

A Message From the Chair

Edward Ricco

Welcome to another edition of the Appellate Practice Section's newsletter! Thank you to our editor, Mark Standridge, for bringing this edition to publication, and also to the authors for their contributions.

Our biggest news this year is that the Section's efforts to establish a pro bono appeals program finally have come to fruition. I was pleased to serve with Jocelyn Drennan and Lynn Mostoller on a committee to develop the details of the program. We had the full support of our Board of Directors as well as that of the Court of Appeals, the Access to Justice Commission and ultimately the Supreme Court.

Our pro bono program is modeled after a program that is operating in Colorado. It uses the Court of Appeals calendaring system as a screening device to identify appeals with substantial issues in which briefing by counsel could be helpful to the court's decision-making. Once an appeal involving a pro se party is assigned to the Court of Appeals general calendar, the party will be contacted by the court and offered the opportunity to request pro bono counsel. Those parties who opt in will be asked to provide financial information to be screened for eligibility by the Volunteer Attorney Program. If the party meets the eligibility criteria, information about the appeal (likely in the form of the docketing statement) will be circulated to a panel of attorneys who have volunteered for the pro bono program, and any attorney interested in potentially taking on representation of the party may obtain the record proper from the Court of Appeals for review. If the attorney remains willing to undertake the representation, the VAP will connect the attorney and party to determine whether they can form an attorney-client relationship, in which case the appeal will proceed as a counseled appeal.

There is no guarantee, of course, that a volunteer lawyer will be found for every eligible pro se party, but with more than a dozen attorneys already having signed on to the volunteer panel and the anticipated flow of cases from the Court of Appeals anticipated to be on the order

of ten per year, we expect that the program will have the capacity to handle the cases that come along. The program may expand to include Supreme Court cases, and there are additional routes into the program for exceptional cases, so we hope to maintain a robust pool of volunteers. I encourage Section members to consider signing up as volunteer attorneys for the pro bono appeals program. Contact Dina Afek at the VAP or Aja Brooks at New Mexico Legal Aid to volunteer.

The Section held its annual Appellate Practice Institute on Sept. 16. The program was particularly rich this year with a keynote address by Howard Bashman, creator of the "How Appealing" blog; a segment focusing on appellate mediation with the 10th Circuit's Chief Mediator David Aemmer, and the Court of Appeals' appellate mediator, Robert Rambo; a conversation with Court of Appeals Chief Clerk Mark Reynolds; and panels discussing administrative appeals, issue preservation, immediate rights of appeal and appellate ethics. If you were able to attend, I hope you enjoyed it. If you missed it, keep an eye out for next year's program.

Additionally, this year the Section is joining with the Court of Appeals and the Supreme Court to present an Appellate Bench & Bar Conference, which will be held at the Supreme Court on Oct. 28. The conference is intended to present an opportunity for the members of the courts to share their views with practitioners on best (and worst) practices and for justices, judges and staff to explain the workings of the courts. There also will be ample opportunity for discussion and Q&A, including an informal lunch. Registration for the conference will open soon and will be limited because of constraints on the available space. I hope as many Section members as possible can attend.

I think those of us who focus on appellate practice are lucky to work in a field that is interesting, intellectually challenging, and important to the development of the law and in which respect and collegiality are the norm. My best to all of you.

Diversity in the Appellate Bar: Looking to the Past and to the Future

Tim Atler

This past June I had an eye-opening experience. I was sitting in the library of the New Mexico Court of Appeals Pamela B. Minzner Law Center. Joining me were Court of Appeals Judge Monica Zamora, her law clerk Trish Payne, and fellow Appellate Practice Section Director Emil Kiehne. We were speaking to a group of middle school students who were participating in the New Mexico Hispanic Bar Association/University of New Mexico Summer Law Camp. The Summer Law Camp is a week-long program in which 12 middle school students from diverse socioeconomic and geographical backgrounds learn about the legal profession. On this particular morning, the students were visiting the Court of Appeals to learn about the appellate courts and how appellate practice differs from trial practice.

One of our main goals was for the students to understand that appellate lawyers have the opportunity to effect significant change in the law. To underscore this point, we presented the students with an important civil rights case decided in the 1950s: *Hernandez v. Texas*, 347 U.S. 475 (1954). *Hernandez* involved the question of whether the systematic exclusion of Mexican-Americans from jury service in Jackson County, Texas violated the Fourteenth Amendment's guarantee of equal protection.

The facts in *Hernandez* are straightforward. In the early 1950s, a grand jury indicted Pete Hernandez for the murder of Joe Espinosa. There is little doubt that Hernandez was guilty of the murder; he shot Espinosa in front of several witnesses and in broad daylight. There is also no doubt that Hernandez was entitled to a trial by a jury of his peers. The question was whether the criminal justice system in Jackson County could fairly provide that to him.

Hernandez's lawyers knew the answer to that question was "no." Jackson County had a long history of excluding Mexican-Americans from service as jury commissioners, grand jurors and petit jurors. The lawyers, who were themselves Hispanic, moved to quash the indictment and the jury panel prior to trial. They presented

evidence that 14 percent of the population of Jackson County were persons with Hispanic surnames and that, for the preceding 25 years, there was no record of any person with a Hispanic surname having served on a jury commission, grand jury or petit jury. They submitted additional evidence that County residents distinguished between "white" and "Mexican," and that there had been segregation in the schools, at restaurants and in other public places. Even the Jackson County courthouse had segregated bathrooms with a sign above one of them denoting "Colored Men" and "Hombres Aqui."

Despite this evidence of pervasive discrimination, the trial court denied the motion. Pete Hernandez was then tried and convicted of murder. Hernandez's lawyers appealed the conviction, first to the Texas Court of Criminal Appeals and then to the U.S. Supreme Court. The State responded to the appeals by arguing that the Fourteenth Amendment only contemplates two classes of persons—black and white—who are entitled to equal protection. Thus, the State asserted, Mexican-Americans were legally white. The Texas appellate court agreed, concluding that there had been no discrimination because the all-white juries that indicted and convicted Hernandez were actually members of his race.

The U.S. Supreme Court reversed. It rejected the state's argument that the Fourteenth Amendment only recognizes two classes of persons. Instead, it held that Hernandez met his burden of proving that Mexican-Americans were treated as a separate class in Jackson County. The Fourteenth Amendment guaranteed him the right to be indicted and tried by juries from which Mexican-Americans had not been systematically excluded.

Hernandez was a compelling case to present to the students, not only because of the factual and legal issues involved, but also because the lawyers who brought the appeal were Mexican-American and had faced plenty of discrimination themselves. Their journey to the Supreme Court is documented in a film we showed to the students which is entitled *A Class Apart: A Mexican American Civil Rights Story*. The film shows how the lawyers, with the support of Mexican-American communities

from across the country, overcame incredible challenges in order to achieve their landmark win.

One such challenge was confronting the Court's apparent lack of familiarity with Mexican-Americans in general. For example, one Justice asked at oral argument, "What is [a Mexican-American]?" Another Justice used a racial epithet, asking whether "they call them greasers down there[?]" Hernandez's law-

yers gave the Justices a history lesson on the United States' annexation of Texas, which caused the U.S.-Mexico border to cross the Hispanic communities that had been living there for generations. The Justices were captivated by the presentation and allowed Hernandez's lawyers sixteen extra minutes beyond the allotted time.

The Justices' apparent ignorance about the history of the Mexican-American community in Texas should not be surprising; after all, these were the first Mexican-American attorneys ever to argue in the Court. Ironically, the composition of the Court itself – all white men – reflected the very inequality and lack of diversity in the legal system that Hernandez and his lawyers were up against.

The film was only part of the eye-opening experience for me that morning. The other part was the students' reaction to the film and to the case overall. I was impressed with their understanding of why the jury system in Jackson County was fundamentally unfair, and why it was necessary to give Hernandez a new trial even though he was obviously guilty. I thought: *They get it. They understand due process!*

But, to me, the students' emotional reaction to what Hernandez's lawyers had achieved was far more important than their understanding of the legal concepts. The students described the lawyers as "brave" and "inspiring." We talked about how the lawyers brought about change in the law that affected everyone, not just their



American Experience documentary *A Class Apart*:
A Mexican American Civil Rights Story
<http://aclassapartmovie.com/about.php>

client, by challenging a system that was unfair. We also discussed why it is important to have diversity at all levels of the legal system, including in our jury pools, in our courts, and among the lawyers who present their cases to those decision-makers. In short, people from different backgrounds may have different perspectives about the law. Equal protection is an empty concept if those perspectives are not given a voice.

Although the legal profession has become much more diverse in the years since *Hernandez* was decided, we still have a very long way to go. Some of our historically disadvantaged communities in New Mexico continue to struggle with poverty, with other barriers to educational and professional achievement, and with inadequate access to the legal system. While it is beyond the scope of this article to explore all of the possible causes or potential solutions to those problems, suffice it to say that these issues are complex and require attention at many levels.

Still, I left the Court that morning with a glimmer of hope and a healthy dose of inspiration. The students awakened in me a consciousness about the need for diverse, skilled lawyers in the appellate bar who can have a meaningful impact on the evolution of the law in our state. My hope is that the meeting also sparked an interest in appellate practice for some of the students. It will be a number of years before we know for sure. In the meantime, we would all do well to remind ourselves about cases like *Hernandez* and *Brown v. Board of Education* and all of the other landmark civil rights cases; it is important to remember how these cases transformed the state of the law and meaningfully impacted society. We should also think about who will be tomorrow's legal heroes and how we can help them break down the barriers to equality that continue to exist in our legal system today.

2016 Appellate Bench & Bar Conference

As noted in the message from the chair, the Appellate Practice Section is joining with the New Mexico Court of Appeals and the New Mexico Supreme Court to present an Appellate Bench & Bar Conference, which will be held at the Supreme Court on Friday, Oct. 28. The State Bar of New Mexico Center for Legal Education will be the course provider for this full-day conference and CLE program. Following remarks to the State Bar from the chief justice of the Supreme Court, chief judge of the Court of Appeals, and chief clerks of the Supreme Court and Court of Appeals, topics to be discussed at the Bench & Bar Conference will include:

- Advocacy: What works and what doesn't in briefs and oral argument;
- Navigating the Court of Appeals docketing and calendaring process;
- Criminal appeals topics; and
- Keys to obtaining (or resisting) discretionary review.

There will also be a lunch buffet at The Inn at Loretto.

More details about this exciting program will be coming soon.

For more information, contact the Center for Legal Education:

www.nmbar.org
cleonline@nmbar.org
505-797-6020

Non-State Bar Members and non-attorneys are encouraged to attend!
Reduced rates also apply for those not seeking CLE credit.

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