone Group, Inc.*, 404 F. Supp.2d 573 (S.D.N.Y. 2005). If a lawyer is the only person with knowledge of the topic areas, courts generally do not recognize a blanket privilege objection protecting the organization from tendering the lawyer as a corporate representative. Instead, the court may strike a balance to allow discovery of nonprivileged information and communications within the witness's knowledge. *See U.S. v. Stabl, Inc.*, 2018 WL 3758204 (D. Neb. Aug 8, 2018).

Objections

Be prepared for questions beyond the scope of the notice. Decide, in advance, based on local court practice and the law of your jurisdiction, whether to object to such questions and whether to allow the witness to answer them. Courts have issued mixed rulings on whether to allow 30(b)(6) questioning that exceeds the scope of the notice. *Cf. Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727, 729 (D. Mass. 1985) (minority view—scope should be limited to the topics in the notice; counsel should let the witness answer, over objection, and then move to limit the scope of the deposition) with *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (majority view — rule does not limit the scope of the notice, although the noticing party has no remedy if the witness does not know the answers to questions outside the scope). This requires a decision whether to allow those answers in only the witness' personal capacity, or whether to require a separate deposition solely in the witness' personal capacity.

Generally, objections should be limited to the form of the question, or as otherwise prescribed by local practice. In some situations, counsel deposing the witness will insist that the defending lawyer make trial objections at the deposition. In that situation, defending counsel should be prepared to do so. Avoid speaking objections. *See* Fed. R. Civ. P. 30(d) Advisory Committee Notes (1993). Reserve instructions not to answer to questions that seek to invade the attorney–client privilege or other applicable privileges. *See* Fed. R. Evid. 502(g). At least one court has addressed this issue under amended Rule 30(b)(6), holding that, when the scope of questioning exceeded that to which the parties had agreed, defendant had a right to limit the testimony but improperly instructed the corporate witness not to answer. The court held that the defendant should have filed a motion to terminate or limit the deposition under Rule 30(d) (3), however, the court did not award sanctions. *Kovich v. Nationwide Prop. & Cas. Ins. Co.*, 2021 U.S. Dist. LEXIS 224920, *7 (S.D. W. Va., Nov. 22, 2021).

Conclusion

Although 30(b)(6) preparation is tedious and time consuming, by doing the required legwork up front, designating the right representative, preparing the witness strategically and methodically, and preparing yourself to defend the deposition and the legal issues that arise, your chance of success is high, and your witness will have every opportunity to shine.

NMDLA Civil Case Summaries

Filed between October 13, 2020 and March 23, 2022

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Arbitration Agreements

NM Bar Bulletin – Oct. 13, 2020
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Peavy v. Skilled Healthcare Grp., Inc., 2020-NMSC-010 (filed Apr. 6, 2020)

Peavy involved a wrongful death lawsuit brought against Defendant, the nursing home operator where the decedent was a resident. The decedent's estate alleged various causes of action, including negligence. Defendant moved to compel arbitration and the District Court denied Defendant's motion. Defendant appealed to the Court of Appeals, who affirmed. Defendant filed petition for writ of certiorari, which the Supreme Court granted.

The appeal concerned the substantive conscionability of an arbitration agreement that exempted Defendant's likeliest claim from arbitration, but requireed its residents to arbitrate their likeliest claims.

The Supreme Court began by summarizing New Mexico conscionability jurisprudence. A presumption of unfair and unreasonable one-sidedness arises when a drafting party excludes its likeliest claims from arbitration, while mandating the other party arbitrate its likeliest claims. This presumption stems from the lack of mutuality that correlates with overly one-sided contracts. The drafting party can overcome the presumption through evidence that justifies the one-sidedness of the arbitration agreement. To do so, the drafting party must offer evidence showing that an arbitration agreement's exceptions are reasonable and fair, such that enforcement of the agreement is not substantively unconscionable.

Then, the Supreme Court announced a two-step analysis for courts to apply when confronted with the substantive conscionability of an arbitration agreement. First, the court should analyze the arbitration agreement on its face to determine the legality and fairness of the contract terms. Second, if the court determines the arbitration agreement is facially one-sided, the court should allow the drafting party to present evidence that justifies the agreement is fair and reasonable, such that enforcement of the agreement would not be substantively unconscionable.

Turning to the case at bar, the Supreme Court concluded that the lower courts had engaged in such an analysis. Additionally, the Supreme Court agreed with the lower courts that: (1) the agreement at issue was facially one-sided, because it exempted Defendant's likely claim while requiring its residents to arbitrate their likeliest claims; and (2) Defendant had failed to justify the one-sidedness of the agreement, because the evidence did not show that the agreement's collections exception was fair and reasonable. Accordingly, the Supreme Court affirmed the Court of Appeals' decision.

IPRA/Summary Judgment

NM Bar Bulletin – Oct. 27, 2021
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No. S-1-SC-37094

Jones v. City of Albuquerque Police Dep't, 2020-NMSC-013 (filed July 14, 2020)

Plaintiff brought an Inspection of Public Records Act (IPRA) enforcement action against the Department of Public Safety (DPS) arising from a records request relating to a police shooting. DPS denied production of some records in its possession on the basis that the shooting was the subject of an ongoing investigation and exempt from disclosure under NMSA 1978, Section 14-2-1(A). Additionally, DPS argued it had a duty to cooperate with the FBI, under NMSA 1978, Section 29-3-3, who had specifically requested that DPS not publicly release evidence related to its investigation in order to maintain its integrity. Plaintiff filed a lawsuit and subsequently moved for summary judgment, contending that IPRA required disclosure of the requested records. The District Court denied Plaintiff's motion, finding that whether there was an ongoing criminal investigation was both material and disputed. It further found that the requested records were exempt from disclosure pursuant to Section 14-2-1(A)(4).

A few months later, DPS moved for summary judgment because it had produced the documents to Plaintiff, subsequent to the completion of the FBI investigation. The District Court granted DPS' motion. Plaintiff appealed and the Court of Appeals affirmed, holding that Plaintiff acquiesced to, and failed to preserve appeal of, the District Court's denial of his motion for summary judgment and, regardless, the case was moot. The Supreme Court heard the case on writ of certiorari.

On appeal, the Supreme Court overturned the Court of Appeals. First, the Supreme Court concluded Plaintiff did not acquiesce to, or fail to preserve appeal of, the District Court's denial of his motion for summary judgment. He was not required to apply for discretionary remedies, such as an interlocutory review or reconsideration, of the District Court's denial of his motion for summary judgment. Second, the Supreme Court concluded that the case was not moot. While Plaintiff eventually had received the records he requested, there was an active controversy over Plaintiff's ability to recover attorney fees.

In addition, the Supreme Court reversed both the District Court's grant of DPS's motion for summary judgment and denial of Plaintiff's motion for summary judgment. Relying on the plain language of Section 14-2-1(A), the Supreme Court held that there is not a blanket exception from inspection of law enforcement records relating to an ongoing criminal investigation. The purpose of IPRA is to ensure that all persons are entitled to the greatest possible information regarding the affairs of the government and the official acts of public officers and employees. Simply put, the District Court's interpretation of Section 14-2-1(A)(4) was overbroad. Moreover, the ongoing FBI investigation was not, of itself, material to whether the requested records could be withheld. Therefore, the Supreme Court held that summary judgment in favor of Plaintiff was proper. He established a prima facie case for summary judgment and DPS did not present any competent evidence that established a genuine issue of material fact as to whether DPS lawfully denied inspection of the requested records.

Injuries to a Person's Reputation/Unfair Practices Act

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No. A-1-CA-36634

Vigil v. Taintor, 2020-NMCA-037, 471 P.3d 1220 (filed Dec. 11, 2019)

Plaintiff alleged that her image was used on merchandise, including flasks and magnets, with the caption, "I'm going to be the most popular girl in rehab!" without her permission. She sued the artist and the artist's corporation alleging defamation, false light, appropriation, and a violation of the Unfair Practices Act (UPA). The District Court granted the defendants' motion for summary judgment, reasoning that Plaintiff's claims were time barred and Plaintiff did not have standing to bring an UPA claim. On appeal, the Court of Appeals affirmed.

With regard to Plaintiff's claims for defamation, false light, and appropriation, the Court of Appeals held that Plaintiff's claims fell squarely within "the single publication rule," which holds that multiple disseminations of the same content give rise to only one cause of action and the statute of limitations runs from the point at which the original dissemination occurred. The Legislature designed the single publication rule to protect defendants from a multiplicity of suits, an almost endless tolling of the statute of limitations, and diversity of applicable substantive law. The single publication rule applies to damages for libel, slander, invasion of privacy, or any other tort founded upon any single publication, exhibition, or utterance. Plaintiff failed to show why the single publication rule was inapplicable to the facts at hand.

Having concluded the single publication rule applied, the Supreme Court concluded that Plaintiff's claims were barred by the statute of limitations, as they were brought more than three years after first sale of the products bearing Plaintiff's image. In the process, the Supreme Court concluded that the republication exception did not apply to avoid the preclusive effect of the statute of limitations on Plaintiff's claims. Plaintiff failed to demonstrate the existence of specific admissible evidentiary facts disputing whether Defendants altered their products in any way that would suggest republication, rather than a delayed circulation of the original edition.

Turning to Plaintiff's UPA claim, the Court of Appeals affirmed. To prevail on an UPA claim, the claimant must prove that the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading, the false or misleading representation was knowingly made in connection with the sale of goods or services in the regular course of the defendant's business, and the representation was of the type that may, tends to, or does deceive or mislead any person. However, Plaintiff failed to demonstrate how her claims as a non-buyer fell within the scope of the UPA's protection.

UM/UIM Coverage

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No. S-1-SC-37478

Crutcher v. Liberty Mut. Ins. Co., et. al., 2022-NMSC-001, 501 P.3d 433 (filed Oct. 4, 2021)

Crutcher brought a class action lawsuit against automobile insurers to recover for violations of common law and consumer protection statutes. The insurers removed the case to the United States District Court for the District of New Mexico. The District Court certified the case to the New Mexico Supreme Court to determine whether the underinsured motorist (UIM) coverage on a policy that provides minimum uninsured (UM)/UIM limits of $25,000 per person/$50,000 per accident is illusory for an insured who sustains more than $25,000 in damages caused by a minimally insured tortfeasor.

The Supreme Court held that this type of policy is illusory because it may mislead minimum UM/UIM policyholders to believe that they will receive UIM benefits when, in reality, they may never receive such a benefit. The Supreme Court further held that an insurer must adequately disclose the limitations of UM/UIM coverage. Without such a disclosure, an insurer may not charge a premium for minimum UIM coverage.

The Supreme Court based its reasoning in large part on the Offset Rule announced in *Schmick*.[1] The *Schmick* rule states that any award of damages under an UM/UIM policy must be offset by available liability proceeds. Under *Schmick*, insurers are supposed to calculate UIM benefits by subtracting the amount of the insured's UIM coverage from the amount of the tortfeasor's liability coverage. A consequence of *Schmick* is if injured persons purchased only the statutory minimum policy, the person's policy will not cover losses for damages in excess of $25,000.

Because of the repercussions of its decision, the Supreme Court held that an insurer may sell minimum limits UM/UIM coverage to a policyholder and only provide UM coverage. Moreover, insurers may charge a premium for such UM coverage as long as they make a proper disclosure to the policyholder.

Personal Jurisdiction

NM Bar Bulletin – Mar. 23, 2022
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No. S-1-SC-37489, S-1-SC-37490, S-1-SC-37491, S-1-SC-37536

Chavez, et. al, v. Bridgestone Americas Tire Ops., LLC, et. al, 2022-NMSC-006, 503 P.3d 332 (filed Nov. 15, 2021)

Plaintiffs brought multiple personal injury and wrongful death actions against foreign automobile manufacturers alleging defectively designed vehicles. The trial court denied the defendants' motions to dismiss for lack of general or specific personal jurisdiction. The defendants filed an interlocutory appeal. The Court of Appeals affirmed, holding that it had general personal jurisdiction over the defendants, as they had registered to do business in New Mexico pursuant to the Business Corporation Act (BCA), NMSA 1978, Sections 53-17-1 to -20 (1967, as amended through 2021). The defendants appealed to the Supreme Court.

On appeal, the Supreme Court considered whether a foreign corporation that registers to transact business and appoints a registered agent automatically consents to the exercise of general personal jurisdiction in New Mexico. The Supreme Court began their analysis by reviewing the history of personal jurisdiction and consent by registration. The Supreme Court noted that personal jurisdiction, as an individual right, can be waived through consent by registration. Thus, the Supreme Court validly acknowledged the continuing viability of *Pa. Fire Ins. Co. of Phila*.[2]

However, whether a defendant consents to personal jurisdiction by registration depends entirely on the express language of the statute. The Supreme Court believed that consent by registration under the BCA equalized domestic and foreign corporations. But, the Supreme Court declined to construe the BCA to require consent by registration in the absence of clear statutory language to that effect. Lacking such statutory language, the Supreme Court departed from *Werner*[3] and held that the BCA does not compel a registered foreign corporation to consent to general personal jurisdiction in New Mexico.

While the defendants were not subject to the general personal jurisdiction of New Mexico courts, the Supreme Court did not address whether specific personal jurisdiction existed over the defendants. The Court of Appeals did not address the issue and, therefore, the Supreme Court remanded to the Court of Appeals with instructions to consider the questions of specific personal jurisdiction.

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1 *Schmick v. State Farm Mut. Auto. Ins. Co.*, 1985-NMSC-073, ¶ 24, 103 N.M. 216, 704 P.2d 1092.
2 *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95-96 (1917).
3 *Werner v. Wal-Mart Stores, Inc.*, 1993-NMCA-112, ¶ 13, 116 N.M. 229, 861 P.2d 270.

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