DLA NEW MEXICO
Defense Lawyers Association

DEFENSE news

The Legal News Journal for New Mexico Civil Defense Lawyers

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IN THIS Edition

New Mexico Defense Lawyers Association
PO Box 94116
Albuquerque, NM 87199-4116
www.nmdla.org
tel: 505.797.6021

2019 NMDLA BOARD OF DIRECTORS

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.

The opinions expressed in our published works are those of the author(s) and do not reflect the opinions of the New Mexico Defense Lawyers Association or its Editors.

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MESSAGE FROM THE PRESIDENT

By Cody R. Rogers, Esq.
Jarmie & Rogers P.C.

Dear NMDLA Members:

As I write to you from Las Cruces, the current temperature is 103 degrees. In southern New Mexico, green chile roasting season traditionally signals the beginning of fall; the signs went up all over town this weekend. According to my calendar, the first official day of fall is less than six weeks away! It seems hard to believe fall is already upon us. I hope that you are able to enjoy green chile and (fingers crossed) cooler temperatures in the very near future.

NMDLA would like to invite you to attend our outstanding upcoming CLE programming. On August 23, Courtenay Keller will present the Insurance Bad Faith Seminar. This full day seminar will cover the latest trends and developments in bad faith litigation, including post-litigation "continuing" bad faith, "defense within limits" ("burning limits" policies), bad faith from the policyholder's perspective, responding to time-limited policy limit demands, and effective trial strategies for defending insurers. This program is designed to benefit practitioners who represent insurers in bad faith litigation as well as insurance claims professionals, in-house counsel, and outside defense counsel who defend policyholders. The program will feature a variety of national and local experts on these important topics, and any practitioner who practices in the insurance defense arena can certainly benefit.

On September 13, 2019, NMDLA will host its Annual Meeting, Awards Luncheon and Golf Tournament at Santa Ana Star Casino. We will present our Outstanding Civil Defense Lawyer of the Year and Young Lawyer of the Year awards, and then hit the golf course for some friendly competition, followed by a reception and happy hour. This is a great opportunity to celebrate the success of our colleagues with one another and enjoy some beautiful fall weather. We look forward to you joining us.

I would also like to encourage you to attend DRI's Annual Meeting, which will be held in New Orleans on October 16-19. If you've never experienced an annual meeting, it is an awe-inspiring event that will leave you invigorated and enthusiastic about the work that we do. Nationally known speakers will provide keynote addresses on a variety of subjects related to business, cybersecurity, overcoming adversity and more. There is also a great opportunity for CLE credit on topics pertinent to your practice. I don't have to tell you that New Orleans is an incredible city, and one that is particularly lovely during the fall. The food, history, culture and music are unrivaled. I can assure that you will enjoy the experience immensely. More information about the Annual Meeting can be found at https://www.dri.org/education-cle/annual-meeting.

As always, please do not hesitate to contact me if you have questions, concerns or suggestions for how NMDLA can better serve its members. Your feedback helps us meet our goal to provide the services that matter to our members and is always appreciated. I hope you enjoy the remainder of your summer and the beauty that is fall in New Mexico.

Cody R. Rogers, Esq.
Jarmie & Rogers P.C.
2019 NMDLA President

NMDLA Would Like to Congratulate Our 2019 Award Winners

Announcing the Outstanding Civil Defense Lawyer and Young Lawyer of the Year

The awards will be presented at the 2019 NMDLA Annual Meeting on Friday, September 13 in the Prairie Star Banquet Room at the Santa Ana Golf Club in Santa Ana Pueblo, New Mexico. The awards luncheon will begin at 11:30 am. Registration and additional information is available at www.nmdla.org.

Outstanding Civil Defense Lawyer

Meena Allen is the founding member of Allen Law Firm, LLC. Her practice is focused primarily on the representation of clients in a variety of commercial and insurance related disputes, including representation in all types of litigation involving trucking claims, personal injury, breach of contract, insurance coverage, bad faith litigation, first party and third party defense, environmental issues, class actions and medical malpractice. She also maintains a vibrant appellate practice. She is AV rated and selected coverage attorney by Super Lawyers for 2015-2019. Ms. Allen has authored articles for DRI on insurance matters and tried numerous cases.

Ms. Allen is admitted to the New Mexico bar, U.S. District Court, District of New Mexico; U.S. Court of Appeals, 10th Circuit; New Mexico, Hopi Tribal Courts and Navajo Nation Tribal Courts. Ms. Allen obtained her LL.M. in Insurance Law from University of Connecticut; JD from Texas Tech University School of Law, MCJ from New Mexico State University and Bachelor of Science from Queen Mary's College, University of Madras.

Ms. Allen loves to cook, watch movies and travel.

Young Lawyer of the Year

Brett C. Eaton is a shareholder with Butt Thornton & Baehr PC in Albuquerque, New Mexico. He is a graduate of the University of New Mexico and the University of New Mexico School of Law. Mr. Eaton's legal practice focuses on trucking and transportation, products liability, government entities and civil rights litigation, retail litigation, and insurance defense. Mr. Eaton enjoys spending time with his wife and two children, hiking, coaching Little League, and enjoying the pace of slow-pitch rec-league softball.

Please contact us by email at nmdefense@nmdla.org or phone 800.426.3265 with questions.

NMDLA Member Brownbag Roundtable for August

REGISTER AT WWW.NMDLA.ORG

Members are invited to dial in over the lunch hour. These calls are not CLE, just an opportunity to connect with each other. If you have a burning issue you'd like to discuss, let us know at nmdefense@nmdla.org.

Wednesday, August 21, 2019

12:00 p.m. MDT

Christina L.G. Brennan will lead a discussion on **"Constitutional Claims and Color of Law"**

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New Mexico Avoids Confusion as to the Definition of Sex Discrimination by Drafting Clear Legislation

By Sabrina Rodriguez Salvato, Esq.
Hinkle Shanor LLP

The New Mexico Human Rights Act[1] ("HRA") was amended in the first legislative session of 2019 to add a new cause of action that affects approximately 45,000 employers.[2] It is now a violation of law for "an employer[3]… to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of… sex, sexual orientation,[4] [or] gender identity[5][.]"[6] The statute was also amended to remove the language limiting this restriction to those employers with 15 or more employees.[7] By amending the HRA, first in 2003[8] and again in this past session, New Mexico has expanded protections for LGBTQ workers where federal protections have historically been slow to change.

The HRA, enacted in 1969, was modeled, in part, after Title VII of the Civil Rights Act of 1964[9] ("Title VII"). Title VII provides in pertinent part: "It shall be an unlawful employment practice for an employer… to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's… sex[.]"[10] The United States Congress has, despite many opportunities to do so, failed to amend Title VII to define the scope of its protections against sex-based discrimination.[11] In the absence of federal Congressional action, a split in authority has developed after the U.S. Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*.[12] The U.S. Supreme Court's subsequent holding in *Oncale v. Sundowner Offshore Services, Inc.*[13] further confounded the issue of what constitutes sex discrimination under Title VII.

The plain language of the HRA avoids these issues with judicial interpretation as to what constitutes sex discrimination. The U.S. Supreme Court, in taking a trio of cases on certiorari, may decide these issues next term. The cases are *Zarda v. Altitude Express, Inc.*,[14] which has been consolidated on appeal with

1 NMSA 1978, §§28-1-1 to -15.

2 Quarterly Census of Employment and Wages, New Mexico Department of Workforce Solutions, https://www.dws.state.nm.us/Portals/0/DM/LMI/Size_Class_2018.pdf (last visited June 16, 2019).

3 An "employer" is defined as "any person employing four or more persons and any person acting for an employer." NMSA 1973, §28-1-2(B) (2007).

4 "[S]exual orientation" is defined as "heterosexuality, homosexuality or bisexuality, whether actual or perceived[.]" *Id.* at §28-1-2(P).

5 "[G]ender identity" is defined as "a person's self-perception, or perception of that person by another, of the person's identity as a male or female based on the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth." *Id.* at §28-1-2(Q).

6 NMSA 1973, §28-1-7(A) (2019).

7 2019 New Mexico Laws Ch. 96 (S.B. 227); NMSA 1973, §28-1-7(A) (2018).

8 2003 New Mexico Laws Ch. 383 (S.B. 28).

9 42 U.S.C. §2000e-2(a)(1).

10 *Id.* The word "sex" "was added as a floor amendment one day before the House approved Title VII without hearing or debate." *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). Sex "was included in an attempt to defeat the bill[.]" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) (plurality), *superseded by statute on other grounds as stated in Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94–95 (2003).

11 *E.g.*, Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); To Prohibit Employment Discrimination Based on Gender Identity, H.R. 3686, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th, Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013); Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015); Equality Act, H.R. 2282, 115th Cong. (2017); Equality Act, S. 1006, 115th Cong. (2017).

12 490 U.S. 228.

13 523 U.S. 75 (1998).

14 883 F.3d 100, 107 (2d Cir. 2018), *cert. granted sub nom. Altitude Exp., Inc. v. Zarda*, 139 S. Ct. 1599 (2019).

Bostock v. Clayton Cnty., Georgia,[15] and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*.[16]

Zarda and *Bostock* address the issue of whether sexual orientation is a form of sex discrimination. And *Harris Funeral Homes* addresses the issue of whether gender identity is a form of sex discrimination. In deciding these cases, the U.S. Supreme Court will resolve a split in judicial authority and a split in the executive branch where the EEOC and the Justice Department differ on their interpretation of Title VII enforcement.[17] What follows is a summary of the case law and decisions that preceded these three cases on appeal.

Price Waterhouse

In a six-member plurality opinion, the U.S. Supreme Court held in *Price Waterhouse* that discrimination on the basis of an employee's failure to act in accordance with gender-based expectations violates Title VII.[18] The employer in *Price Waterhouse* did not promote a senior manager, Ann Hopkins, to partner based, in part, on the partners' belief that Ms. Hopkins did not act the way a woman should act. For example, she was told that in order to improve her chances for making partner she should, "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[19] The employer's sex stereotyping was also evident in its insistence that women not be "aggressive" in the workplace.[20] Justice Kennedy, in his dissent, observed that "Title VII creates no independent cause of action for sex stereotyping."[21] Rather, sex stereotyping was recognized as a way to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[22]

Oncale

Nine years later, the Supreme Court in *Oncale* interpreted Title VII to include a prohibition of same-sex sexual harassment.[23] The employee in *Oncale* was part of an eight-man crew on an offshore oil rig who claimed he was harassed and sexually violated by his co-workers and with the employer's knowledge.[24] In creating this new cause of action, the Court recognized that while "male-on-male sexual harassment in workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII… statutory prohibitions often go beyond the principle evil to cover reasonably comparable evils[.]"[25]

Circuit Split on Sexual Orientation Discrimination

While neither *Price Waterhouse* nor *Oncale* expressly defined sex to include sexual orientation or gender identity, both cases have been used to argue for such protections under Title VII. The Second Circuit, in *Zarda*, and the Seventh Circuit, in *Hively v. Ivy Tech Cmty. Coll. of Ind.*, sitting *en banc*, have recently held that Title VII's prohibition of discrimination based on sex extends to sexual orientation.[26] Other Circuits have held the sex stereotyping theory protects male employees from adverse treatment when their conduct, appearance, and mannerisms were deemed insufficiently "masculine" by their employers.[27]

Unsurprisingly, Courts have found distinguishing between sex discrimination based on stereotyping and sexual orientation discrimination to be challenging.[28] As Judge Posner of the Seventh Circuit observed in *Hamm v. Weyauwega Milk Prods., Inc.*, the case law on sex stereotyping could lead to "the absurd conclusion… that the law protects effeminate men [or masculine women] from employment discrimination, but only if they are (or are believed to be) heterosexuals."[29] The Seventh Circuit's decision in *Hively*, relying on *Oncale* and *Price Waterhouse*, overruled *Hamm* and concluded that sexual orientation discrimination is a form of sex discrimination under Title VII. The Second Circuit in *Zarda* cited to the persuasive precedent of *Hively* in holding that "Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of… sex.'"[30] Neither case was considered persuasive enough for the Eleventh Circuit to grant an *en banc* rehearing in *Bostock*.[31] *Zarda* and *Bostock* are consolidated on appeal before the U.S. Supreme Court.

Circuit Split on Gender Identity Discrimination

The Sixth Circuit, in *Harris Funeral Homes*, held that under *Price Waterhouse*, Title VII prohibits "discrimination on the basis of transgender… status[.]"[32] Similarly, other courts have used the reasoning of *Price Waterhouse* to extend statutory protections to members of the transgendered community under different statutes. The Ninth Circuit extended *Price Waterhouse*'s sex stereotyping theory to protect a transgendered inmate from sexual assault from a corrections officer under the Gender Motivated

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15 894 F.3d 1335 (11th Cir. 2018), *cert. granted sub nom. Bostock v. Clayton Cnty. Bd. of Commissioners*, 139 S. Ct. 1599 (2019).

16 884 F.3d 560, 566 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019).

17 *Compare* U.S. Attorney General Op. on Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017), available at https://www.justice.gov/ag/page/file/1006981/download (last visited June 28, 2019) *with* EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) and EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015).

18 *See* 490 U.S. at 250–51, 258–61, 272–73 (White, J. & O'Connor, J., concurring).

19 *Id.* at 235.

20 *Id.* at 250–51; *see also id.* at. 234–35, 256.

21 *Id.* at 294 (Kennedy. J, dissenting).

22 *Id.* at 251 (internal quotations omitted).

23 523 U.S. at 80.

24 *Id.* at 77.

25 *Id.* at 75.

26 *Zarda*, 883 F.3d at 108; *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

27 *See Smith v. City of Salem, Ohio*, 378 F.3d 566, 574 (6th Cir. 2004) (*Price Waterhouse* protections extend to men who "act femininely[]"); *EEOC v. Boh Brothers*, 731 F.3d 444, 459–60 (5th Cir. 2013) (*en banc*) ("[A] jury could view Wolfe's behavior as an attempt to denigrate Woods because—at least in Wolfe's view—Woods fell outside of Wolfe's manly-man stereotype.").

28 *See Christiansen v. Omni Group, Inc.*, 852 F.3d 195, 205 (2nd Cir. 2017) (Katzmen, C.J. concurring) (the approach is "unworkable"); *Hively*, 853 F.3d at 350 ("The effort to [remove 'sex' from 'sexual orientation'] has lead to confusing and contradictory results[.]").

29 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, C.J. concurring), *overruled by Hively*, 853 F.3d 339.

30 *Zarda*, 883 F.3d at 108.

31 894 F.3d at 1336–37 (Rosenbaum C.J. and Pryor C.J. dissenting).

32 *R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 567.

Violence Act, 42 U.S.C. §13981.[33] The First Circuit held that under *Price Waterhouse*, a bank's refusal to give a loan application to a biological-male dressed in "traditionally feminine attire" because his "attire did not accord with his male gender" stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§1691–1691f.[34] The Seventh Circuit held that that under *Price Waterhouse*, Title IX required public schools to allow transgendered student access to sex-specific campus facilities based on the student's gender identity.[35]

The EEOC Decisions: *Macy* and *Baldwin*

The EEOC has interpreted Title VII, which it has statutory authority to enforce, to include both gender identity and sexual orientation.[36] Two EEOC decisions reflect this interpretation and rely on *Price Waterhouse*.

In 2012, the EEOC said in *Macy v. Holder* that a "complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII."[37] In *Macy*, a police detective, who was known as a man, applied for a job with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF").[38] The detective, while still presenting as a man, was interviewed and offered the job pending a background check.[39] After the background check had begun, but before it was completed, the detective informed the investigator with a third-party vendor who was conducting the background check that she was in the process of transitioning from male to female.[40] Five days later, Macy received an email from the third-party vendor's Director of Operations stating that the ATF job was no longer available due to budget constraints.[41]

The EEOC, relying on *Price Waterhouse* and *Oncale*, held that "a transgender person who has experienced discrimination based on his or her gender identity may establish a prima face case of sex discrimination… under a theory of gender stereotyping," or under any other of a number of ways of proving sex discrimination.[42] For instance, a transgender employee could demonstrate that she would have gotten the job as a male, but the director was unwilling to hire her once he found out that she was now a woman.[43]

Similarly, until 2015 when the EEOC issued its decision in *Baldwin v. Foxx*, it remained largely unquestioned that Title VII protections from discrimination based on "sex" did not include protections for sexual orientation.[44] In *Baldwin*, the EEOC took the position that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex."[45] In so holding, the EEOC identified three ways for a claimant to illustrate what it described as the "inescapable link between allegations of sexual orientation discrimination and sex discrimination."[46] First, sexual orientation discrimination "is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex."[47] Second, it is "associational discrimination" because "an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex."[48] Third, sexual orientation discrimination "necessarily involves discrimination based on gender stereotypes," most commonly, "heterosexually defined gender norms."[49]

The EEOC's decision cited to *Price Waterhouse*[50] for the proposition that under Title VII, employers "may not rely upon sex-based considerations or take gender into account when making employment decisions."[51] The EEOC relied most heavily on *Price Waterhouse* in its discussion of the third way "sexual orientation discrimination is sexual discrimination."[52] *Price Waterhouse*, the EEOC explained, changed the legal landscape by opening up sexual discrimination claims to be brought by lesbian, gay, and bisexual individuals asserting "gender stereotyping under Title IV if such individuals demonstrate that they were treated adversely because they were viewed—based on their appearance, mannerisms, or conduct—as insufficiently 'masculine' or 'feminine.'"[53]

Conclusion

New Mexico has largely avoided such confusion regarding the bounds of a cognizable sex discrimination claim by expressly creating a cause of action for discrimination based on "sexual orientation" and "gender identity" through the passage of legislation. In the absence of federal congressional action, the scope of *Price Waterhouse* will likely be clarified by the U.S. Supreme Court next year when it decides *Zarda*, *Bostock*, and *Harris Funeral Homes*.

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33 *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000).
34 *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000).
35 *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260, 200 L. Ed. 2d 415 (2018).
36 U.S. EEOC, https://www.eeoc.gov/laws/types/sex.cfm (last visited June 23, 2019)
37 2012 WL 1435995, at *1.
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.* at *10.
43 *Id.*
44 2015 WL 4397641, at *2. The EEOC was interpreting 42 U.S.C. §2000e-16(a), protecting federal employees and which is "analogous" to 42 U.S.C. §20002-2(a)(1). *Id.* at *4.
45 *Id.* at *10.
46 *Id.* at *5.
47 *Id.*
48 *Id.* at *6.
49 *Id.* at *7–8 (internal quotation marks omitted).
50 490 U.S. 228.
51 2015 WL 4397641, at *4 (citing *Price Waterhouse*, 490 U.S. at 239, 241–42) (internal quotation marks and brackets omitted).
52 *Id.* at *7.
53 *Id.*

Maintaining Attorney–Client Privilege in the Cloud

By Jeffrey Mitchell, Esq.
O'Brien & Padilla, P.C.

The Cloud. When we think about things "in the cloud," I suppose it is appropriate to think about funny shapes and animals, like we all did when we were kids looking at clouds. But, in the 21st century, the cloud is some undefined area of the internet where all our information is stored. Long gone are the days where people chose to be "in the cloud"; it is now pretty much mandatory. iPhones and Android cell phones both run in the cloud. Office 365, Gmail, Dropbox, and OneDrive are all cloud-based services as well. Unless you still carry a typewriter and rolling briefcase everywhere you go, odds are some part of your practice is in the cloud.

Despite the widespread adoption of cloud-based services, there are still limited opinions on how to address the ethical obligations of cloud usage. Through the end of 2018, there have only been 20 states that have issued ethics opinions regarding the cloud. Despite a limited number of ethics opinions on the use of the cloud, protecting client data in the cloud clearly falls within the scope of the Rules of Professional Responsibility.

While the main use of cloud-based services is to store data, one of the peripheral uses is to transfer large data. The days of sending data using physical media like CDs or DVDs are long gone. Instead, a user can create a folder containing a large amount of data (such as a larger set of discovery responses, or a video) and then send a unique link to other parties to download that information. However, this can be a risky proposition if not used properly. You would not freely hand out the keys to your file cabinets, why would you freely allow others to access sensitive data in the cloud.

Indeed, unsafe cloud practices could create an argument that you may have waived attorney–client privilege.

A recent federal case from the Western District of Virginia outlines some of the steps an attorney should take to safeguard their use of the cloud. Consider the case *Harleysville Insurance Company v. Holding Funeral Home, Inc.*, Case No. 1:15cv00057, 2017 WL 1041600 (W.D. Va. Feb. 9, 2017). As a general background, Holding Funeral Home suffered a fire loss claim on October 22, 2014. Harleysville believed the fire to be deliberately set. The investigator on behalf of Harleysville Insurance uploaded a video of the loss scene for review by the National Insurance Crime Bureau ("NICB"). The Harleysville investigator uploaded the file to Box.Net, a cloud service for storage and access to large files, and a link to the folder was emailed to the NICB. Notably, the information was not password protected.

As the file moved into litigation, the entire claims file and investigation file was uploaded and stored in the same folder. This time, the link to the folder was sent to Harleysville's counsel so they could easily access the large computer file. Approximately six months later, counsel for Holding Funeral Home sent a subpoena to the NICB for its file. Included in the produced materials was the original email, containing a link to the Box file sharing site. Counsel followed the link and found the entire claims file still stored there.

Holding's counsel downloaded and reviewed the claims file, without notifying Harleysville. During the exchange of discovery, Harleysville learned that Holding had accessed all of the materials on the Box cloud site. Harleysville requested Holding destroy the materials downloaded, but Holding admitted that they had already reviewed the materials and shared the files with other defendants. Harleysville proceeded to file a motion to disqualify Holding's counsel for downloading the claims file.

The Court disagreed, holding that disqualification was an excessive sanction. In short, the Court recognized that the entire claims file had been stored on an unsecured cloud site for at least six months. The folder where the claims file had been stored was in the same folder that had been shared with a third-party, NICB. The Court recognized that Harleysville knew, or should have known, that the information on Box.net was freely available, and thus the attorney–client privilege had been waived.

The analysis of the Court gives way to some best practices that should be adopted by anyone using cloud-based storage, particularly for storing or transmitting data. The duty to keep your client's data safeguarded does not necessarily require special security measures. In fact, many of the issues raised in *Harleysville* could have been addressed with the application of some common sense.

First and foremost, if you use a cloud-based service to transfer documents, it is critical to ensure that the data is not available to the public or freely available to anyone that happens to find the data. Therefore, it is critical to ensure access to the data is protected by a password. Additionally, data should be stored in such a way that a user's access is limited only to the dedicated recipient.

The practical way to implement these protections is to ensure that the shared data is stored in a separate folder for each recipient. And, each user has their own unique password to access their data. Dropbox and GoogleDrive are two of the most popular filesharing services on the internet. However, most people don't realize that their basic, free service, does not offer password-protected folders.

Another best practice that can be taken away from the *Harleysville* finding is to ensure that the sensitive data is removed after a brief period of time (*i.e.*, 30 days or less). If your intent is to send files to one person, delete the files from your cloud storage as soon as you can confirm that person received it. Some cloud providers permit you to set automatic expiration dates for shared data. On the date the user sets, the link automatically stops working. (Unfortunately, this is another feature that is not available on GoogleDrive's free service.)

Certainly, these safety precautions mean that your shared data may "disappear" and inconvenience the recipient. However, it's important to remember that, as long as that data is on the cloud drive, you are responsible for it. Consider a hypothetical to illustrate the risk of leaving cloud data online too long.

Let's say you want to send a large PDF file of documents to your expert witness. The attachment is too large to send via email, and your expert does not want to wait for a disc. Rather, you upload the data to your cloud provider, and then send him a link via email. Your expert downloads the data, but you leave the data "in the cloud." At some point in the near future, your expert leaves his iPhone at a hotel, and it is stolen. The thief finds the email link and gains access to the data. Even though your expert was the one who lost his iPhone, as the attorney who shared that information, you are likely going to be responsible.

As a final note, remember that ethical cloud usage also includes your practices pertaining to other parties' cloud data as well. In *Harleysville*, the Court found that Holding's counsel should have known the information they were obtaining from Harleysville's cloud account had been inadvertently disclosed. The Court admonished Holding's counsel and sanctioned them with attorneys' fees on the motion practice. This is important to consider as well. The requirements of Rule 16-404 NMRA as to when a lawyer "reasonably should know" that disclosure is inadvertent also apply to cloud data. If you are downloading cloud data and discover information you are not entitled to, you should take prompt steps to communicate to opposing counsel that they may have inadvertently disclosed privileged material.

Seeking Editorial Board Members

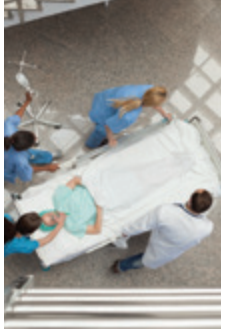
NMDLA seeks members to join the Defense News Editorial Board. The requirements for service on the board are minimal but crucial to the continued success of the publication.

- Attendance at a majority of the 6 meetings held per year
- Contribution of concepts/topics for at least one article per year
- Writing or co-writing at least one article per year

The 2019 Editorial Board meetings are held on the second Tuesday of alternate months, 12 noon to 1:30 pm, at Doughty Alcaraz, P.A., 20 First Plaza NW, Suite 412, Albuquerque, NM 87102. A light lunch is served.

Remaining meeting dates for 2019: October 8, December 10.

Contact NMDLA for further information at admin@nmdla.org.

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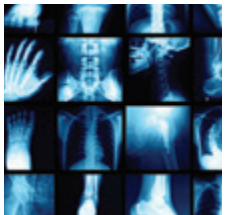
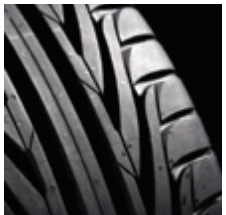


Putting Stressful Thoughts on Trial: A Practical Way to Achieve Peace of Mind

By Lara Patriquin, MD, and Brian Bellardo, Esq.

"If you are distressed by anything external, the pain is not due to the thing itself but to your own estimate of it; and this you have the power to revoke at any moment."

—Marcus Aurelius

Life as a civil defense attorney can be awfully stressful. The introductory article in this wellness series shared the grim statistics for attorneys nationwide: between 21 percent and 36 percent qualify as problem drinkers; 28 percent experience depression; 19 percent anxiety; and 23 percent stress. Some 9,100 lawyers nationally have attempted suicide.[1] For better or worse, few careers are more taxing than the law. Additionally, litigation is arguably the most anxiety-provoking of all the legal subspecialties. It is a zero-sum game, with one winner. One attorney's great triumph is another's deafening defeat.

It is not just the final verdict that causes stress, however. The process is long and drawn out, full of fits and starts and maddening bumps in the road. We are exposed to unsavory characters and see a side of humanity that most do not. We often sit aghast at what humans are capable of, and the idiocies of a poorly designed system that feels like it is failing everyone.

When we are not judging the system and others, we complain and worry about ourselves. We fear potential failure and how that would play out with our partners, families, and communities. What will become of our reputations? We doubt our capacity to meet the task and paint a picture of a future that is frightful and dark. This feeling of dread can often keep us up at night.

All of these thoughts—the judgments of ourselves and others, the predictions of the future, the worries—arise from a voice in our head. The inner roommate that is in a state of constant hyper-alertness, telling us "how it is," "what will go wrong" and "what has gone wrong." Most of the stories it tells are catastrophic, none pan out as we think they will in reality, and overall have a negative impact on our ability to do good work.

The voice is what causes our stress, anxiety, worry, short fused-ness, and, ultimately, depression. This narrative drives the statistics we cited earlier. It also leads all too many to seek alcohol, drugs, and other addictions such as Netflix and monitoring our cell phones while in line at Starbucks. These activities and distractions are an attempt to turn down the volume of our inner voice, even if only for a short time.

The Left Brain Interpreter

Ever wondered where these thoughts come from? What is the process behind our proclivity to tell negative and grossly unreliable stories about our lives? As far as we know, we are the only species to have this "inner voice." It is likely the reason we are the only species that suffers from chronic stress.

"The voice" was given a scientific name upon its discovery in the 1970's when Drs. Roger Sperry and Michael Gazzaniga, then out of the California Institute of Technology, dubbed it "the Left

[1] Wellness and Mindfulness: An Introduction by Raul A. Carrillo, Jr., Esq., *Defense News* Fall 2018, p. 8.

Brain Interpreter."[2] They noticed in their "split brain" experiments that a series of modules in the brain, predominantly located in the language-rich left hemisphere, worked continuously to make a moving commentary on what it believes is going on in our internal and external worlds. It pulls together information from our senses, emotions, knowledge base, and history to generate a narrative, a "best guess," of what is happening. The point is to give a semblance of coherence and sense to our lives.

It is the PR office of a highly complex machine, telling us "our" story. Without it, we would be like a computer running many programs but without a story to tie it all together. We would not feel a sense of "me, a someone," with a life story, something to protect.

This creation of "me" has a definite survival advantage and distinguishes us from all other species. It comes at a huge emotional toll, however, particularly when we buy into the narrow and incomplete story that it tells. When this series of interpretations has a lock on the truth and is the only way to be in the world, we suffer. Left unchecked, the left brain interpreter becomes less of a trusted servant and more like an imperious master.[3]

The interpreter favors a coherent quick narrative over truth. It does not look for profundity or wisdom. Given that it is a survival tool, it tends to err on negativity and suspicion and likes to catastrophize the future.

Non Compos Mentis

So it is that we have some 60,000 thoughts a day, 90 percent of which run "negative" and most of which are mostly the same as yesterday's thoughts. Most salient, however, is the fact that none of these thoughts that create the narrative are entirely accurate. When we were growing up, we would have likened "the voice" to a cheap AM talk radio host. Now we think of it as a "24-hour fake news anchor," who is dramatic, eloquent, reactive, blaming, and competitive. And will not shut up!

Making thoughts seem real

The mind then performs the biggest snow job of all by branding each thought with an emotion. It is as if a silent black and white film turns into an IMAX special. "I won't make partner" becomes an upset stomach, a feeling of bottoming out and tightness in our chests. How could that thought NOT be true? It feels so, so real! As a result, we believe this story as if it were, indeed, our own and not the machinations of the interpreter. We buy the fake news of "who we are" and "what is going to happen."

What can we do?

When a witness fibs on the stand, we cross-examine, pointing out contradictions and holes until the truth is clear. When our voice tells us that we will lose the case and the respect of our communities, we believe it wholeheartedly, especially at 3 a.m. Case closed.

Yet we know we are quite capable of rational, clear thinking. We have been doing it for years. Our capacity for discernment, for deep wisdom, for higher cognition is what has propelled us into the professional realm. We have all felt moments of flow when decisions seem to have made themselves, when the right words came to us effortlessly and we relied on deeper wisdom. Lawyers often describe this in court, where they feel they are speaking from a "higher place." Others find this in nature, listening to music or while playing team sports. Our minds are entirely capable of stress-free, big-picture thinking. We just have trouble accessing this mind when we get triggered by fearful thoughts.

Beyond the narrative, into clarity

Notice how it is so easy to see that our best friend should quit her toxic job, but we stay stuck in a similar situation much longer than we should. When our interpreter kicks in, we lose our wisdom, our discernment in favor of a cheap, dramatic story. The trick is to bypass the interpreter and think from a wiser place. This is also known as developing wisdom and gaining perspective.

Mindfulness

Mindfulness is a process by which we repeatedly leave the world of thinking (*i.e.*, the story of the interpreter) and bring our minds back into the awareness of the present moment: this is a highly valuable process that everyone should learn. There are times, however, when this is easier said than done. Sometimes we believe our thoughts so wholeheartedly that dropping said thoughts is not an option. We stay "hooked" into our thinking, even though it is painful.

Our own experience of this voice has led us to find a strategy we can use ourselves to help break the spell of "interpreter" thinking. The process is called "The Work" and is a method of self-inquiry, or as we call it: "mindfulness for people on the go." It was created in the 1980's by American author Byron Katie Mitchell (Byron Katie) and is now practiced throughout the world.[4]

Stress is the belief in a thought that isn't true.

This compelling first tenet sums up the approach: stress is telling us we are off on our thinking. It is an inner alarm letting us know it is time to cross-examine our thinking so that we can let go of the stressful narrative and regain our rational mind. It is time to regain perspective.

This approach is particularly well suited for attorneys as it works by using questions to hone in on the truth. Essentially, these questions put the thoughts that stress us out on trial. We question until a more profound reality becomes clear.

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[2] https://en.wikipedia.org/wiki/Left-brain_interpreter.

[3] Lara Patriquin, www.thinkingtwopoint0.com/single-post/2018/06/23/The-Left-Brain-Interpreter.

[4] Byron Katie's process is described and used throughout this article and can be found in Byron Katie's books. *See, e.g.*, Katie, Byron with Stephen Mitchell. *Loving What Is: Four Questions That Can Change Your Life*. Harmony Books, New York, 2002.

We can ask these questions of ourselves whenever and wherever we choose. Training in this methodology can be free and anonymous or available through a variety of coaches and conferences.

The method[5]

1) Sit in a quiet space of contemplation. This is a form of meditation and can't be hurried. Notice the thoughts that cause stress. The best place to start is with the judgments of other people. Isolate a specific event where you had a stressful thought about someone.

   Record your judgments in writing. Bring to mind every detail: where you were, who else was there, were you sitting or standing? Notice the facial expression, tone of voice and body gestures of that person.

   In this contemplative space, ask each of the following four questions. Take your time before answering, waiting for answers to arise naturally, not reactively. Record your answers on paper.

   1. Is this thought true?
   2. Can I absolutely know that it's true?
   3. How do I react, what happens when I believe this thought?
   4. Who would I be in this situation if I could not think this thought?

   The answers to the first two questions are either "yes" or "no."

   In answering the third question, let it all out. Dig deep into the judgments, the anger, the frustration. Hold nothing back and do not censor, be petty and small. Keep writing until you have put it all on paper.

   In the fourth question, relax your body and mind. Consider who you would be without the thought. This can be difficult and may require some imagination, particularly if this is a long-held belief. Be patient. How would you feel physically without the thought? How would you treat others? How would you treat yourself?

4) The Turnarounds: turn the thought around. Look for at least three real examples of how each turnaround could be true or truer than your original thought.

   There are three turnarounds to consider:

   To the self: How is it possible that you are doing to yourself what you blame others for doing to you? "She ignored me" becomes "I ignored me."

   To the other: How are you doing to others what you thought others were doing to you? "She ignored me" becomes "I ignored her."

   To the opposite: How are others not doing what you think they are doing? "She ignored me" becomes "She didn't ignore me."

An example of The Work with a litigator upset with opposing counsel

The situation: *I am in a heated discussion with opposing counsel during a pre-trial meeting. Near the end of the meeting, he yells disparaging remarks while flinging his papers at me. My stressful thought is "He disrespected me."*

1. "He disrespected me." Is it true? *Yes.*
2. Can I absolutely know that it's true, "He disrespected me?" *Yes.*
3. How do you react, what happens, when you believe the thought "He disrespected me?"

   I am shocked and angry. I clench my jaw and my fists. My body tenses up and my breath becomes shallow and erratic. How dare he? I judge him as rude and without manners. I don't listen to him, except to find ammunition to attack him. I deride him in my mind. I see images of how he has acted in the past, finding all the proof I need that he is an enemy. I see him not as a lawyer who might be stressed but as a deficient human being. I label him by his current behavior and forget that he has done good work in the past. I forget that I too have lost my temper in the past. I think of ways I can get back at him and "show him who is boss."

   I chastise myself for being in this situation. Why did I choose this line of work? I blame myself for getting assigned this case. I wonder if he would have yelled at me had I shown up differently. What it is about me that makes this OK in his mind? I consider how I could have stopped him from yelling.

4. Who would I be in that situation without the thought, "He disrespected me?"

   I would be calm and cool-headed, breathing normally. My heart rate wouldn't go up. I would not be taking his action personally or as a threat. I recog-

[5] To learn more about Byron Katie and "The Work," which is used herein, visit https://thework.com.

nize this has little to do with me. I would be curious as to why he did that and would evaluate what to do next. I would be staying collected in the present moment. I would notice his frustration without feeling triggered by it. I would notice how many times I have felt like doing the same thing and that none of what he is doing related to me. I would be present for my client's interests and would be thinking about how best to serve him given this eruption. I would be happy to be getting out of the meeting and looking forward to being at home.

The Turnarounds:

1) I disrespected me.

   In this situation, I disrespected me because I took it personally, by matching my mood to his and allowing myself to get angry. I "swallowed the bait." I took the blame for his actions by thinking he would not have yelled had I shown up differently. I berated myself for being a lawyer and second-guessed the choices I had made in my life.

2) I disrespected him.

   I disrespected him by ridiculing him in my mind. I disrespected him by not listening to him and not connecting to him as another stressed-out lawyer, just like me. I can find where I provoked him even though I knew he was close to the limit. I disrespected him by labeling him by his current behavior even though I knew he had done good work in the past.

3) He did not disrespect me.

   He did not disrespect me because he wasn't even aware of me at that moment. He was merely acting out his blinding rage, which had nothing to do with me, it wasn't personal. He would have acted the same whether I was there or not. He didn't disrespect me because I know this is his MO; he yells in order to try to throw me off my game. If he had thought I was a weak lawyer, he may not have felt the need to do this. He didn't disrespect me, he pressed my buttons. I was the one who made this a respect issue. I caused the drama in my mind by disrespecting him and myself.

A Fresh Perspective

After questioning his beliefs and looking at the situation from multiple angles, the lawyer is able to relax. His mind slows down, and stops spiraling. He can see beyond his irritability and place the events of the day into a clearer perspective. The narrative becomes wiser. His physiology is no longer caught up in fight or flight, and he is able to slow down, it helps him sleep. Useful "next steps" emerge from a space of calm creativity. He is better able to address his clients' interests. He is no longer a slave to his left brain interpreter.

In our experience, this process is the surest way to bypass the stressful thought patterns generated by the interpreter and tap into the wisdom and compassion that has drawn us to this profession. It frees us up to be more effective advocates for our clients while maximizing focus, clarity, and creativity. A kinder, wiser version of ourselves emerges from the chaos.

Lara Patriquin, MD is a speaker and coach in Albuquerque, NM. For more information on her approach to wellness using mindfulness and inquiry please see www.thinkingtwopoint0.com or LaraPatriquin@gmail.com.

Brian Bellardo has been a practicing attorney for over 40 years and was a litigator for 20. He can be reached at bbellardo@hotmail.com.

Ask Judge Smith

Letter to a Law School Graduate

By J. Layne Smith

Congratulations—graduating from law school is a milestone! Take time to celebrate your achievement with family and friends. Tomorrow you can refocus on passing the bar exam, finding a job and paying back student loans.

Good fortune has already smiled on you. Your chosen profession will open doors for you in private practice, public service, business and government. With continued effort and focus you can earn a good living and be a difference maker.

However, only you can decide how to live and what you want to accomplish with your career. So, think big and aim high. Stay humble and pay your dues because you still have a lot to learn and there is no substitute for actual experience. Be patient because the key to success is earning the confidence of others through sustained effort and high achievement over an extended period of time.

Diligently protect your reputation by being honest and avoiding even the appearance of impropriety. Having good character and a reputation for fairness will serve you well. Don't say or do anything that you wouldn't say or do in front of your mother or the sheriff. You can avoid scandal, prison and heartache by following that simple advice. Likewise, be careful what you post, say or do on the internet.

People notice how you treat others, including the janitor, your paralegal, and opposing counsel. Show respect to everyone and be plain-spoken. Make it a habit to introduce yourself and network with a purpose.

Do you want to be a successful trial lawyer? Visit your local courthouse and observe how skilled lawyers and judges handle hearings and trials. Screen out and eliminate bad cases up front. Outwork your opponents, don't overreach and adopt a style suitable to your personality.

Great trial lawyers are great storytellers! Tell simple, direct and memorable stories. Juries are more likely to return favorable verdicts if your presentation at trial involves a combination of visual, auditory and kinetic learning.

Try to listen twice as much as you speak, because when you are new you don't have a clue. Don't lose touch with ordinary people or lose the ability to empathize with their daily concerns.

A good trial lawyer is a born skeptic who thinks, questions, clarifies and communicates clearly. Your doctorate level vocabulary is a gift and a curse, so craft your words to strike a chord with your target audience.

Read books and stay current with popular culture. You never know when information, a well-turned phrase, or a cultural reference will come in handy. Finally, be a community leader and stretch beyond your comfort zone. Good luck and I hope to see you in my courtroom.

J. Layne Smith is a Leon County Judge who often speaks and writes about civics, the law and the administration of justice. Email your questions to askjudgesmith@gmail.com.

NMDLA Civil Case Summaries

Filed October–November 2018

By John S. Stiff, Ann L. Keith & Arturo R. Garcia
Stiff, Keith & Garcia, LLC

Workers' Compensation

NM Bar Bulletin—May 1, 2019, filed October 16, 2018
Vol. 58, No. 9
No. A-1-CA-36072

Griego v. Jones Lang Lasalle, 2019-NMCA-007

David Griego tripped and fell while working as a contractor for Intel. His job required him to walk long distances, and he tripped over his own foot while walking. Mr. Griego filed a workers' compensation claim with his employer. The employer's insurer denied the claim arguing the fall was not work-related. The Workers' Compensation Judge ruled that the accident did not arise out of Mr. Griego's employment and Mr. Griego appealed. In reversing the Workers' Compensation Judge, the Court of Appeals looked into the workers' compensation statute where in order to receive compensation the worker must (1) be performing a service arising out of and in the course of his employment at the time of the accident; and (2) the injury must arise out of the course of employment. The Court next looked into New Mexico case law which allows workplace accidents resulting from unexplained reasons to be recoverable. The Court concluded that Mr. Griego's requirement to walk as part of his job and his trip-and-fall accident were the result of an unexplained fall, which was a neutral risk. The Court went on to comment that the employer/insurer failed to rebut the presumption that the accident arose from Mr. Griego's employment; therefore, Mr. Griego's workers' compensation claim was valid and improperly denied by the Worker's Compensation Judge.

IPRA

NM Bar Bulletin—May 29, 2019, filed November 13, 2018
Vol. 58, No. 11
No. A-1-CA-35864

Albuquerque Journal v. Board of Education of Albuquerque Public Schools, 2019-NMCA-012, *cert. granted*, Feb. 18, 2019, No. S-1-SC-37420

The *Albuquerque Journal* and KOB-TV made an IPRA request to the Albuquerque Public Schools Board of Education (APS) and APS's records custodian regarding public records concerning the resignation of the APS superintendent. APS provided certain requested records, denied the existence of any responsive records to other requests, and denied certain requests based on claimed exemptions under IPRA. Plaintiffs filed an IPRA action, alleging the defendants did not satisfy their burden of showing the requested documents were completely exempt from disclosure under any of the exceptions enumerated in NMSA 1978, §14-2-1. The defendants argued the records withheld were protected by attorney–client privilege, the attorney work-product doctrine, and/or IPRA's exception for "letters or memoranda that are matters of opinion in personnel files."

During the IPRA litigation, Plaintiffs subpoenaed the former superintendent's attorney to produce, "all documents, records, or things reflecting or recording any communications from APS or any APS representative, agent, or attorney concerning any complaints or allegations of misconduct regarding the former superintendent or his wife made to APS or any member of the APS Board." The attorney objected to the subpoena claiming attorney–client privilege. The attorney was deposed, and she refused to answer particular questions, asserting that certain communications were protected by the attorney–client privilege and on the basis of Open Meetings Act (OMA) confidentiality. Plaintiffs filed a motion to compel her answer to the questions she refused to answer during her deposition and to produce notes she took during the school board meeting.

The district court granted the motion to compel concluding: (1) no OMA privilege exists in New Mexico; and (2) the court was not provided with a factual basis to find there was a common

Continued from Page 20

interest between APS and the former superintendent for the relevant time period. The court ordered the attorney to respond to the deposition questions and produce the relevant notes. The Court of Appeals held the district court properly determined that no OMA privilege exists in New Mexico and the district court did not abuse its discretion in determining the attorney failed to meet her burden of establishing the applicability of the attorney–client privilege based on a claimed common interest with APS's attorneys.

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