

# Appellate News

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## AN INTERVIEW WITH JUSTICE GENE E. FRANCHINI

*Bruce Rogoff, Esq.*



*Justice Gene E. Franchini*

**A**s everyone knows, the great Justice Gene E. Franchini retired at the end of 2002. His heart, soul, intellect and sense of humor will be missed by all of us lucky enough to practice before him. The Justice and I visited the day after the 2002 elections, and, as you will see, he had a few things on his mind.

**Rogoff:** It's November 6th, the day after the elections. What do you think about political advertisements in judicial races?

**Franchini:** You have to be extremely careful if you're running for judicial office. According to the code, there is not a lot you can say about judges, about your opponent, or anything else in the system. This is supposed to be the least political of all the three branches of government. Not completely free of politics because how you get there and how you stay there has a lot to do with politics but it's still the most apolitical branch of government.

So when organizations like—and I don't mean to single these out in a derogatory manner—but people who have agendas like Mothers Against Drunk Driving, Court Watchers, Better Government, the League of Woman Voters, plaintiff's lawyers, defense lawyers, prosecutors, and criminal defense lawyers start grading judges based upon the decisions they have made, rather than whether or not they are doing their job honestly and with integrity, then you've got a problem. I was particularly offended by some of the political advertisements that indicated without saying it that judges should be crime fighters or arms of the police department or arms of the prosecution bar or the defense bar. Because that indicates to me that you're talking about electing or selecting an individual who has already made up his or her mind about the merits of a case before they even hear any evidence, and that's offensive to me. It's offensive to me because I'm a judge, but also because I'm afraid that a lot of people actually believe that.

**Rogoff:** When you used to run in elections, what kind of things did you say during your campaign?

**Franchini:** I never said anything positively or negatively about my opponent. I talked about the judiciary, what the job was about,

what needed to be done, the slowness in deciding cases, the congestion of court dockets and the administration of the courts. I also talked about educating the public in a more informative way about what judges are and what judges do and how important that is to society. Because if judges and courts become just another rubber stamp for the state, you no longer have separation of powers and you no longer have checks and balances.

What other job in the world can you get where they start calling you "The Honorable" whether you are or you aren't or have a reputation for it or not? Where else can you get a position where when you are referred to as "Your Honor," or "Judge," or, when you're in this position, "Justice." So it's pretty heady stuff, so heady that some people can't handle it. If a judge or a justice does not examine his or her conscience at least on a monthly basis, you can get caught up in this position. When you do, then you become willing to say anything, or do anything to get the job and then keep it. If that happens, I begin to wonder at that point whether the job's worth having in the first place. That's the thing that disturbs me about politicizing the courts.

I thought we were doing pretty well. I thought we were, at least in New Mexico, changing that around so people thought, "You know, these people aren't deciding this on political basis, but they're deciding this on a system that has been used for years, on cases that have gone before." Then along comes *Gore v. Bush* and just blows all of that. We went from a not-so-good mark of 72 percent or 73 percent of the people believing that the decisions of the courts were based on politics to something in the neighborhood of 83 percent in a matter of just months and even weeks. That's disturbing. If you think about it, there are a lot of things that have an influence upon how a judge looks at the law, interprets the law, decides cases—how he or she is raised, what kind of an environment he or she comes from, how he or she is educated, what religion they belong to. All kinds of factors have

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*Recently retired New Mexico Supreme Court Justice Gene E. Franchini reflects on the profession while viewing old photos at the State Bar Center.*

an influence on the way an individual acts and reacts in a legal setting.

**Rogoff:** When I hear you talk about this, I think about the comments you made to the new lawyers a few weeks ago.

**Franchini:** The first time that I spoke on that subject was about 16 days after September 11, and I was concerned then, and I'm even more concerned now. If a society becomes fearful enough, fearful for their safety, the safety of their family, the safety of their children, the safety of their state, community, nation, then that kind of a society will do anything, say anything, and accept anything that makes them feel more secure. And that leads to giving up some hard-earned constitutional rights that don't seem to be important enough to fight for or preserve. Feeling more secure is what's important to these people. In this atmosphere, people with pure hearts who really love the country will propose laws and programs that not only depreciate the value of our constitutional rights, but actually serve to eliminate them. They're all saying, "This is temporary." When this terror is over, when this "war on terrorism," which you know as well as I do is not a war, "is over, we'll get these back."

When I was 6 years old I was listening to one of President Roosevelt's fireside chats. He wasn't talking about the Constitution or constitutional rights, he was talking about income tax, and he was talking to those people who were self-employed in the country in the dark days of 1942-43. Then, people who were self-employed paid their taxes on April 15. The President said this war—that's the key word—this "war is costing a lot of money and we need our cash flow to be increased, therefore I'm proposing a law that, on a temporary basis, self-employed people will pay their income tax quarterly. Other people have their taxes withheld so you are going to have to estimate how much you're going to make and pay your income tax quarterly. But don't worry about it because as soon as this war is over, we will go back to the old

way." This is now 2002 and the self employed are still paying quarterly returns. The point I'm making is that once you give up any rights or they're taken away from you, you never get them back. You just don't.

**Rogoff:** What did you want to be when you were a kid, and when did you decide you wanted to be a lawyer?

**Franchini:** You're never going to believe this. I have never wanted to be anything else but a lawyer and I don't know when that happened or why it happened. I used to like talking. I know that's hard for you to believe. I used to like thinking, reading and arguing. It was just something I always knew I was going to do and that's how it happened. I was in high school from 1949 to 1953, and there wasn't a lot going on in Albuquerque in those days. There were four theaters, you saw four movies, and then there was nothing else to do.

So I used to go down and watch trial lawyers try cases in the Bernalillo County Courthouse and there was some great ones. William Keleher, the daddy of all the Kelehers, A. H. McCloud, Jim Paulantis, Judge Johnson—there were so many. They were just great trial lawyers and they put on a show. They really did. They were forceful speakers and very entertaining. It was just like a theater. I used to do that and once it gets in your blood, you're never going to get rid of it.

**Rogoff:** You went to high school in Albuquerque?

**Franchini:** Yes. I went to St. Mary's Grade School and High School beginning in 1941 when the war started. I went all the way through grade school, junior high and high school at St. Mary's down on Sixth Street. When I got out of high school I had a scholarship to Loyola of the South, in New Orleans, La. I was there on a combined business and law program which was three years of business and then three years of law. Then you got two degrees, one in business and one in law. I'm such a bright guy that it took me two years to figure out that Loyola of the South was the only law school in the country that was still teaching the Napoleonic Code. So after two years I figured that I'd better do something else. I came back home and went to the University of New Mexico my junior and senior year and got my first degree which I needed to go on to law school at Georgetown in Washington, D.C. I went to Georgetown and after I finished there after three years I returned here and took the bar. Dick Ransom and I went to law school at Georgetown at the same time.

**Rogoff:** What happened then?

**Franchini:** I went into practice with a small firm, with Rolando Matteucci and Avelino Gutierrez. This doesn't happen anymore but they changed the name to Matteucci, Gutierrez and Franchini. We were trial lawyers, we tried mainly personal injury cases and also some criminal cases. I started practicing with them on September 1, 1960, and, as I recall, on September 16, 1960, our senior partner, Rolando Matteucci, had a massive stroke which completely incapacitated him for the better part of a year. In that

year, right out of law school, Avelino and I tried seven or eight major jury trials, all of which went to the Supreme Court. We had no Court of Appeals in those days. I tried more cases in the first two-and-a-half to three years in my life as a lawyer, both in the trial court and in this court, than I tried in the next 15. It was a hard way to get a lot of experience in a hurry. Simultaneously, your initiation into the federal system was to go over there every Friday for a year. You would be assigned criminal cases to try and you would try them. This was *pro bono*. There was no public defender. So I'll bet you in the first two years of my career I actually tried to completion maybe 14 or 15 jury trials.

**Rogoff: Did you love it like you thought you would?**

**Franchini:** Oh, yes. I loved it. The next big turning point came in 1968 when Reyes Lopez Tijerina was accused of shooting up the courthouse in Tierra Amarilla. The newspapers and the news media started making a big to do about it. It was called the "Insurrection in New Mexico." To make a long story short, I was appointed to defend him, but for all practical purposes he was his own lawyer. They charged this man with 54 counts, including capital kidnapping. In 1968, if you kidnapped a person and during the course of the kidnapping you injured them to such an extent that they could die from the injuries the defendant inflicted upon them, the defendant could get the death penalty. They charged him with 54 counts and Judge Paul Larrazolo was the judge. Mr. [Alfonso] Sanchez was the D.A. in the First District, and Alfonso appointed two special counsel to prosecute. One of them was Jack Love and the other was Mr. Gonzales from here in Santa Fe. Judge Larrazolo called us in and said to the prosecution, "We're not going to try seven defendants for 350 counts total. We're going to try Reyes Tijerina first and you're going to pick three charges and throw out the other 51 charges." Things were different in those days.

So they went out and picked the only three charges that I knew they couldn't prove. Out of 54 to pick the only three that they couldn't prove was really astonishing to me. In the meantime, we had all of these lawyers, political lawyers, coming from all over the country coming in to defend Tijerina for free. One of them was the famous lawyer from Chicago, William Kunstler.

I stood up and said, "Judge Larrazolo, if you're going to let these lawyers come in and defend this defendant, you don't need me. He threw them all out. So when the D.A. comes in with these three charges I was the only one of the defense lawyers that could speak Spanish. I told Mr. Tijerina, "Tell them you want to be your own lawyer and I'll stay here and help you through the trial. Tell them you want to be your own lawyer." So he says, "I want to be my own lawyer." And I said, "Judge, he has the right to that." These other lawyers were blowing their top because this was the opportunity of a lifetime. This was national media, national newspaper coverage. So the judge okays it and we pick a jury and we try the case. To make a long story short, the case was six weeks long, which at that time was the longest criminal case in the history of the state, and the jury came in less than four hours and acquitted him on all counts. He was acquitted because of a language thing.

What happened is that they arrested various Hispanics who were having a party at Navajo Canyon up toward Tierra Amarilla and they were raising all kinds of hell. I remember they shot a deer and some Forest Service people came by to try to stop it. Finally, they were arrested for unlawful assembly, inciting a riot, and some other charges. The arraignment was set in T.A. Judge Scarborough from Santa Fe goes up there for the arraignment. He comes out on the bench, takes two guns out of his holsters and puts them on the desk. All hell breaks loose. There were lots of people there to see this arraignment, and Reyes Tijerina's daughter and her boyfriend came in. They're with another fellow who's like their bodyguard who's also armed. People were armed in the courthouse in those days. A state policeman makes a move that they thought was an attempt to draw his gun and the bodyguard shoots the policeman in the leg. Now everyone is going crazy. The daughter runs out and goes to get her Dad who's in a house about two blocks away and says, "Daddy, daddy, they're killing our people." Everybody starts shooting guns and they're herding people around. They take these four or five defendants that are being arraigned and they take them away from the jailer. They open the jail door real quick and they hit this jailer on the head, and made a cut over his eye. Then they took him from there to the county commission room and this was the basis for the capital kidnapping charge. The prosecution got a doctor from Chama who testified that the jailer could have died from this wound. That was the basis for the charge of capital kidnapping.

Reyes comes to the courthouse and there are guns shooting off. The sheriff is literally jumping out the window of his office. There are bullet holes all over the place. Thank God, nobody is hurt. And in comes Reyes Tijerina and he walks into the clerk's office and says in Spanish a phrase which I'll repeat in a minute. The witness for the prosecution is a young girl working in the clerk's office and the D.A. asks, "What did he say?" And the young girl said, "He said, '*acaben con todos estos.*'" Which translates to "away with these people - waste these people." *Acaben con todo estos.*

Reyes knows the facts better than anybody and gets up and asks, "My dear, did I say '*acaben con todos estos*' or did I say '*acaben con todos esto*'" which means "cut this out, stop this." She says, "I don't remember." And I'm thinking thank you God, thank you. That's what really turned this case around because the publicity against Reyes Tijerina was so strong. After the verdict, when we walked out of the courthouse, I remember somebody driving by and yelling, "We're going to get you for this."

That night they invited me to their *Allianza* Headquarters which was down on Third Street, across from the park, for a party, but I had somewhere else to go. Some crazy that night got a bomb, molotov cocktail, and drives by the place to throw it into the building. This is in December and it is a cold evening. The crazy forgets to roll down the window of his car and succeeds in blowing off his arm. That's how wild this was.

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**Rogoff:** At some point you decided you wanted to leave that and become a judge.

**Franchini:** I don't know whether I ever really decided that but I'll tell you about it. It's never happened to me before and it's never happened to me since, but when I turned 40 years old I went into a funk, Bruce. That had never happened to me before, and I felt useless and that I hadn't accomplished anything at the ripe old age of 40. I'd already argued a case before the Supreme Court of the United States, *Morton v. Mancari* [417 U.S. 535 (1974)], but somehow I felt that I had not accomplished much. My friend, Governor [Jerry] Apodaca, who I went to school with and played against in the North-South All Star football game, became governor. He had appointed Bob McBride as a district judge in Albuquerque. Bob left the State Senate to go on the bench. Well there's a prohibition in the Constitution that if you create a job when you're a state legislator or increase the emoluments thereof, you can't take that job for a year. He had voted for a pay raise the year before he went on the bench and some Republicans filed a claim that went all the way up here to the Supreme Court. In a three-to-two decision, the court held that the Constitution was breached and they removed Bobby from the bench.

There was a group of us who met again and I said, "Well, who's the next one going to be?" And they said, "Why don't you do it?" I said, "I don't want to be a judge." I can remember this like yesterday and they finally said, "Hey, it's not a bad deal. You'll have a lot more time to go fishing," and they knew I liked to fish in those days. So I finally said, "Okay," and that's how I got to be a judge. Then, when I left the bench in 1981 after six years and four months, I started another law practice and practiced for almost 10 years before I came up here. I came up here because I got angry, not because I wanted to be a Supreme Court justice. I thought my time as a judge was over with.

**Rogoff:** What were you angry about?

**Franchini:** It was the first time the new way of selecting judges was in effect. The constitutional amendment was passed in 1988, this is the 1990 election. The governor at the time was Garrey Carruthers and he said to the people who were on this commission, "You know, I wish you'd send me some Republican names for consideration. I've been appointing judges here and all you've been sending is Democrats. I'm having a hard time explaining this to my party and if you'd send me one, I'd appreciate it." So they send up four names to the governor. Ken Wilson was the only Republican and the other three Democrats dropped out of the race. So I start making calls to these other Democrats to persuade them to run, but they wouldn't. Finally I called Rozier Sanchez and I said, "Rosie, you just can't drop out, you've got to do this." And he said, "Look, if you're so excited about this you do it." And I said, "Okay, I will." This is January. I go home and I tell my wife, "Glynnie, Honey, I'm running for Supreme Court and we have to

have 3,700 signatures in by March 15. Honey, here are these petitions, go out and get me 3,715 Democrats to sign, and I'm going to Boston for a week to take depositions."

She didn't talk to me for a long time.

**Rogoff:** Well, we can't talk about you without talking about Glynnie. Tell me how you met.

**Franchini:** I met Glynnie between my junior and senior year in college. She was divorcee and she had a little girl at that time. I met her at Western School for Private Secretaries because I was told that I should learn how to type. Well, I went to school and I was sitting there learning how to type and this girl stood up to sharpen her pencil at the pencil sharpener. In those days, Bruce—this was before you were born—women used to wear these tight skirts that went all the way down to the ankles.

Well, man, let me tell you. Glynnie could wear these. To make a long story short, we fell in love. I'm an Italian Catholic. My mother said, "You know, I just love this girl, she's a real sweet girl,



*Gene E. and Glynnie Franchini,*  
1998

but there's no way you're going to be able to marry a divorced girl. And if you want to go to law school, that's all over with." So, we split up and we went our separate ways. I got married, she got married.

She had three children, I had one. Fifteen years went by. She was in the throes of a divorce. My wife had left me about two years before. My aunt thought Glynnie was getting the short end of the stick on the assets of the divorce. They were in the liquor business. My aunt says, "Glynnie, you know Gene. He knows about the liquor business, why don't you go see him?" Well I still hadn't gotten over the girl and so I said to myself, "I'm not going to blow this twice." So I tell her, "Glynnie, I really have to talk to you, I've got to talk to you in private." She says, "My folks and I are going to go out with my children for supper in Old Town, why don't you come with us and then they'll take care of them." I said, "Fine, but I have to talk to you." So I ask her up to my apartment. I said, "You sit there and I'm going to sit over here on the floor." I had this big coffee table with the big chess set. I start talking about 15 years ago, the religious difference and the nationality difference and my mother and everything else I could think of and I finally wind up saying, "And I want you and your babies to marry me." Bang! This was after two hours.

**Rogoff:** You hadn't really even had a date or anything.

**Franchini:** Oh, we did 15 years before.

**Rogoff:** Yeah, but this time.

**Franchini:** Yes, that's right. She runs into the bathroom and the chances were maybe 50/50 whether she was going to run out the door or run to me. She ran to me. That was 34 years ago.

**Rogoff:** Amazing.

**Franchini:** True story. Nancy, the youngest one is ours. She is practicing law now.

**Rogoff:** What should lawyers know about the Supreme Court that we don't know?

**Franchini:** I think that they think that all we do is sit up here, read briefs and second guess everybody who's involved in the case. The main thing that was a surprise to me when I got up here is the tremendous amount of time we spend administering the courts and taking care of administrative problems at all levels of the judiciary in New Mexico. If you want to put it in percentages, I think that any justice up here spends probably 60 percent to 65 percent of their time doing that, and when you're chief justice, it's probably more than 70 percent.

**Rogoff:** Well what percentage of your time is spent on emergency writs and things like that?

**Franchini:** I don't think any more than 10 percent to 12 percent. These come to us periodically. We vote on them in panels and we vote independently of one another. Most of the time it's a unanimous decision to grant, deny, set for oral argument. So the time is not that great except for reading the petition. If it's set down for hearing, of course, it takes a little longer but I don't think we spend an inordinate amount of time on that. Ruling on petitions for writs of certiorari, however, takes a considerable amount of time. I don't use my clerks for that. After the oral arguments or after the case is submitted, then I start talking to my clerks, but not before that.

**Rogoff:** Does oral argument ever change the way a case is going to go?

**Franchini:** Oh absolutely. But there's another thing that lawyers may not know. An oral argument has a better chance of losing your case than winning it, but I think that oral argument can be extremely important.

**Rogoff:** What kinds of things do lawyers do that you find persuasive? Do you have any pet peeves, things lawyers do that turn you off?

**Franchini:** Well, my biggest pet peeve is when a lawyer asks for an oral argument and then just comes up here and reads the briefs back to me. The thing that turns me on is to see a lawyer interested, even passionate, about his or her case, not that they're moving around a lot, but by the way that they're handling themselves at the podium, and the way they answer questions. That is what impresses me.

**Rogoff:** And what makes a good brief, or a bad brief?

**Franchini:** Most briefs are not brief, or simply are not brief enough. Most of the people on supreme courts should be literate and should be able to understand the concept without the lawyer saying the same thing more than three ways. After a while it gets a little bit tedious. One of the suggestions is never ever use footnotes and I make a promise to all lawyers, "If you don't use any footnotes in your brief, I won't use any in my opinions." I hate footnotes.

*If you become a lawyer to get rich and make money, boy have you made the wrong decision. If you became a lawyer in order to serve people and to help solve the problems not only of your clients but of your community, your state and your nation, that's what matters. Even if the fee is a smile or a tear or a handshake rather than money, those are the fees that you're going to remember for the rest of your life.*

**Rogoff:** I've always wondered, as a judge making a decision, where does the head end and the heart begin?

**Franchini:** Hopefully never, and I'll tell you why. The application of the law and justice is a combination of head and heart and if either one of them is missing, there's something missing in the result. What's legal is not always just. What's just may not be legal. When you're in this kind of a position, you should be more careful because what comes from your lips and is put on paper you may be stuck with for at least a generation. Once lawyers see what the Supreme Court has said on a particular issue they simply don't care to return and try it again until the court has changed its personnel three or four times, or many years have passed. I think that's a mistake some lawyers make.

**Rogoff:** Right, an inertia. Once there's a sentence or two in an opinion that says this is so, it develops it's own inertia because we say, "Well it's been decided and we don't change."

**Franchini:** In a lot of courts, including this one from time to time, *stare decisis* has become an immovable object that you don't dare disturb. Even though the times, the facts, the situation, and the history has changed over a period of time, we still stick to it as a matter of religious dogma. There was a dean of Yale Law School, Dean Russell. I know that I've been accused of not being as serious as some people think I should be about *stare decisis*, but he said something that impressed me and I've never forgotten it. He was talking to a group of law students and law professors about

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## **Justice Gene E. Franchini**

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*stare decisis* and he said, “*Stare decisis* is like the Killyloo bird.” And they said, “Dean, what is a Killyloo bird?” He said, “A Killyloo bird is a great big, black, fat bird that can only fly backwards. It doesn’t know where in the hell it’s going but it’s extremely interested in where it’s been.”

As an example, after 40 years of saying there was no claim in New Mexico for loss of consortium, the majority of the court, in two opinions that I authored [*Romero v. Byers*, 117 N.M. 422, 872 P.2d 840 (1994)], changed its mind and said we now have a claim for loss of consortium. We also have a new principle of damages with regard to the value of life itself rather than only the economic value of life. Our earlier holding was based upon a case that was 42 years old from the state of New York. That case had been reversed by New York 35 years earlier, but we stuck to our original opinion. I don’t know how many opportunities we’ve had, if any, to revisit that before *Romero*, but this is a classic example of an old ruling you continue to follow long after the reason and viability of the rule has ended.

**Rogoff: Our profession is often perceived in a negative light. Any ideas about that and ways we might change? Should we try to change?**

**Franchini:** Ever since the Bible nobody has had much good to say about lawyers including God Almighty in the Old Testament and Jesus in the New. A lot of those comments are taken out of context, but I think the major factor that has caused people to get the bad impression of lawyers today as opposed to say 50 years ago, is that we are perceived today as being business men and women rather than service providers. We don’t do anything for anything or anybody unless we get paid for it and we don’t do anything for anybody unless it means something to us in the bottom line. We are no longer servants of the law, but bean counters.

Why does a person become a lawyer? If you become a lawyer to get rich and make money, boy have you made the wrong decision. If you became a lawyer in order to serve people and to help solve the problems not only of your clients but of your community, your state and your nation, that’s what matters. Even if the fee is a smile or a tear or a handshake rather than money, those are the fees that you’re going to remember for the rest of your life. One of the main reasons people think badly of us has been what I refer to as the damnable billable hour. I don’t care whether it’s \$100, \$300, \$500, \$1,500 an hour, you’ve put a price on your integrity. You’ve put a price on your value and as a person and as a lawyer. Who’s going to say what the value of a person is? If he has honesty and integrity, he’s priceless; and if he doesn’t, he’s worthless.

**Rogoff: What about TV ads and billboards? Now lawyers can advertise in a way they never could before. Do you think that helps us or hurts us?**

**Franchini:** I think it hurts us. We’re now just like any other huckster selling to the public for a price. It’s here to stay. I don’t



*The Franchini family, from left to right: Daughter, Nancy Franchini; son, Jamie Elias and wife, Carla; grand daughters, Abby Trent, Lori Elias (front); daughter Pam Trent; Glynnie and Gene E. Franchini.*

know if you’re ever going to stop that. You’re running into some constitutional legal principles about commercial free speech, so I don’t know if it’s even possible to stop legal advertising. But what a depreciating thing it has been for the profession.

**Rogoff: I feel the same. It all looks so cheap.**

**Franchini:** Yes, and it’s too bad. But when the day is done, and I still firmly believe this, if you ask a group of people, “What do you think about lawyers?,” you’re going to get this kind of reaction, “They’re cheaters, they’re dishonest, they’re disloyal, they’re crumb bums, they’re scum bags.” Then ask them, “But what about your lawyer? What do you think about your lawyer?” They’ll say, “He’s the greatest guy, or she’s the greatest gal that I’ve ever had. They’re really helpful, he’s really concerned about me and my problems. I love him. I love her.” And that’s as definite a reaction as the other reaction when you’re talking to a group of people.

After all is said and done, there are billions of dollars placed in attorney’s trust accounts all across this nation every day of the week with no fear whatsoever that that money will be stolen. People and businesses who have lawyers have faith in them. As a group maybe we don’t have the reputation that we had but on the other hand as individuals we still do.

Here is a story. A friend of mine was at a cocktail party that was given by a group of physicians and surgeons. Of course, there were lawyer jokes. My poor friend kept listening to them. After about the 150<sup>th</sup> joke, he said, “You know when your forefathers were treating George Washington by putting leeches on his butt because they thought that he had some kind of a malady, mine were writing the Declaration of Independence and the Constitution of the United States.”

That’s our heritage, those documents, those magnificent ideas, because that’s what you are when you’re a lawyer. You’re a person who has ideas in order to make the life of the individual and the community better, that’s what we do. And when we cure somebody, we just don’t cure one person like doctors do, we can cure a whole society. If you keep that in mind, there’s no profession where on a day-to-day basis you have more

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# NEW MEXICO AND ARIZONA APPELLATE COURT SYSTEMS

Michael J. Thomas

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*Pursuant to Bruce Rogoff's invitation for articles, I thought an article comparing our state's appellate court system and that of Arizona might be interesting, if not directly useful, to section members. My knowledge of the Arizona court system derives from serving as a law clerk for Judge J. William Brammer, Jr., of the Arizona Court of Appeals in Tucson from spring 1999 to late summer 2000.*

## Court of Appeals

The primary difference between the New Mexico Court of Appeals and the Arizona Court of Appeals is that New Mexico's court is, for lack of a better word, a "unified" court, meaning that it has statewide jurisdiction. Once a panel of the New Mexico Court of Appeals decides an issue, that issue is resolved statewide until the New Mexico Supreme Court disagrees, or until another panel of the Court of Appeals, perhaps years later, decides to overrule the decision.

In contrast, the Arizona Court of Appeals is divided into "Division One" and "Division Two." Division One is based in Phoenix and covers the northern half of the state. Division Two is based in Tucson and covers the southern counties. Because the two divisions have exclusive areas from which appeals are taken, it is possible for there to be a split of authority between the two divisions. Such splits often cause the Arizona Supreme Court to take up cases from the two divisions to resolve important legal issues.

The Arizona court has 22 judges, 16 in Division One and six in Division Two, in contrast to less populous New Mexico which has 10 judges on the court. Division One of the Arizona Court of Appeals sits in the Supreme Court's building in Phoenix. Division Two is housed in the Arizona State Office Building in Tucson. Both the New Mexico and Arizona courts have staff attorneys (referred to as "Prehearing Division" in New Mexico) who assist the courts in the disposition of cases. As in New Mexico, the staff attorneys work primarily on relatively simple criminal cases.

In New Mexico, when cases are assigned, they are assigned to random three-member panels. In Arizona, the cases are assigned to previously arranged panels. The panel members rotate about every three months in Division One and once a year in Division Two. On each panel in Arizona, there is a presiding judge who is charged with the additional responsibility of ruling on motions and other matters affecting the panel's cases.

## Supreme Court

The Arizona Supreme Court has, like the New Mexico Supreme Court, five members. A recent issue of *Arizona Attorney* magazine featured an interview with former Arizona Supreme Court Justice Frederick Martone, now a federal district judge in Arizona. Judge Martone was asked if he thought the Arizona Supreme Court should be expanded to seven members. He replied that such was a good idea in his mind, as he believed it would bring more diversity to the court and prevent a small subgroup of judges from exercising major influence, even in areas such as which cases to accept on certiorari.

I believe such an idea should be considered in New Mexico. It would potentially bring more diversity to our supreme court. Of course, in New Mexico, we may not have the financial ability in our state budget to add two new justice positions (along with secretaries and law clerks) to the New Mexico Supreme Court. There are other, more pressing needs of the state judiciary, such as perhaps larger, more modern office space for the New Mexico Court of Appeals' Albuquerque office.



## Related Resources

Visit [www.supremecourt.nm.org](http://www.supremecourt.nm.org) for New Mexico Supreme Court and Court of Appeals opinions, table of citations, announcements, and more.

Visit [www.supreme.state.az.us](http://www.supreme.state.az.us) for court opinions, and judicial information related to Arizona.

**Justice Gene E. Franchini**

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opportunities to do more good for more people more often than in this profession. There just aren't any.

**Rogoff: What are you going to do now?**

**Franchini:** I'm not going to quit living or leave. I'm going to maintain my license. I taught mediation and arbitration for the American Arbitration Association for about three years before I came up here on the bench. I'll continue to do mediations and arbitrations. I'll still lecture at the [UNM] law school when they ask me to do so. I'll consult on cases and I'll even help people try cases either up here or in the trial court if they think I could be useful.

Glynnie has told me, "I married you for better or for worse, but not for lunch, so you'd better have some plans." And I said, "Yes, ma'am." I surrendered to that lady a long time ago.

**Rogoff: Is there anything else you'd like to talk about that we missed, anything at all?**

**Franchini:** The job of judging is very difficult. You are called upon to make unpopular decisions quite frequently. If you are concerned with "bad press" or "letters to the editor" and it affects your decisions, you are lost forever. Your oath as a lawyer and a judge is to uphold and support the Constitution and laws of the United States and the State of New Mexico, and to do it equally without regard to race, creed, color, sex or status. I hope that I have always done that. I know that I have really tried. It has been a wonderful experience which I will remember and cherish always.

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