

Appellate News

Volume VIX - Summer 2002

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MESSAGE FROM THE SECTION CHAIR

by Tom Bird

Our section remains active and productive. We are beneficiaries of generous contributions in time, talent, and effort from our section's membership and board. This year finds the section again promoting communication and practice skills for New Mexico's appellate law practitioners.

You may have recently received an invitation via e-mail to participate in the section's new "list serve," or e-mail mailing list. Subscribers can e-mail appellate law-related questions, answers, insights announcements and other information they may want to communicate to other section members. It offers a chance to communicate efficiently with you appellate practice colleagues. If you would like to participate, but did not receive an invitation, please contact Veronica Cordova at vcordova@nmbar.org for subscription instructions.

The board has approved a writing—focused CLE program scheduled for August 16, 2002. Presenters will include Martha Faulk, Esq., an authority on writing skills who will address approaches to making your legal writing more readable and more persuasive. Ed Ricco, Esq. will discuss editing and organization in brief writing, Judge Cynthia Fry will discuss writing skills from the judicial

perspective and Andrew Montgomery, Esq. will talk about the convergence of persuasiveness and high ethics in legal writing. The program, entitled "The Thirteenth Annual Appellate Practice Institute: The Art of Persuasive Writing," is scheduled for August 16, 2002 at the State Bar Center. We hope you will attend what promises to be an excellent, practical program.

The Board has also approved preliminary plans for a 2003 CLE program focused on *Brown v. Board of Education* as an appellate case study. Chair-Elect Andy Montgomery has conceived an ambitious program which will explore the historical roots of *Brown*, analyze the arguments presented in the *Brown* briefs and oral arguments, and discuss *Brown's* legal and historical significance. The section anticipates sponsoring this program jointly with the New Mexico Black Lawyers Association and perhaps other appropriate organizations.

Please contact me with any suggestions you may have for ways to improve our section and its services. My direct telephone number is: (505) 346-9123

and my address is:

PO Box AA
Albuquerque, NM 87103

I am always looking for people to write articles for this newsletter. If you have any interest, please let me know.
Bruce Rogoff, NM Court of Appeals, PO Box 2008, Santa Fe, NM 87504-2008; telephone, 505-827-4811; fax, 505-827-4946

NEW MEXICO COURT OF APPEALS CALL FOR VOLUNTEERS

by Judge Cynthia A. Fry

On occasion, the Court has cases in which one party or the other is self-represented, but in which the Court thinks counsel may be of assistance and the party who is self-represented may want counsel to perform services. These are cases that are screened by the staff attorneys or by the attorney/clerk of the court. The court is aware of a few attorneys who have volunteered to help on such cases and is interested in compiling a larger list of volunteers.

The volunteer attorneys' contact at the Court of Appeals will typically be a member of the Appellate Courts' Pro Se Committee, either Bridget Gavahan, Senior Staff Attorney, or Patricia Wallace, Attorney/Clerk of the Court. These Court staff would not inform any judges of any attorney's specific actions.

In addition to the description stated above, the guidelines for such volunteers include the following information. Attorneys would not be required to take cases upon the court's referral. They could decline particular cases and could

decline cases at particular times. The reasons for declining cases do not need to be revealed. Such reasons may include that the attorney does not wish to represent persons who the attorney thinks can afford counsel or that the attorney does not think that the particular litigant will be sufficiently cooperative with the attorney. In appropriate cases, the attorney would be free to negotiate a reduced fee from the attorney's regular rates to perform unbundled services. The court is flexible about the arrangements that can be made, because the court is committed to programs that provide access to justice. The court asks only that counsel participate in good faith on a *pro bono* or reduced fee basis to the extent appropriate in any given case. See Rule 16-601 NMRA 2002 (explaining what qualifies as *pro bono* representation).

When the court has such a case it wishes to refer, it makes the case file available to the attorney, who will then review the file, make copies at the attorney's expense of what the attorney wishes to be

copied, and contact the prospective client. The attorney will be responsible for contacting the litigant to determine if the litigant wants counsel's assistance and if the attorney wishes to represent the litigant. If it appears that *pro bono* or reduced fee representation will prove of use to the client and the attorney wishes to undertake such representation, the attorney will do so. If not, the attorney will so inform the Court, and the litigant will remain self-represented.

The attorney could volunteer for limited tasks, e.g., responding to a notice of proposed disposition, but not writing any briefs if the case were to be assigned to a general calendar; handling the case in the Court of Appeals, but not further; handling the case to opinion, but not rehearing, etc. In such instances, the attorneys should follow the notice originally printed in the *Bar Bulletin* of February 15 and 23, 2001, and reprinted below. The attorney should, of course, make clear to the litigant the tasks that the attorney is undertaking and should

send the client copies of the limited appearance.

If you wish to volunteer to be on the court's list of available attorneys, please contact Bridget Gavahan, Senior Staff Attorney, P.O. Box 2008, Santa Fe, NM 87504, (505) 827-4936, coabmg@nmcourts.com.

From February 2001 Bar Bulletins: Notices - N.M. Supreme Court and Court of Appeals—Appearance for Limited Purpose

The New Mexico Supreme Court and Court of Appeals will accept papers for filing in which the filing attorney's appearance is limited to particular purposes, such as filing discrete pleadings. Both courts ask that the limitation be clearly set forth both on the title page and in the signature block in accordance with rule 12-302(B) NMRA 2001. Further, in accordance with Rule 12-302(C), the document itself, on the title page and in the signature block, or any subsequent motion to withdraw, shall contain an address at which service may be made on the client.

RECENT DEVELOPMENTS IN NEW MEXICO

APPELLATE PRACTICE

compiled by Edward Ricco
Rodey, Dickason, Sloan, Akin & Robb, P.A.

April 2002
Cases from *Bar Bulletin*, Vol. 40, Nos. 27-52

Finality/Appealability

Pina v. Espinoza, 2001-NMCA-055, ¶ 30, 130 N.M. 661, 29 P.3d 1062, cert. denied, No. 27,048 (2001).

Where no review as of right existed from order compelling plaintiff to disclose allegedly privileged information, plaintiff could obtain review by disobeying order and appealing from resulting dismissal; plaintiff had sought writ of superintending control, which was denied, and would not be required to pursue interlocutory appeal, which was discretionary with both trial and appellate courts.

State v. Ngo, 2001-NMCA-041, ¶ 7, 130 N.M. 515, 27 P.3d 1002.

Order imposing monetary sanction on counsel payable in 30 days under penalty of suspension was final and appealable when entered.

Fate v. Owens, 2001-NMCA-040, ¶ 12, 130 N.M. 503, 27 P.3d 990, cert. denied, No. 26,972 (2001).

Appeal was properly certified under Rule 1-054(B)(1) from order that disposed of claims, and remaining counterclaims involved issues that were “legally and factually discrete.”

Notice of Appeal

State v. Ngo, 2001-NMCA-041, ¶ 9, 130 N.M. 515, 27 P.3d 1002.

Notice of appeal that referenced and attached order sanctioning defense counsel but did not name counsel as appellant was adequate; it was clear that defense counsel was appealing the sanctions order.

In re State ex rel. Children, Youth & Families Dep’t, 2001-NMCA-071, ¶ 44, 130 N.M. 781, 32 P.3d 790.

Notice of appeal did not perfect appeal from subsequent order where, after party received notice of order in time to appeal from it, party failed to amend original notice of appeal or file another notice of appeal.

Writ of Error

Chavez v. Board of County Commissioners, 2001-NMCA-065, ¶ 12, 130 N.M. 753, 31 P.3d 1027.

Failure to seek writ of error from order denying motion for summary judgment on qualified immunity grounds, while waiving claim of immunity from suit, did not bar defendant from asserting immunity from liability at trial and raising issue on appeal.

State v. Ngo, 2001-NMCA-041, ¶ 7, 130 N.M. 515, 27 P.3d 1002.

Writ of error not appropriate means of reviewing sanctions order that was final and appealable when entered; writ quashed as improvidently granted.

Preservation of Issues/Waiver or Abandonment

Harbison v. Johnston, 2001-NMCA-051, ¶¶ 7-8, 130 N.M. 595, 28 P.3d 1136.

Although plaintiff did not assert statute raised on appeal as basis for contention that trial court had personal jurisdiction over defendant, defendant argued that court lacked jurisdiction under that statute and court agreed in granting motion to dismiss; jurisdictional issue was squarely before court, and court was clearly alerted to specific issue of jurisdiction under statute in question.

State v. Hill, 2001-NMCA-094, ¶¶ 6-7, 131 N.M. 195, 34 P.3d 139.

Jury instruction issue was preserved although defendant did not tender correct written instruction; purpose of tender requirement is to alert trial court to defendant’s argument; trial court’s comments during discussion of instructions indicated that court clearly understood type of instruction defendant wanted and that tendered instruction had to be modified to correctly state the law.

State v. Foxen, 2001-NMCA-061, ¶ 12, 130 N.M. 670, 29 P.3d 1071, cert. denied, No. 27,051 (2001).

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Fundamental error analysis would be applied although error may have been invited by counsel's participation in formulating erroneous jury instruction, where error was result of oversight or neglect rather than of deliberate trial tactic gone awry.

State v. Benally, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134.

Split (3-2) decision in which Court divides sharply on application of fundamental error analysis involving omission of essential element in criminal jury instructions.

State v. Ngo, 2001-NMCA-041, ¶ 8, 130 N.M. 515, 27 P.3d 1002.

Counsel appealed and petitioned for writ of error challenging sanctions order. Court of Appeals stated in calendar notice that it would consider sanctions under case number assigned to writ of error and dismiss appeal. Counsel did not abandon challenge to sanctions by failing to oppose dismissal of direct appeal, even though court ultimately concluded that appeal rather than writ of error was proper procedural course: "[W]e will not penalize defense counsel for not opposing summary dismissal of the direct appeal when our actions encouraged him to act as he did."

Administrative Appeals

C.F.T. Development, LLC v. Board of County Commissioners, 2001-NMCA-069, ¶¶ 8-9, 130 N.M. 775, 32 P.3d 784.

Issues on which Court of Appeals may grant writ of certiorari to district court in administrative appeal, and grounds on which Court of Appeals will review lower

court's decision, are as set forth in appellate rule: conflict with an appellate decision, statute, ordinance, or regulation; significant constitutional question; or issue of substantial public interest. Much of what commonly falls within administrative standard of review is assigned to district court sitting in appellate capacity. Court of Appeals does not have task of reviewing whether agency decision is arbitrary, capricious, fraudulent, abuse of discretion, or not supported by substantial evidence.

Prior Decisions - Precedential Effect

Aguilera v. Palm Harbor Homes, Inc., 2001-NMCA-091, ¶¶ 11, 23, 131 N.M. 228, 34 P.3d 617, cert. granted, No. 27,144 (2001).

Court of Appeals need not follow Supreme Court precedent if it determines that Supreme Court, if given opportunity, would conclude that precedent is no longer good law and would overrule it; court declines to follow statement in 15-year-old Supreme Court decision which was based upon widely criticized opinion by divided panel in another jurisdiction, conflicts with present practice, and contravenes strong New Mexico policy favoring opposite result; "[t]imes have changed" and it is questionable whether Supreme Court statement "reflects the state of our law today."

Attorney Discipline

In re Allred, 2001-NMSC-019, 130 N.M. 490, 27 P.3d 977.

Failure to file timely docketing statements as basis for discipline of counsel.

A VISIT WITH JOE WOOD ABOUT THE EARLY YEARS OF THE COURT OF APPEALS

by Bruce Rogoff

It was 1966, the year the great Sandy Koufax won 27 games, and I was ten. He was brilliant that year, with a sparkling 1.73 E.R.A., striking out 317 batters. I loved Sandy and his Dodgers. The year before, 1965, they beat the Minnesota Twins to become World Champions. I have a genuine world series program from 1965, and I trot it out once in awhile for a CLE presentation, finding a way to squeeze it in. It's a period piece now. On the cover, two Twins (naturally) and a single Dodger boldly face each other, in vintage Apollo space capsules, and menacingly wield baseball bats. Inside, the program advertises the great 1966 Dodge Coronet, the "show plus go car," urging the reader to "make no mistake, make it a Dodge." You could get it filled up at a service station, by guys who'd circle around the car, ask if you wanted a wash too. I think they even had uniforms. And, oh yeah, the Court of Appeals started that year, 1966.

My friend Joe Wood, one of my mentors in this business, was one of four judges named to the new court by Governor Jack Campbell. The others were E.T. Hensley, Jr., Waldo Spiess, and LaFel Oman. They represented a geographic cross-section, Hensley from Clovis, Spiess from Las Vegas/Albuquerque, Oman from Las Cruces, and Wood from Farmington. If you visit the Supreme Court building in Santa Fe, you can see their first picture on the wall, black-and-white, with two of the men wearing conservative 60's eyeglasses that have returned to fashion. Wood is the only living member of the original court.

Wood retired from the court in 1986, and until recently was of counsel to the firm of Hinkle, Hensley, Shanor, and Martin. I called over there to speak with him, and he was not there, so I asked to be put through to his voice mail. "Don't bother," said the receptionist, "he never listens to it." So I left a message in the old fashioned way, as Wood likes, on a piece of paper. It did not take long for him to call back,

and we agreed to meet for lunch.

According to Wood, there was no great fanfare when the court opened. "We just showed up, got sworn in, and went to work," he said. They occupied the wing where the current Court of Appeals' clerk's office is, and the wing above that, on the second floor. Wood says that during the court's first year, they did not just function as appellate judges, but were assigned to try cases around the state. He reminded me that there were no uniform jury instructions prior to 1966, and lawyers just made up their own instructions.

In the Court of Appeals, all opinions were typed, using carbons. There were no xerox machines, computers, or word processors. It seems funny to think about it now. Try very hard not to make mistakes, or make changes, or someone would have to type the whole thing over again. I'm not sure, but perhaps that is why the opinions of those days are relatively short, hardly the detailed discourses they are now. At various times in these lunches with Judge Wood, he has expressed his view that modern judges just write too much.

In 1966, Woodstock and the foment of the late 60s hadn't happened yet, but the seeds of change were there.

Gideon v. Wainwright, 372 U.S. 335 (1963), was decided in '63. That resulted in an increase in the court's criminal caseload. Initially, to deal with the

requirements of Gideon, judges simply appointed lawyers in criminal cases. Appointed counsel did not dare not to appeal, so the number of criminal appeals increased. However, under the appointment system, the quality of counsel varied. To deal with that issue, and other problems of the appointment system, the legislature created the Public Defender system in the early 1970s.

When defendants began to receive appointed counsel, and still later, with the advent of the Public Defender system, the number of criminal appeals increased dramatically. In

Wood and the committee developed the calendaring system, a mysterious process some have said, perhaps uncharitably, that involves something like sending over a steak and having it come out hamburger.

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response, at the direction of the Supreme Court, Wood chaired a committee to develop a proposed set of appellate rules in criminal cases. The existing appellate rules had few provisions directed to criminal appeals, such as bail, and the existing rules were not concerned with the time involved in a criminal appeal. A person incarcerated for a fourth degree felony could have served his minimum sentence and been discharged before the paper work in his appeal reached the appellate court. Wood and the committee developed the calendaring system, a mysterious process some have said, perhaps uncharitably, that involves something like sending over a steak and having it come out hamburger. The committee wrote new rules to include the calendaring system, and the rules were approved by the Supreme Court. The calendaring system, which in the beginning dealt only with criminal appeals, was designed to weed out weak appeals from those that deserved much more significant treatment. The court also created the prehearing division to help administer the calendaring system.

Because the calendaring system was used only for criminal appeals, for many years there was a separate version of the appellate rules for criminal cases. Now, of course, all appeals, civil and criminal, go through the calendaring process, and there is only one set of appellate rules.

Wood also said that, at least in the beginning, there was a well defined hierarchy between the two appellate courts. He told me the judges' chairs in the Court of Appeals courtroom had to be lower than those used by the Supreme Court justices.

"There are a few skeletons I haven't told you about, and I'm not going to," he said, erupting into his unmistakable laugh, pulling on his houndstooth newsboy cap, and heading back to work.

Appellate Practice

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of the State Bar of New Mexico

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