A Message From the Chair

Jonathan E. Sperber
Office of the State Engineer

The past year has been one of change for appellate practice in New Mexico. The Appellate Practice Section mourns the passing of Former Chief Justice Pamela B. Minzner, who was honored with a tribute by the State Bar and for whom the Leadership Training Institute has been named. We welcome Governor Richardson’s appointment of Justice Charles Daniels as Justice Minzner’s replacement on the Supreme Court. Justice Daniels, who has served on several Supreme Court and State Bar committees and as a professor at the University of New Mexico School of Law, is expected to seek election to the Supreme Court during the 2008 primary and general elections.

Other appellate changes during 2007 include the Supreme Court’s adoption of major revisions to the Rules of Appellate Procedure, proposed rules changes recommended by the Ad Hoc Committee on Administrative Appeals, and progress toward a new Court of Appeals building on the UNM law school campus.

The Appellate Practice Section was also very active in 2007. At our 18th Appellate Practice Institute, Justice Petra Maes and Judges Harris Hartz, Michael Bustamante and Cynthia Fry engaged in a debate on the use of unpublished opinions; Judge Lynn Pickard participated in a panel discussing new directions in administrative appeals; Supreme Court librarian Robert Mead discussed legal information in the 21st century; Chief Appellate Court Clerk Gina Maestas and Supreme Court Senior Staff Attorney Joey Moya presented insider views of the appellate courts; keynote speaker Stephen Armstrong spoke on writing for impact; and board members Sue Herrmann and Ed Ricco provided an appellate law update.

Last year the Appellate Practice Section also donated $1,000 to the UNM School of Law National Moot Court Team, which recently went up against some of the top law schools in the country. Sue Herrmann presented a summary of changes to the Rules of Appellate Procedure at the State Bar convention in Ruidoso and her presentation was well attended, in spite of having a time slot opposite Justice Sandra Day O’Connor. Jonathan Sperber gave a presentation to New Mexico’s water law judges at the Judicial Education Center on appeals from State Engineer decisions. Thanks to graphic designer Julie Schwartz, the Section newsletter has taken on a new and colorful look.

This year also promises to be very exciting for the Appellate Practice Section. The Supreme Court, Court of Appeals, and the Section will be hosting an Appellate Bench/Bar Conference in Santa Fe on April 11, which will provide an opportunity for practitioners to formally discuss appellate practice with judges and staff. In addition, we are actively organizing the 19th Appellate Practice Institute, which will be held at the State Bar Center on August 15, and we are continuing work on the appellate forms project.

We encourage you to participate in these Section events and to attend our board meetings during 2008. As always, the Section’s continued success depends upon an active membership.
An Interview with Judge Cynthia A. Fry

Scott M. Davidson, Esq.

Cynthia A. Fry is a judge on the New Mexico Court of Appeals. We visited about how she approaches briefs and oral arguments, her favorite types of cases, and her judicial philosophy.

Davidson: There are different styles of approaching briefs as a judge. A judge on the United States Court of Appeals for the Third Circuit said that when she reads briefs, she’ll curl up in a comfortable chair with a cup of tea and read the briefs like she’s reading a novel. Then there’s former New Mexico Supreme Justice Gene Franchini who reads the brief in chief on issue #1, then the answer brief on issue #1 and so forth. What’s your style of reading and reviewing briefs?

Judge Fry: When we get cases that are assigned to the general calendar, the authoring judge is supposed to read the briefs right then and there and then provide a memo to the other panel members about what the authoring judge thinks should be done in the case. In that situation I generally just sit down and read them—brief in chief, answer brief, reply brief. But if I’m starting to draft an opinion, it’s a whole different deal. I outline the arguments more like Justice Franchini, because I’m having to actually respond to those arguments in more detail.

How frequently do you find yourself going outside the research in the briefs and supplementing that with independent research into an issue?

In most cases we do that to a certain extent because we want to make sure that the parties haven’t overlooked any major New Mexico cases. But generally, we try to stick to the issues as argued by the parties, because we don’t want to try or appeal their cases for them. And it’s not really fair to rely on authority that they didn’t rely on. But sometimes it’s necessary to look beyond the cases cited by the parties if it’s a case of first impression.

Do you find there’s a tension between resolving the case as argued by the parties and making sure, for a published opinion, that the law in New Mexico goes in the right direction?

The tension that’s more likely to occur is where the parties will address one aspect of an issue in great detail and pretty thoroughly but, for some reason, they have missed what appears to us to be a much more dispositive approach to the issue. If the parties have briefed an issue but they have missed New Mexico law or important authority on that issue, especially if it’s New Mexico authority, then we have to talk about it even if they overlooked it.

Does that happen very often?

No, not really. I can’t remember the last time someone overlooked a big deal case.

I’ve heard judges say that briefs are too long. That’s something that appellate practitioners struggle with. On one hand you want to get everything important in the brief, yet on the other hand you’re conscious of the fact that the appellate judges are busy and you don’t want to bore them. In your opinion, what percentage of opening briefs is too long?

About a third of the opening briefs are too long. But in those instances, it is not generally a matter of a well-drafted brief going on too long. It’s more a matter of a really poorly drafted brief that never seems to get around to saying what it wants to say. We generally don’t mind reading long briefs written by experienced appellate practitioners, because those briefs are usually well crafted and get to the point and say what they need to say. It’s just the lousy briefs that are too long.

When opening briefs are too long, do you find that it’s due to poor selection of issues, such as briefing five issues when they should have briefed only two?

That’s very common.

Or do you find that within each issue, they go on and on?

I think issue selection is one of the biggest culprits. When I open a brief and it has ten issues, I know that many of them are going to be without merit and probably shouldn’t have been argued. And in some briefs the writer makes a point and then makes it again; it’s redundant. Those two are the most common culprits, in addition to the brief that just is poorly organized.

And how about the fact section—do you find that where briefs are too long they include a lot of extraneous detail?

Yes. That’s an easy area to flounder around in. For example, people like to list all the pleadings that were filed and the dates they were filed on. Unless the dates are critical, as in a statute of limitations issue, it’s pointless to include that information.
How often do you find answer briefs to be too long?

In the case of answer briefs, some people give them short shrift. Because they have won below, they think that they don’t have to try as hard. And sometimes if we are struggling with an issue and the answer brief doesn’t provide that much help, it makes it very difficult to decide.

When the appellee or respondent has a different view of the facts, as often will be the case, do you find it’s helpful if they give their own version of the facts from their prospective?

Yes. If they can say they agree with a lot of the facts but disagree with some statements and then recite their own summary of what they think the evidence was, that can be very helpful. In fact, that’s why some cases end up on the general calendar—you get completely divergent views of what the evidence was, so you have to look at the record in order to decide the case.

What percentage of reply briefs are too long?

I don’t feel that there’s a huge percentage of reply briefs that are too long. Some people don’t file reply briefs.

I was recently at a conference in Denver where a panel of Tenth Circuit judges emphasized that one should never waive a reply brief. Do you agree?

I think that’s right. If there’s no reply brief, your immediate thought is that they must not think much of their arguments or they feel that they’ve been slammed by the answer brief, so why bother with the reply. In a lot of cases people don’t file reply briefs because they think, well I said it all in the brief in chief and there’s really nothing I want to add. But it doesn’t give that appearance. So I would suggest people file reply briefs.

In a criminal appeal, when you see citations to State v. Franklin, 78 N.M. 127, 428 P.2d 982 (1967), and State v. Boyer, 103 N.M. 655, 712 P.2d 1 (Ct. App. 1985), do you take that as a concession by the appellate attorney that the issue is not meritorious?

I view it that way. It gives the appearance that the appellate counsel has made a determination that the argument has no merit. However, that doesn’t mean we just skim over the issue. Even if Franklin and Boyer are cited, we go ahead and analyze the issue as if it’s an issue that may have potential merit.

I’ve often felt that there’s some ethical tension for the appellate attorney, as if the intent of citations to Franklin and Boyer is to send a quasi-secret signal to the court but the client is left out of the communication. The issue is “raised,” but by citing Franklin and Boyer, you’re not really raising it.

I think there’s a possibility that you’re leaving the client out of the loop. However, the appellate public defender’s office generally includes a parenthetical after the Franklin or Boyer citation with the holding of those cases. If the client is reading the brief and reads the parenthetical, it becomes clear to the client that the issue is being raised because the client wants it raised but that it may not have merit. The citation to Franklin and Boyer can also be helpful to the appellate lawyer because they’re not just saying, I don’t think this argument has merit. They may be saying, I recognize my ethical obligation to the court not to raise issues that are not colorable under the state of existing law.

What kinds of cases do you like best?

I like procedural issues, believe it or not. Those are kind of fun to analyze. I like tort issues. I like some criminal issues, such as procedural questions, which I think are interesting. I really am not crazy about Fourth Amendment cases because under the analysis as it has developed, it’s very easy to be result-oriented about those issues. And I do not like being allowed to be result-oriented.

Would you say the same thing about search and seizure cases on Article II, Section 10?

You know, that doesn’t come up often because people don’t tend to preserve that. But when it does it’s the same analytical framework while giving a little bit more leeway to the defendant than the Fourth Amendment analysis. But the same analytical framework, I think, is flawed.

Is it the exclusionary rule?

No. It’s not the exclusionary rule, per se. We say it’s a mixed question of law and fact and we defer to the trial court’s findings of historical fact. Yet the question of where the constitutional line is drawn is a question of law. And so you wind up parsing moment by moment everything that has happened on the street between law enforcement and the defendant. The question of law that we’re deciding is very mushed up together with the factual findings.
Are you saying it’s hard to untangle the facts from the law in that context, providing a little too much wiggle room?

Right. The way it’s developed makes it very difficult.

In Fourth Amendment cases, is it frequently the case that you find yourself trying to decipher which particular historical facts were determinative?

Yes. That’s very difficult because, in suppression hearings, courts don’t typically make detailed findings of historical facts. Typically they’ll just say, I think that this went too far and so I’m going to suppress it. If we had more detailed findings, it might be easier for us to figure out where to give deference and where not to.

Would it make the appellate courts’ job easier in search and seizure cases, or in other cases where you have a standard review that’s a mixed question of law and fact, if the lawyers in district court proposed findings of fact and conclusions of law and requested that the district court spell out the basis for its ruling?

I think that reviewing courts always find it helpful to have findings and conclusions. I would imagine if the lawyers in the trial courts asked the trial courts to make findings and conclusions, they would willingly do so. The problem is that it takes a lot of time to put together a set of requested findings and conclusions.

What do you think about sufficiency of the evidence appeals in civil and criminal cases?

I don’t think many reviewing judges particularly like appeals where that is argued, because most of the time you’re going to find evidence that supports the verdict or the judgment. But there have been cases where those appeals have been successful. So it’s not like we can recommend people completely stop doing them, because sometimes they’re right and there isn’t substantial evidence supporting a decision.

Do you see a lot of cases in the court of appeals on certiorari review where there was an appeal to district court from an administrative agency ruling, and the party that lost in district court applies to the Court of Appeals for certiorari review?

We don’t see very many. I would say less than a quarter of the cases.

Does the calendaring judge decide whether or not to take those discretionary cases? Or are those decided by a panel?

If there’s an application for interlocutory appeal or cert, it usually goes first to a prehearing attorney who will make a recommendation to the calendaring judge. Once the calendaring judge has decided which way he or she thinks it should go, then another panel member is randomly assigned because in those discretionary appeals you have to have two judges agreeing.

How does it proceed if the two panel members disagree?

Usually, there’s a panel conference. The two judges who disagree with each other would have a panel conference with the prehearing attorney to determine whether they can agree to go one way or the other. If not, then a third panel member would be assigned and it would go whichever way two out of the three decide it should go.

In the Court of Appeals, oral argument is not granted very frequently. When someone requests oral argument, what is usually the determining factor in whether it is granted?

It’s usually the author’s call. Some judges grant oral argument every time it’s requested, but that’s the minority. If I’m the author and oral argument has been requested, I look at several things. One, whether the requesting party is the party that we suspect will likely be successful. If so, then we’re less inclined to grant argument because we don’t need to be persuaded any further by that party. Another factor is if the briefs are terrible. I don’t particularly want to have people give me a terrible oral argument. It takes a lot of time to get ready for argument. If the issues are pretty straightforward and there’s nothing novel, I think maybe my time is better used by getting opinions drafted and filed.

When oral argument is granted, what types of arguments can persuade a panel to change its initial inclination?

That’s a good question. I don’t know that I can categorize it. When we grant oral argument, the parties provide nuance that’s not in their briefs and that sheds light on the issues and makes it easier for us to analyze it, even if we’re not changing our view of how it should be resolved.

Do cases where oral argument is helpful tend to be fact-sensitive cases, with a lot of factual complexity and where the dispositive issues are highly fact-dependent?
No. I think that the ones that tend to be more helpful are where it’s an issue of first impression and we’re struggling with what guidance New Mexico case law provides for us. The only time that the fact-specific stuff is helpful is if there’s something that’s not in the record but that explains how we got here. Even if it’s nothing that we can include in the opinion, sometimes it’s helpful to us to just have context and understand what was driving the case.

Did you always know that you wanted to be a lawyer or is it something that came to you later in life?

I got interested in being a lawyer when I was in college and I took a history class on constitutional rights. It was a historical survey of U.S. Supreme Court decisions in the 1950s and 1960s. I thought, I really like this stuff, so maybe I should go to law school. I went to the career counselor at my college and he said, you don’t want to be a lawyer. There are too many lawyers out there. So I gave it up. And then it just so happened after college I fell into a job as a paralegal. Doing that kind of work day to day convinced me that my initial inclination was right. That’s when I decided to go to law school.

And your career as a practicing attorney prior to becoming a judge was primarily appellate?

Right. I started out at a civil defense firm and did litigation there. I did some appeals in the course of that. I decided I liked that a lot better than trial work. And so when I left the firm, I tried to specialize in appeals. I did that for about fifteen years.

Do you have a favorite justice on the U.S. Supreme Court?

I always liked Sandra Day O’Connor because she was a swing vote. And so I felt that she tended to more accurately reflect the sense of the country as to how cases should be decided. I like the idea of someone being the swing vote, being able to change the course of the law like she did. And also, perhaps, not being easily pegged. She didn’t seem to lend herself to being characterized as very conservative or very liberal.

Do you find yourself writing a lot of dissents?

I do more now than when I first started. When I first started I was a little timid about writing dissents. But since I’ve gotten to feel more confident about my ideas and my thinking, I have been writing a few more.

Do you have a judicial philosophy?

About the best way I could characterize my kind of overriding philosophy is that I do not want to be result-oriented. And I want to constantly be aware of the danger of being result-oriented. I view my role as an intermediate appellate judge as trying to assess what the law is and how the law would dictate that a case should be decided.

When you say result-oriented, what do you mean by that?

There are many cases where I go through the briefs and the record and I think this case should be decided this way because any other way feels wrong to me. It just feels unjust. But if the law as it’s spelled out in New Mexico dictates that the result should be the way that feels wrong to me, then I should do what the law is pushing me to do rather than what my gut is telling me.

It seems to me there are certain situations where justice seems to pull you in one direction but the law pulls in a different direction. In those cases, do you feel that you have an obligation to go with the law as written?

As an intermediate court, we are obliged to follow our Supreme Court’s precedent. And it may be that personally I don’t agree with the way the Supreme Court has decided something in particular, but I’m obliged to do it. Even when the Supreme Court precedent is not entirely clear, you nevertheless get a sense of where the law is pushing you.

Would that be an instance where a special concurrence is called for—that is, where you agree that the law in New Mexico compels the result that the majority has articulated, but you write a special concurrence to suggest that perhaps the law should compel a different result?

Right. That is a common basis for a concurring opinion. And I think that’s more likely to happen when we are talking about case law. If it’s a matter of effectuating a statute that seems to me to be pretty clearly written but it’s not one that I particularly agree with, then I don’t think I have much room for writing a concurring opinion unless it’s to say to the legislature, I wish you would change how this is written.

Thank you, Judge Fry.
Immediate Review of Discovery Orders Compelling Disclosure of Protected Information: Evolving Approaches

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No right of immediate appeal ordinarily lies from a discovery order compelling production. If the order impacts sensitive material – such as confidential attorney-client communications, medical peer review material or trade secrets – securing immediate review becomes critical. Once the disclosure occurs, it cannot be undone. Which routes, then, are available to pursue immediate review? This article outlines cases in which the New Mexico Supreme Court and Court of Appeals have provided views on the issue, not always in unison.

The writ of error emerged as a seemingly viable alternative following the Supreme Court’s decision in Carrillo v. Rostro, 114 N.M. 607, 845 P.2d 130 (1992). Acknowledging that appellate jurisdiction generally only exists over final orders, see NMSA 1978, § 39-3-2 (1966); cf. id. § 39-3-4 (1999), N.M. Const. art. VI, § 3, the Court recognized that absent a pre-judgment right of appeal, important rights might be irretrievably lost. It resolved the issue by crafting a New Mexico version of the federal collateral order doctrine and prescribing the writ as the means for invoking the doctrine. To guard against unwarranted use of the writ, the Supreme Court limited its availability to orders which: (1) conclusively determined a disputed question; (2) resolved an important issue completely separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgment. See Rule 12-503 NMRA. Additionally, appellate courts retained discretion to deny review. The writ appeared well-suited to securing immediate review of the type of discovery order under consideration.

Use of the writ in the context of discovery orders was called into question by the Court of Appeals in King v. Allstate Insurance Co., 2004-NMCA-031, 135 N.M. 206, 86 P.3d 631. Invoking an earlier opinion, In re Estate of Pino, 115 N.M. 759, 859 P.2d 426 (Ct. App. 1993), the court reasoned that an order compelling discovery does not meet the third writ of error criterion because review may be obtained prior to entry of a final judgment by means of a contempt judgment, see NMSA 1978, § 39-3-15 (1966). The court derivatively held that a party seeking to challenge such an order may either (1) pursue an interlocutory appeal; or (2) refuse to comply, be held in contempt, and appeal the contempt judgment and the underlying discovery order.

Subsequent actions by the Supreme Court, however, suggested that writ relief in some form remained available at least for discovery orders impacting material afforded heightened protection from disclosure. E.g., Albuquerque Rape Crisis Ctr. v. Blackmer, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820 (Supreme Court granted petition for emergency writ of prohibition or alternatively a writ of superintending control to review order requiring production of records allegedly shielded from discovery by the Victim Counselor Confidentiality Act); accord Southwest Cnty. Health Servs. v. Smith, 107 N.M. 196, 755 P.2d 40 (1988) (Court granted...
similarly-styled writ petition to address ruling impacting confidential medical peer review material claimed to fall within the Review Organization Immunity Act. In an unpublished order, in a case in which alleged attorney-client communications and work product material were ordered disclosed, the Supreme Court handled a petition for a writ of error or in the alternative a writ of superintending control/prohibition by remanding the case to the Court of Appeals where review had been sought through a companion petition for writ of error. The Court of Appeals subsequently granted the writ of error and assigned the case to its general calendar. (The resulting decision is reported. See Santa Fe Pacific Gold Corp. v. United Nuclear Corp., 2007-NMCA-133, Vol. 46, No. 48, SBB 22 (“SFP”).)

With this state of affairs in mind, in a medical malpractice case involving an order mandating disclosure to the plaintiff of medical peer review material, after the district court declined to certify its ruling for interlocutory appeal, defense counsel simultaneously petitioned both appellate courts requesting immediate review of the order. The Supreme Court, after ordering a response to the defendant’s petition for a writ of superintending control, declined the petition without advertizing to King. The Court of Appeals, which had yet to act on the petition for writ of error before it, subsequently denied the writ, citing King. The Court of Appeals accepted review after the defendant incurred a judgment of contempt and appealed from that judgment. Chavez v. Lovelace Sandia Health Sys., Inc., Ct. App. No. 27,427 (appeal filed Jan. 23, 2007).

The Court of Appeals later changed the jurisdictional posture of the SFP case, which remained pending before it. Following the completion of briefing, the court ordered counsel to address at the scheduled oral argument the implications of King on its jurisdiction. It also encouraged the appellants in the interim to file a motion asking the district court to enter an amended discovery order which would certify the discovery ruling for interlocutory appeal. The parties and the district court acceded and an application for interlocutory appeal was filed. Following oral argument, the Court of Appeals entered an order in which it expressed its belief that review of the discovery ruling by writ of error would contravene King, and it quashed the writ. At the same time, the court concluded that on the record then before it, its jurisdiction had been properly invoked through an interlocutory appeal application. The court granted the application. Cf. SFP, 2007-NMCA-133, ¶ 1.

The procedural outcomes in Chavez and SFP do not neatly settle the issue of which routes one may use to obtain immediate review of a discovery order which impacts especially protected material. The Supreme Court continues to signal its willingness to intervene as circumstances warrant to address discovery orders involving such material, as evidenced by the recently published opinion in Pincheira v. Allstate Insurance Co., 2007-NMCA-094, 142 N.M. 283, 164 P3d 982, cert. granted, 2007-NMCR-007, 142 N.M. 330, 165 P3d 327, a case involving trade secrets allegedly protected from disclosure by New Mexico’s Uniform Trade Secrets Act and trade secrets privilege.

Pincheira provides a tableau of the evolving jurisprudence. Initially the Court of Appeals granted the appellant’s petition for writ of error. Following King, the court quashed the writ. The appellant thereafter attempted to comply with the contempt route of review outlined in King. It incurred the contempt sanction of default as to liability and appealed the resultant contempt judgment and the underlying discovery order. The Court of Appeals declined review, finding that because the district court had reserved judgment on all damages issues, the default judgment was a nonfinal order. The appellant thereupon filed a petition for writ of certiorari with the Supreme Court which the Court granted. Following full briefing and oral argument, the Supreme Court remanded the case to the district court for entry of an order clarifying whether the contempt judgment was intended to secure review pursuant to King. After entry of such an order and the filing of a second notice of appeal, the Court of Appeals undertook review.

Where, then, do matters stand? Presently it appears that at least three routes exist for pursuing immediate review of a discovery order involving protected material. A party can apply for interlocutory appeal of the ruling if the district court is willing to certify the order for immediate appeal. See NMSA 1978, § 39-3-4; Rule 12-203 NMRA. Despite King, it appears that a party still may pursue extraordinary writ relief from the Supreme Court, perhaps in conjunction with a petition for writ of error. E.g., SFP, Chavez; see N.M. Const., art. VI, § 3; NMSA 1978, § 39-3-5 (1966); Rule 12-504 & Rule 12-503 NMRA. Finally, a party always can refuse to comply with the order at issue, be held in contempt, and appeal from the contempt judgment and discovery order at issue. If the final scenario materializes, the proceedings in Pincheira caution in favor of drafting an order which specifies that the judgment is intended to secure appellate review in accordance with King.

Endnote
1 The author wishes to thank Edward Ricco for helpful discussions and guidance regarding this article.
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