Appellate News

Volume _______ • Fall 2004

INDEX

Recent Developments in New Mexico Appellate Practice 4
Interview of the Appellate Defender, Sue Herrmann, Esq. 8

CITING "UNPUBLISHED" OPINIONS: AN OVERVIEW OF THE NATIONAL DEBATE

by: Caren I. Friedman[1]

For the past several years, a storm has been brewing in federal appellate courts across the country. The controversy concerns the citation of unpublished opinions. This article will frame the issue and report on some recent developments. For those who wish to study the problem in greater detail, a quick review of the endnotes to this article will lead you to many useful sources.

The issue has been kicking around for decades. It probably dates back to 1973, when federal appellate courts began limiting the publication of opinions, fearing that a "crisis of volume" would "crush [the common law] by its own weight if the rate of publication [was] not abated."[2] The modern-day version of the controversy was sparked when Eighth Circuit Judge Richard Arnold ruled that the portion of the local Eighth Circuit rule "that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'"[3]

Anastasoff began as an unassuming tax refund claim that has grown into gigantic proportions. The plaintiff had argued that although there was a case directly on point that went against her, the court was not bound to follow it because it was unpublished and, therefore, not precedent under the local rules of the Eighth Circuit.[4] Judge Arnold began by noting that the "doctrine of precedent was well-established by the time the Framers gathered in Philadelphia."[5] In support of this contention, he hearkened back to the writings of Sir Edward Coke and Blackstone. Coke teaches that "'[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion.'"[6] Blackstone teaches that because "precedents are the 'best and most authoritative' guide of what the law is, the judicial power is limited by them."[7] The doctrine of precedent, the court noted, was not only important "to keeping the law stable," but was a "crucial sign of the separation of the legislative and judicial power."[8] Thus, as Alexander Hamilton put it, "'[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.'"[9] After holding part of its local rule unconstitutional, the court felt that it had a duty to follow the unpublished decision.[10]

Judge Arnold's opinion in *Anastasoff* caused quite a stir. It was only a matter of months before Judge Alex Kozinski, perhaps the leading opponent of Judge Arnold's position, put his two cents in.[11] In *Hart v. Massanari,* Judge Kozinski lodged his concern that *Anastasoff* "may seduce members of our bar into violating" the local rule prohibiting citation of unpublished decisions "under the mistaken impression that [the local rule] is unconstitutional."[12] Judge Kozinski thus set out to "lay these speculations to rest."[13]

Judge Kozinski first pointed out that rules that prohibit citation of unpublished decisions would only be cause for alarm if they truly "cut . . . courts free from all legal rules and precedents."[14] In his view, all such rules do, however, is allow appellate panels to decide whether a particular ruling will have binding effect.[15] He then took issue with Judge Arnold's suggestion that Article III somehow constitutionally limits the manner in which courts conduct business: "*Anastasoff* may be the first case in the history of the Republic to hold that the phrase 'judicial Power' encompasses a specific command that limits the power of the federal courts."[16]

Judge Kozinski attempted to debunk the idea that accepted practices at common law could somehow be constitutionalized to limit the federal judiciary today. To do so, he relied on examples of the ways in which our system of law has changed since the Framing.[17] One way, according to Judge Kozinski, is that today we hold a much stricter conception of precedent than did the Framers.[18] For example, at common law published decisions were scarce, and, therefore, "the most important sources of law were not judicial opinions . . . but treatises that restated the law."[19] Moreover, case reporters were merely "entrepreneurs who scribbled down jury charges as they were delivered by judges, then printed and sold them."[20] For this reason, "case reports often contradicted each other in describing the reasoning, and even the names, of particular cases."[21] There is thus no constitutional impediment to issuing

continued on page 2

"UNPUBLISHED OPINIONS"
(continued from page 1)

nonprecedential opinions, Judge Kozinski concludes, "because the Framers would have seen nothing wrong with the practice."[22]

According to Judge Kozinski, our modern concept of precedent – that opinions must be followed – came about during the nineteenth and early twentieth centuries.[23] It was then that the West Company began to publish case reporters.[24] As a result, "the weight of precedent began to increase – weight, that is, in terms of volume."[25] In Judge Kozinski's view, it is crucial, then, for appellate courts to have the power to determine what will constitute binding precedent and what will not.[26] And because drafting precedential opinions is "an exacting and extremely time-consuming task," appellate courts generally do not "have the resources to write precedential opinions in every case that comes before them."[27] Consequently, in order to spend the requisite time drafting precedential opinions in the 16% of decided cases resulting in published dispositions, Judge Kozinski urges, the court must be free to issue unpublished dispositions – "more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision" – in the remainder of the cases.[28] Judge Kozinski further posits that litigants should not be permitted to cite these unpublished dispositions, in essence because they are not as carefully crafted as published opinions.[29] Contrary to the holding in *Anastasoff*, Judge Kozinski concluded that the local rule prohibiting citation of unpublished decisions was constitutional.[30]

It is worth pausing to examine how the Eighth Circuit's rule differs from the Ninth Circuit's, and to note how the Tenth Circuit's rule fits into the mix. In the Eighth Circuit, "[u]npublished decisions are not precedent" while in the Ninth Circuit "[u]npublished dispositions . . . are not binding precedent" and generally may not be cited to or by the courts in that circuit.[31] Tenth Circuit Rule 36.3 states that unpublished opinions are not binding precedents, except for purposes of claim/issue preclusion and law of the case. While "[c]itation of an unpublished decision is disfavored," counsel may nevertheless cite it if it "has persuasive value with respect to a material issue that has not been addressed in a published opinion[] and it would assist the court in its disposition."[32]

The position of state appellate courts with respect to unpublished decisions is beyond the scope of this article. Nevertheless, it is worth noting briefly that the Arnold/Kozinski debate has certainly had an effect upon state judiciaries. For example, in the wake of *Anastasoff* and *Hart*, the Texas Supreme Court decided to allow citation of formerly unpublished decisions. In addition, the California Court of Appeals began posting unpublished opinions on the court's website. Our own Court of Appeals has emphasized, albeit pre-*Anastasoff/Hart,* that "summary calendar opinions are not precedent." [33]

Professor Stephen R. Barnett, a leading commentator on the topic, has noted other developments resulting from the debate. For instance, the American Bar Association's House of Delegates has gone on record in disagreement with Judge Kozinski's opinion. According to the ABA, a court's prohibition on the citation of unpublished decisions is "'contrary to the best interests of the public and the legal profession.'"[34] Thus, the ABA has urged federal appellate courts to make unpublished decisions available and to permit their citation.[35] The District of Columbia Circuit, too, has aligned itself with Judge Arnold: the court rescinded its no-citation rule and announced that unpublished opinions entered after January 1, 2002 "may be cited as precedent."[36] The First Circuit followed suit later that year; however, it will consider unpublished opinions only for their "persuasive value but not as binding precedent."[37] A further development, which Professor Barnett dubs a "startling action that drains the meaning from the term 'unpublished' opinion," is the September 2001 debut of West's Federal Appendix, a new case reporter that "looks, reads, and quacks like a book of 'published' case reports," but that actually consists of "unpublished" opinions from the United States Courts of Appeals.[38] This latter development is "worthy of *Alice in Wonderland.*"[39]

On the merits, so to speak, Professor Barnett's thoughts are worth examining. The heart of Professor Barnett's response is what he calls the "spectrum of precedent."[40] As fascinating as he finds Judges Arnold's and Kozinski's historical debate, he points out that all of the shouting is really only about one kind of precedent: binding precedent. But in Professor Barnett's view, there are other kinds of precedent, especially as that concept is used in federal appellate courts' local rules. For example, some precedent may be overruled, although the *en banc* procedures must be followed in order to do so. Other "precedent" is considered as having only "persuasive value," which is the phrase the Tenth Circuit uses to refer to unpublished decisions. These cases are not "precedents" in terms of the doctrine of *stare decisis* and, in fact, they may be overruled, or rejected as unpersuasive, by subsequent panels of the same circuit, obviating the need for the court to go *en banc.* Then there is "citable precedent." This, according to Professor Barnett, is what is at stake today, because basically what the opponents of Judge Kozinski are asking for is merely to be permitted to *cite* unpublished decisions. Indeed, "[t]he case against no-citation rules asks not that unpublished opinions be regarded as binding precedents, or as precedents at all in the normative, *stare decisis* sense. It asks only that they be acknowledged and considered."[41] Thus, ultimately, Professor Barnett advocates the way currently taken by the Tenth Circuit, namely that unpublished decisions are not binding precedents (except under law of the case, res judicata, or collateral estoppel) but nevertheless may be cited for their "persuasive value."[42]

That is essentially the approach taken by the Advisory Committee on Appellate Rules when it proposed adoption of new Federal Rule of Appellate Procedure 32.1.[43] The Advisory Committee's Report states that the rule is "extremely limited," for several reasons.[44] First, the rule takes no position on whether it is constitutional to issue unpublished or non-precedential opinions. Second, the rule does not dictate to the courts the circumstances under which they may issue unpublished decisions. Third, the rule is silent on the effect that a court must give to one of its own, or to another court's, unpublished opinions. The Committee Note accompanying the proposed rule observes that "[p]arties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value . . . includ[ing] . . . opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles."[45] It is thus "difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own 'unpublished' opinions."[46]

There has been an outpouring of formal comments to the proposal.[47] As could be expected, both Judge Kozinski and Professor

continued on page 3

"UNPUBLISHED OPINIONS"

(continued from page 2)

Barnett submitted comments in the form of single-spaced letter briefs running upwards of twenty pages apiece. Not surprisingly, Judge Kozinski "urge[s] the Committee to abandon this ill-advised proposal."[48] His comments provide a candid look at the workings of the court, including the role of law clerks and staff attorneys in drafting opinions. "When the people making the sausage tell you it's not safe for human consumption," Judge Kozinski quips, "it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway."[49] Professor Barnett's comments are, also not surprisingly, a critique of Judge Kozinski's comments. He sharply criticizes Judge Kozinski by quoting a fellow law professor: "'[Kozinski] is saying that : (1) We will determine *ex ante* that this case makes no usable law under whatever circumstances may arise, (2) having made that determination, we see no need to write a careful opinion, and (3) because of our guess as to the ruling's future inutility, and because our ruling is rough, we prefer to hide it in a file.'"[50] Closer to home, Tenth Circuit Judge David Ebel wrote that he supports the proposed rule, but, thinking ahead, he stated that he "would be *very* opposed to any amendment in the future that might require unpublished dispositions to carry precedential weight."[51]

The embattled proposal will need to be approved by various bodies, including the full Judicial Conference, the United States Supreme Court, and then Congress, before taking effect.[52] On June 17, 2004, the Standing Committee on Rules of the Judicial Conference referred proposed FRAP 32.1 back to the Appellate Rules Committee for further examination of the problems cited by judges in the Kozinski camp. Tenth Circuit Judge Harris Hartz has gone on the record as stating that he favors the proposed rule, but that because "he has a lot of sympathy" for the proposal's opponents, he thinks that a "delay is important."[53] The delay is certainly a setback for those opposed to Judge Kozinski's views, but in Judge Arnold's words, ultimately, no-citation rules and attempts to enforce them "are doomed to fail."[54]

Endnotes

[1] Caren I. Friedman is certified as an appellate specialist by the New Mexico Board of Legal Specialization. Her practice focuses on civil and criminal appeals in federal, state, and tribal courts.
[2] Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment,* 28 U. MICH. J.L. REFORM 119, 122 (1994).
[3] *Anastasoff v. United States,* 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot,* 235 F.3d 1054 (8th Cir. 2000).
[4] *Id.*
[5] *Id.* at 900.
[6] *Id.* at 901 (quoting 1 E. Coke, *Institutes of the Laws of England* 51 (1642)).
[7] *Id.* (quoting 1 Sir William W. Blackstone, *Commentaries on the Laws of England* 69 (1765)).
[8] *Id.* at 901, 902.
[9] *Id.* at 902 (quoting *The Federalist No. 78* at 510 (Alexander Hamilton) (Modern Lib. ed., 1938)).
[10] *Id.* at 900.
[11] Neither Judge Arnold nor Judge Kozinski are newcomers to the debate. *See* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!* 20 CAL. LAW. 43 (June 2000); Richard S. Arnold, *Unpublished Opinions: A Comment,* 1 J. APP. PRAC. & PROCESS 219 (1999).
[12] 266 F.3d 1155, 1159 (9th Cir. 2001).
[13] *Id.*
[14] *Id.* at 1160.
[15] *Id.*
[16] *Id.*
[17] *See id.* at 1162-63. One example that does not have direct bearing here, but is particularly amusing to our modern sensibilities, is the then-common practice of allowing judges to participate in the appeal of their own decisions. *See id.* at 1162 (citing Act of March 2, 1793, ch. 22, § 1, 1 Stat. 333).
[18] *Id.* at 1163.
[19] *Id.* at 1165.
[20] *Id.* at 1166.
[21] *Id.*
[22] *Id.* at 1163.
[23] *Id.* at 1168.
[24] *Id.* at 1169.
[25] *Id.*
[26] *See id.* at 1176.
[27] Id. at 1177.
[28] Id. at 1178.
[29] *See id.*
[30] The court, however, declined to sanction the attorney who had dared to cite the unpublished opinion because he had tested the rule's constitutionality in good faith. *Id.* at 1180.
[31] *See id.* at 1159 & n.2.
[32] 10th Cir. R. 36.3(B).
[33] *Pollard v. Westinghouse Elec. Corp.,* 119 N.M. 783, 786, 895 P.2d 683, 686 (Ct. App. 1995) (citing SCRA 1986 12-405(A)). *See also State v. Gonzales,* 110 N.M. 218, 227, 794 P.2d 361, 370 (Ct. App. 1990) (unpublished memorandum opinions not meant to be cited as controlling authority because they are written solely for the benefit of individuals).
[34] Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules,* 4 J. APP. PRAC. AND PROCESS, Iss. 1 (2002) (quoting American Bar Association, Sections of Litigation, Criminal Justice, Tort and Insurance Practice and Senior Lawyers Division, *Report to the House of Delegates,* Resolution No. 01A115 (Aug. 1, 2001)). Apologies are offered for any inconvenience that arises from the lack of pinpoint citations to Professor Barnett's article, as the version with which I am working was obtained from the Journal's website.
[35] *Id.*
[36] See D.C. Cir. R. 28(c)(1)(B).
[37] 1st Cir. R. 32.3(a)(2).
[38] Barnett, *supra* note 33.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] The text of the proposed rule reads as follows:
Rule 32.1. Citation of Judicial Dispositions
(1) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.
(2) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.
[44] The proposed rule, the Advisory Committee's Report, and the Committee Note can be found at http://www.nonpublication.com/newrule32.htm.
[45] *See id.*
[46] *Id.*
[47] All comments cited herein can be found on the website www.nonpublication.com.
[48] Letter from Hon. Alex Kozinski to Hon. Samuel A. Alito, Jr. of 1/16/04, at 1.
[49] *Id.* at 2.
[50] Letter from Stephen R. Barnett to Hon. Samuel A. Alito, Jr. of 2/17/04, at 6 (quoting Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions,* 76 S. CAL. L. REV. 755, 773 (2003)).
[51] Letter from Hon. David M. Ebel to Peter G. McCabe of 10/9/03.
[52] *See* Tony Mauro, *Judicial Conference Group Backs Citing of Unpublished Opinions,* LEGAL TIMES, April 15, 2004.
[53] *See* Brent Kendall, *Citation Rule Change Hits Obstacle,* DAILY JOURNAL, June 18, 2004.
[54] Interview by Howard Bashman with Judge Richard Arnold (Nov. 3, 2003). The interview can be found at the appellate blog, "How Appealing." http://20q-appellateblog.blogspot.com. (You'll need to click on Judge Arnold's name on the left).

RECENT DEVELOPMENTS IN NEW MEXICO APPELLATE PRACTICE

Compiled by Edward Ricco
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January 2004
(Cases from *Bar Bulletin,* **Vol. 42, Nos. 1-52)**

FINALITY/APPEALABILITY

Fitzjerrell v. City of Gallup, 2003-NMCA-125, ¶¶ 5-7, 18-19, __ N.M. __, 79 P.3d 836.

Consent judgments: After parties stipulated to entry of judgment dismissing plaintiffs' complaint on ground that existing New Mexico law did not allow plaintiffs' claims for loss of consortium and agreed that plaintiffs' right to appeal issue would be preserved, Court of Appeals entertained appeal from judgment.

District court's order dismissed plaintiffs' claims for loss of consortium, allowed amendment of complaint with respect to other claims, and required that amended complaint be removed to federal court. Court of Appeals considered appeal from aspect of order that was final – dismissal of consortium claims – but not from requirement that amended complaint be removed; amended complaint was "still pending before the district court. In fact, Plaintiffs' refusal to remove . . . their amended complaint . . . is the subject of a motion currently pending before the district court."

Albuquerque Commons Partnership v. City of Albuquerque, 2003-NMCA-022, 133 N.M. 226, 62 P.3d 317.

Lessor of land appealed to district court from city's deferral of action on its site plan and also asserted claim for damages against city. Site plan application was remanded and disapproved by city, and lessor again appealed to district court to review site plan denial. District court reversed city's action and ordered approval of site plan, and city sought review of that ruling by Court of Appeals through writ of certiorari. Court of Appeals lacked jurisdiction and quashed writ because, even though lessor's second appeal was given a different case number and assigned to different judge and was finally determined by district court's order, proceeding before Court of Appeals involved part of a case that was still pending in district court with respect to claim for damages. District court's order was not final absent certification under Rule 1-054(B)(1).

State v. Candy L., 2003-NMCA-109, ¶ 6, 134 N.M. 213, 75 P.3d 429, *cert. denied,* No. 28,171 (2003).

Order requiring delinquent child to pay restitution in set amount according to plan yet to be developed by probation office was not final, and appeal challenging requirement of restitution was premature; plan was substantive rather than ministerial aspect of case disposition, and if present appeal were allowed court might well face second appeal regarding specific plan when issued; although issue of finality was "not cut and dried," Court of Appeals would "err on the side of avoiding piecemeal appeals."

Collier v. Pennington, 2003-NMCA-064, 133 N.M. 728, 69 P.3d 238.

Order compelling arbitration of some claims but leaving other, unresolved claims pending in district court is not final without Rule 1-054(B)(1) certification; unless interlocutory appeal is sought and allowed, aggrieved party may challenge referral of claims to arbitration only after entry of final judgment.

PARTIES TO APPEAL

City of Sunland Park v. Santa Teresa Services Co., 2003-NMCA-106, ¶ 3, 134 N.M. 243, 75 P.3d 843, *cert. denied,* No. 28,166 (2003).

Condemnee utility whose interest was aligned with condemnor in seeking to uphold judgment of condemnation, awarding what it viewed as fair compensations for its assets, against intervenors challenging condemnation, was treated, along with condemnor, as proper party/appellee to appeal.

NOTICE OF APPEAL/PETITION FOR WRIT OF CERTIORARI TO DISTRICT COURT – TIMING

Romero v. Pueblo of Sandia, 2003-NMCA-137, ¶ 7, Vol. 42, No. 51, SBB 30.

Failure to file timely notice of appeal (or to file a notice of appeal at all) would be excused where appellant filed application for interlocutory appeal, albeit from final order from which appeal as of right should have been taken, and appellate court, rather than dismissing appeal at calendaring stage, advised litigants that application for interlocutory appeal would be considered to serve as notice of appeal and docketing statement; Court of Appeals would not later reject appeal because of technical defect it helped create.

Georgia O'Keeffe Museum v. County of Santa Fe, 2003-NMCA-003, ¶ 25, 133 N.M. 297, 62 P.2d 754.

After district court consolidated taxpayer's appeal from adverse decision of county valuation protest board with taxpayer's independent suit for refund, it affirmed appeal and dismissed refund action; taxpayer filed timely notice of appeal which perfected appeal from judgment of dismissal but failed to file petition for writ of certiorari with respect to administrative appeal; Court of Appeals granted taxpayer's unopposed motion to treat docketing statement as petition for writ of certiorari and to extend time for filing so as to deem petition timely filed and proceeded to review both district court rulings).

continued on page 5

RECENT DEVELOPMENTS
(continued from page 4)

Southwest Research & Information Ctr. v. State, 2003-NMCA-012, ¶¶ 20-21, 133 N.M. 179, 62 P.3d 270, *cert. granted,* No. 27,578 (2002).

Court had jurisdiction over administrative appeal although notice of appeal was filed after lower-level official announced decision and no notice of appeal was filed after secretary of agency issued letter that arguably constituted agency's final action; assuming notice of appeal was premature, pursuant to Rule 12-201(A) notice would be treated as filed after and on the date of the agency's final order. Alternatively, docketing statement filed within 30 days after agency secretary's letter that arguably constituted final agency action could be construed as notice of appeal.

State v. Esparza, 2003-NMCA-075, ¶¶ 38-39, 133 N.M. 772, 70 P.3d 762, *cert. denied,* Nos. 27,985 & 28,001 (2003).

Although appeal may have been taken from nonfinal order, little but delay would be accomplished by remanding for filing of new notice of appeal which would simply return case to appellate court; record on appeal included subsequent, unquestionably final, judgment and contained all information necessary for review of issue raised, issue had been fully briefed, and no party raised question of finality; "unique circumstances" supported review of issue on present appeal.

Shearton Development Co., L.L.C. v. Town of Chilili Land Grant, 2003-NMCA-120, ¶ 8, __ N.M. __, 78 P.3d 525, *cert. denied,* No. 28,259 (2003).

Plaintiffs filed multiple-count complaint in dispute over ownership of real property. Defendants filed notice of appeal from order quieting title to some of property at issue. Defendants filed second notice of appeal from subsequent order quieting title to remainder of property and reserving jurisdiction over remaining counts of complaint. Remaining counts were ultimately dismissed with prejudice. Court of Appeals consolidated and decided the two appeals taken from non-final orders: "Now that all claims have been resolved below, we proceed to address the issues raised" in both appeals.

WRIT OF ERROR
State v. Augustin M., 2003-NMCA-065, Vol. 42, No. 20, SBB 26, *cert. granted,* Nos. 27,995 & 27,996 (2003).

Writ of error or constitutional right to appeal not available as basis for immediate appeal from denial of motion to quash indictment based on error in grand jury proceedings, in contrast to cases involving double jeopardy; available avenues of appellate review are interlocutory appeal and writ of prohibition.

SUPERSEDEAS BONDS
Khalsa v. Levinson, 2003-NMCA-018, 133 N.M. 206, 62 P.3d 297.

Bond given to stay enforcement of interim award of attorney's fees and costs pending appeal was available to appellee when appeal was dismissed for lack of final order; given purpose of bond to secure payment of judgment if appellant fails to achieve reversal, court rejects arguments that bond was available only if appellate disposition was on the merits and if appellant was ordered to pay by appellate decision.

RECORD ON APPEAL – JUDICIAL NOTICE
State v. Frost, 2003-NMCA-002, ¶ 16, 133 N.M. 45, 60 P.3d 492, *cert. denied,* No. 27,803 (2002).

Court of Appeals would take judicial notice of contents of document describing county detention center electronic monitoring program which was attached to brief in chief; trial court was aware of requirements of program and no objection to court's taking judicial notice was made.

PRESERVATION OF ISSUES
Losey v. Norwest Bank of New Mexico, N.A. (In re Norwest Bank of New Mexico, N.A.), 2003-NMCA-128, ¶ 30, Vol. 42, No. 49, SBB 10, *cert. denied,* No. 28,297 (2003).

Issue not preserved where party with burden of demonstrating preservation cited generally to two-volume hearing transcript; court would not search record for evidence of issue preservation.

Home & Land Owners, Inc. v. Angel Fire Resort Operations, L.L.C., 2003-NMCA-070, ¶ 23, 133 N.M. 733, 69 P.3d 243.

Court of Appeals would not consider issue first raised in motion for reconsideration which was not reached by district court because motion was denied by operation of law.

Turner v. Bassett, 2003-NMCA-136, ¶¶ 31-32, Vol. 42, No. 50, SBB 30, *cert. granted,* No. 28,317 (2003).

Issue raised initially in summary judgment reply brief, which would normally be considered untimely, was tried by consent where opposing party failed to object when issue was argued at summary judgment hearing and ruled upon by trial court; therefore, issue was preserved.

In re Marlon C., 2003-NMCA-005, ¶ 7, 133 N.M. 142, 61 P.3d 851, *cert. denied,* No. 27,782 (2002).

Issue adequately preserved where, although objection "was not as articulate and complete as it could have been, the trial court clearly understood" it and therefore "the purpose of the preservation rule was served."

State v. Joanna V., 2003-NMCA-100, ¶ 10, 134 N.M. 232, 75 P.3d 832, *cert. granted,* No. 28,100 (2003).

Court would not exercise discretion to review issues not preserved under exceptions listed in appellate rules, where "there is no argument on appeal that the exceptions apply."

State ex rel. Children, Youth & Families Dep't v. Amy B., 2003-NMCA-017, ¶ 9, 133 N.M. 136, 61 P.3d 845.

In first case to reach Court of Appeals regarding constitutionality of federal statute regarding termination of parental rights and state statutes passed in response to it, court would reach constitutional issues, although not raised in trial court, as matter of general public interest.

continued on page 6

RECENT DEVELOPMENTS
(continued from page 5)

Azar v. Prudential Insurance Co., 2003-NMCA-062, ¶¶ 25, 29, 133 N.M. 669, 68 P.3d 909, *cert. denied,* Nos. 27,910 & 27,911 (2003).

Claim of federal preemption which concededly was not raised by defendant in trial court was not preserved for appellate review by plaintiffs' "passing reference" in response to summary judgment motion that preemption dd not apply. "An appellant cannot rely on the argument of the opposing party to establish preservation."

General public interest exception allowed court to review preemption defense raised initially on appeal, where issue of preemption potentially affected insurance industry and policyholders in state and had bearing on at least 20 similar lawsuits pending in state courts at time of appeal.

Losey v. Norwest Bank of New Mexico, N.A. (In re Norwest Bank of New Mexico, N.A.), 2003-NMCA-128, 10, Vol. 42, No. 49, SBB ¶ 10, *cert. denied,* No. 28,297 (2003).

Providing trial court with legal authority to support an argument is not a requirement of issue preservation; submitting requested findings and conclusions is sufficient.

Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶¶ 40-42, 134 N.M. 77, 73 P.3d 215, *cert. granted,* No. 28,046 (2003).

Plaintiffs failed to object on record to challenged jury instruction, let alone point out specific defect in challenged instruction which was given in lieu of their tendered instruction; however, trial court indicated that Plaintiffs' tendered instructions were rejected despite arguments that evidence or state of law warranted giving the instructions; Plaintiffs also made general pre-trial objections relating to issue addressed by challenged instruction; opposing parties did not claim lack of preservation. "In light of these circumstances, . . . we believe the trial court was alerted to Plaintiffs' position," but preservation presented "close call" and was "barely adequate."

McNeill v. Rice Engineering & Operating, Inc., 2003-NMCA-078, ¶ 35, 133 N.M. 804, 70 P.3d 794, *cert. denied,* No. 28,070 (2003).

After district court granted directed verdict on punitive damages at close of Plaintiffs' case based on evidence then admitted, argument that testimony adduced during Defendants' case supported punitive damages was not preserved where Plaintiffs did not request district court to reconsider its prior ruling in light of the later evidence.

State v. Gomez, 2003-NMSC-012, ¶¶ 6-7, 133 N.M. 763, 70 P.3d 753.

Court would not uphold dismissal of criminal complaint on alternative ground that facts alleged in supporting affidavit were insufficient to establish crime; because argument was not raised below, state had no need to argue to district court that it might be able to obtain additional evidence if case were allowed to proceed.

Romero v. Pueblo of Sandia, 2003-NMCA-137, ¶ 17, Vol. 42, No.51, SBB 30.

Argument that dismissal of defendant was proper on alternative ground that complaint failed to include necessary allegations to state claim for relief against that defendant would not be considered initially on appeal because doing so would be unfair to plaintiffs; had argument been raised in motion to dismiss, plaintiffs would have had opportunity to amend complaint.

REVIEW BY WRIT OF CERTIORARI – SUPREME COURT

State v. Muniz, 2003-NMSC-021, ¶ 5, 134 N.M. 152, 74 P.3d 86.

After Court of Appeals reversed district court on ground that court lacked jurisdiction to sentence juvenile defendant as adult and remanded with directions that defendant could waive right to juvenile disposition or have guilty plea nullified, defendant petitioned for writ of certiorari arguing that he was entitled to juvenile disposition on remand; Supreme Court granted writ, but affirmed district court on alternative ground that court had authority to impose adult sentence, reversing Court of Appeals, although that issue was not the one on which certiorari was granted; "We believe we have the power to consider this issue even though it is outside the scope of the issue raised in Defendant's petition for certiorari. Indeed, we believe we have a duty to consider this issue, because we must affirm the district court if its decision was correct."

REVIEW BY WRIT OF CERTIORARI – COURT OF APPEALS

Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806.

In review of agency action on writ of certiorari to district court, scope of review by Court of Appeals is not limited to grounds set forth in Rule 12-505 for granting writ (overruling C.F.T. Development, LLC v. Bd. of County Comm'rs, 2001-NMCA-069, 130 N.M. 775, 32 P.3d 784).

Village of Angel Fire v. Wheeler, 2003-NMCA-041, ¶ 9, 133 N.M. 421, 63 P.3d 524, *cert. denied,* No. 27,882 (2003).

Court of Appeals considers it "prudent" to limit review to issues on which writ of certiorari was granted and not to address questions not yet considered by district court.

STANDARDS OF REVIEW

Shearton Development Co., L.L.C. v. Town of Chilili Land Grant, 2003-NMCA-120, ¶ 32, __ N.M. __, 78 P.3d 525, cert. denied, No. 28,259 (2003).

Where much of evidence in dispute over title to real property was documentary – i.e., deeds – but trial court relied on testimony of expert surveyor to determine whether certain property was within deeded tract, review was for substantial evidence rather than de novo.

United Properties Ltd. v. Walgreen Properties, Inc., 2003-NMCA-140, ¶¶ 6-7, Vol. 42, No. 52, SBB 11.

While district court's exercise of its equitable powers to provide appropriate remedy is reviewed for abuse of discretion, question

continued on page 7

RECENT DEVELOPMENTS
(continued from page 6)

whether district court is permitted to exercise equitable powers at all on a given set of facts is question of law that is reviewed de novo.

Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n, 2003-NMSC-005, ¶¶ 12-13, 16, 133 N.M. 97, 61 P.3d 806.

Reviewing court is not limited to legal grounds specifically stated in agency order in determining whether order should be upheld; court "may substitute its own interpretation of the applicable law" for that of the agency. But court should not try to supply its own reasoned basis to correct deficiencies in agency decision where agency "failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"(citations and internal quotation marks omitted).

In reviewing agency action on writ of certiorari to district court or court of appeals, reviewing court "will conduct the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal" (applying administrative standard of review prescribed by applicable statute to review of agency order).

BRIEFS

Gill v. Public Employees Retirement Bd., 2003-NMCA-038, ¶14, 133 N.M. 345, 62 P.3d 1227, cert. granted, No. 27,823 (2003).

Brief that was filed eight days late would not be basis for dismissal of appeal or sanctions, where counsel explained that he calendared the due date while he was "not thinking very clearly" a few days after the birth of his son; no prejudice to opposing party was shown, and circumstances involved "only a matter of days, . . . an understandable excuse, and . . . a brief that had already been filed" when motion to dismiss or for sanctions was made. Motion to dismiss was not warranted in circumstances, but "it would have been better form for . . . counsel to have moved at the time the brief was filed for permission to file the brief late."

Richards v. Allianz Life Ins. Co., 2003-NMCA-001, n.2, 133 N.M. 229, 62 P.3d 320, *cert. denied,* No. 27,791 (2002).

Counsel criticized for using footnotes extensively throughout brief in chief and reply brief, "apparently as a means of avoiding our page limitation stricture."

Azar v. Prudential Insurance Co., 2003-NMCA-062, ¶¶ 89-90, 133 N.M. 669, 68 P.3d 909, *cert. denied,* Nos. 27,910 & 27,911 (2003).

Court would address issue that was raised and ruled on in trial court and raised with citation to leading case in brief in chief, even though argument in brief in chief was limited to one sentence and most of the argument on the issue was made in amicus briefs.

Hagen v. Faherty, 2003-NMCA-060, ¶ 21, 133 N.M. 605, 66 P.3d 974, *cert. denied,* No. 27,961 (2003).

Counsel for both sides chastised for attacking opponent's arguments as disingenuous ("a characterization which is on the borderline of acceptable briefing"), vacuous, long-winded, last-ditch, etc. "We think the parties' arguments in this case could have been made more effectively if they were less strident and more tailored as a logical refutation of the other side's arguments. Accordingly, we commend a more civil, collegial, and professional briefing style to all attorneys practicing before us."

APPEALS TO DISTRICT COURT

Village of Angel Fire v. Wheeler, 2003-NMCA-041, ¶¶ 11 & 16, 133 N.M. 421, 63 P.3d 524, *cert. denied,* No. 27,882 (2003).

On appeal from municipal action that is legislative in character, written minutes of policymaking body can be sufficient to constitute official transcript, and duly approved and executed resolutions of body can serve as statement of legal and factual basis for decision, to provide record for review under civil procedure rules governing administrative appeals.

SUPREME COURT PRECEDENT – BINDING EFFECT

Padilla v. State Farm Mutual Automobile Insurance Co., 2003-NMSC-011, ¶¶ 5-6, 133 N.M. 661, 68 P.3d 901.

While Supreme Court case is not precedential with respect to issues not considered, it is binding with respect to issue that actually was considered; "mere citation of new authority or . . . reliance on a different justification than was presented in a prior case," as by arguing that prior decision was incorrect or adopted unwise public policy, is not sufficient basis to depart from Supreme Court's considered holding on issue, where adopting new authority or rationale would "in effect overrule[ ]" prior holding; however, Court of Appeals may comment on Supreme Court opinion though bound by it.

LAW OF THE CASE

State v. Brown, 2003-NMCA-110, ¶ 8, 134 N.M. 356, 76 P.3d 1113, *cert. denied,* No. 28,167 (2003).

Issues that could have been raised in prior appeal would not be considered in second appeal after remand.

AMENDMENTS TO APPELLATE RULES

Rules 12-502 (certiorari to Court of Appeals) and 12-505 (certiorari to district court) were amended effective November 1, 2003, to allow the filing of conditional cross-petitions for a writ of certiorari.

INTERVIEW OF THE APPELLATE DEFENDER, SUE HERRMANN, ESQ.

by Kerry Kiernan
July 7, 2004

Q. We're here with Sue Herrmann. Shall we talk a little bit about what the function of your job is and what your title is?

A. That would be interesting, because I actually looked at the statute and found out that I'm supposed to be doing some more things than I actually do.

Q. Well, go ahead and tell us.

A. The Appellate Defender is an appointed position under the Public Defender Act, 31-15-8 if you want to know, and in addition to assisting the Chief Public Defender and the District Public Defender by providing representation in the Court of Appeals and the Supreme Court in appellate review and post-conviction proceedings, we're also supposed to be assisting private counsel not employed the Public Defender Act in any appellate review or post-conviction remedy proceedings by providing representation to persons entitled to representation under the Indigent Defense Act. Basically what we do here is we assist anybody at any stage, whether they be in trial or whether they be on appeal. We don't do that much post-conviction, because we have a separate post-conviction unit in the Public Defender Department. And our business has grown so substantially that it's just become too difficult for us to do a lot of the extra duties that are out there now for us.

Q. Is the Public Defender Department an executive department?

A. It is.

Q. So what would be the hierarchy? You'd have the Chief Public Defender?

A. Yes.

Q. Who would oversee every operation within the State?

A. Right. And then the Deputy Chief Public Defender, who oversees all of the District Defenders and the Appellate Defender.

Q. And you're appointed by the Chief Public Defender?

A. Yes.

Q. And the Chief Public Defender is appointed by the Governor?

A. Yes.

Q. And how long is your term?

A. It's not a term. Basically, we serve at the will of the Governor. If he decides at any point in time, or if there's a new governor, as there was a change of administration in 2002, they come in and generally want to put in their own people into the various positions throughout State government.

Q. People who are working under you are considered assistant appellate defenders?

A. Right. And they're all classified. In Santa Fe there are 12 assistant appellate defenders, and there are an additional three in Albuquerque who exclusively do appeals from the Metro division in Albuquerque.

Q. Are those de novo appeals?

A. Some are de novo and some are on the record. They are primarily misdemeanors, domestic violence, DWIs. That's the bulk of their work there. And the DWI now are record appeals. The domestic violence ones are de novo.

Q. And why was Albuquerque broken up? Because of the sheer number of cases?

A. Right.

Q. How long have you been an appellate defender?

A. Since January of 2001, two-and-a-half years.

Q. And what portion of your job is administrative versus case load? Or how would you best describe your job?

A. In dreamland or in reality?

Q. In both.

A. I think ideally it's very difficult for a person who's trying to do all the administrative stuff to sit down and really do any kind of a complex case. I have tried to assign to myself the cases that nobody else wants to do, the *Franklin/Boyer* sufficiency cases, the really simple cases that I think can be disposed of in pretty short order. And I have been wrong 50% of the time. Half of my cases are now on a general calendar.

Q. Because of issues you've discovered in going through?

A. Yes. So it's pretty amazing. I spend at least, depending on what happens to be going on at any particular time, I'd say 50 to 75% of my time is taken up with administrative duties, but I also just have the sheer luck of having a full case load right now

Q. And what exactly is the administrative work that you'd be doing?

A. I do a lot of work for the agency itself. I have a lot of general counsel-type responsibilities because we don't have a general counsel.

Q. Would that include legislative liaison?

A. Legislative analysis. I did a considerable amount of that in the last session. I think probably I must have done 100 bills. And there's also the day-to-day administration of the cases, making sure that we have all the proper orders, order of appointment, the docketing statement, all the necessary documentation that we need from trial counsel; handling all the questions, because we handle questions from attorneys statewide. When I came back as appellate defender the New Mexico Criminal Defense Lawyers had a list serve that all of the members are on, and

continued on page 9

SUE HERRMANN
(continued from page 8)

we field questions from and get answers – it goes both ways – from private counsel and their contract counsel, and our State public defenders all around the state on all kinds of issues. It's been a wonderful experience, because people are so willing to assist other attorneys. It's just been great.

Q. Will you get a lot of questions from trial counsel during the pendency of trial?

A. Yes. I mean, you'll also get the call at lunchtime that says, "We're at lunch. I'm going to close this afternoon and we're going to do instructions conference and I need to know what I need – what kind of instruction I need to put in for this." Or people will often ask, "Where do I get an expert for this?" "What kind of information should I be presenting to the jury on that?" We've had some really interesting issues coming up with eye witness identification. We haven't had too much on DNA, but eye witness ID has been a big email. Experts on shaken baby syndrome. On child abuse cases, whether or not if the child claims that they have been abused sexually, whether or not their testimony has been tainted by the pre-trial investigative interview.

Q. How many, if you know, of the criminal cases in the state on appeal come through this office?

A. We guess about 90%.

Q. Really? Which would mean 10% are private?

A. Yes. We did in-house a record number in this last fiscal year. I assigned 270 cases. Right now there's a lot of people waiting for attorneys. Recently there has been a tremendous increase in the number of cases for some reason that are going to trial. We used to estimate that we got one-third of our violent felonies that went to trial or just felonies that went to trial from the Fifth Judicial District. That number is now down. It's been replaced by Las Cruces. So we're seeing a far greater number of cases from the Third Judicial District, as opposed to the Fifth. We can't say why. We're also seeing a lot more from Albuquerque, a lot more cases are going to trial in Albuquerque.

Q. So the 270 represents what?

A. Actual number of cases that have been or will be assigned to the 13 people who are here in this office.

Q. Most of the time will the docketing statement already have been prepared before your office gets involved?

A. Hopefully. We actually had a couple of unfortunate incidents with trial attorneys this year where they actually packed up and left and said, "I don't want to do this anymore." And we had to do the docketing statements in those cases, as well. We ended up doing about 24 docketing statements.

Q. Even though the rules provide that trial counsel is to draft the docketing statement, in practice will trial counsel ask for your advice?

A. We sure hope so. Unfortunately, if we get a docketing statement and an issue hasn't been preserved, then it's too late. There are issues that can be raised if counsel feels really that they made a mistake. They can say that they were ineffective. And, of course, sufficiency of the evidence is one of those issues, or double jeopardy, that you don't waive.

Q. If you're responding to a calendaring notice will you have the record in front of you at that point, or will you have to consult with trial counsel?

A. I'll have the record proper, which consists, of course, of anything that was filed in the court.

Q. But if it's an evidentiary question you won't have the tapes or transcripts?

A. No. We are battling with a split system now in the courts, because we have five districts that are stenographically recording trials. Everything else is or may be done on tape. But the other eight districts are still on tapes and moving towards – I guess moving towards CDs now. If we call up the clerk of the court and say, "Oh, I really need the tape from the suppression hearing," we may be able to get one or two tapes from them. A lot of times we just have to rely on trial counsel.

Q. Could you ask trial counsel to listen to the tapes even if you couldn't get the tapes?

A. I could do that. We end up doing that a lot.

Q. In other words, there's no uniform methodology for you having access if it's an evidentiary issue at this point?

A. No. Not on the summer calendar.

Q. For those of us who aren't familiar with – you mentioned Franklin and Boyer appeals. Would you explain what you mean by that?

A. Well, unfortunately it happens sometimes that somebody has gone to trial and has had a very clean trial and there are no issues that we're going to be able to get a conviction reversed on. But under the Constitution of our state, a person who has been aggrieved, which means in our realm they've been adjudicated guilty, has an absolute right to one direct appeal. While the client has the right to an appeal, counsel also has an obligation to the court not to present frivolous matters to the court. One way that the trial counsel can say "I'm fulfilling my constitutional obligation to my client, but I'm also telling the court that there's a very strong possibility that you may not think that this issue has any merit" [is to cite] *State v. Franklin* and *State v. Boyer* [which approve of this method].

Q. Is there a natural tension in your job between your function and also attempting to be a diplomat to the courts?

A. Oh, yes. Yes, especially now that we're all on performance base budgeting. It's like we all have this need to show the legislature how hard we're working. And unfortunately for the court that's the number of appeals that they resolve during the year versus how many are filed. And, as a natural flow of work, they have an interest in disposing of cases that come into the court. So they have a natural interest in seeing that we get our pleadings on time. The problem that we're up against right now is one of my positions, after it was vacated, was frozen which means I'm short one attorney. And somehow I have

continued on page 10

SUE HERRMANN
(continued from page 9)

to convey to the court that we're hurting. But we're working as fast as we can. I think that if you asked anybody here they would say our foremost duty is, of course, to represent our clients in the best way that can.

Q. Are there meetings that can occur between you and the court?
A. Whenever the calendaring judge changes we generally have a meeting with the prehearing division, the attorney general, the clerk of the court, and whoever is going to be calendaring judge and tell them where we are in the scheme of things, how we are with staffing, how we are with case numbers, what things are going on that either speed us up or slow us down.

Q. And the court has been responsive to that in the past?
A. Yes.

Q. Has the court ever granted or has the Department ever gone to the court with a request for extensions *en masse***?**
A. Yes. Actually, I just did. The court is trying to work with us and said, "No, we can't give you an en masse. You have to do it on a case by case basis, and we'll give you an extension for this period of time and then come back to us and tell us where you are, you know, when that period of time is up."

Q. In terms of court procedures and calendaring or internal administration, do the courts ever seek the AG's advice or the Public Defender's advice on the streamlining of cases? Is there any kind of input sought?
A. I think the closest one to that probably is the Rules Committee. Generally speaking if there is a change needed in a rule, I think the Court would consult with us on that and say "how would this affect you?"

Q. Is there a distinction between fundamental error and other issues that would survive that are not listed in the docketing statement?
A. [There is] fundamental error and plain error. Plain error [goes] to evidentiary issues that affect[ ] the outcome of the proceeding, or affect[ ] the fairness of the proceeding, because the prejudice so far outweighed the relevance. Fundamental error is where you have a trial where either the guilt of the defendant is so far in doubt and counsel had not raised an issue that should have been raised, or the fairness of the proceedings has been so affected by an error, that the result – the court is really concerned about the result of the verdict.

Q. Just because you have a constitutional issue doesn't necessarily mean its fundamental error?
A. Right.

Q. But there are some that could be?
A. Yes.

Q. Like, for instance, double jeopardy?
A. Double jeopardy issues may always be raised.

Q. Do candor and honesty play an important part in the advocate's role?
A. [They] do. I don't think there's any question about that. I think that if a court is going through a brief and you put in a citation, and they either can't find it in their record or can't find it where you said it happened, or find it to be other, it sticks in somebody's head that you're trying to pull a fast one on them. There's a fairly limited number of people who practice before the appellate courts. We're frequent flyers. I mean, we are there all the time. So our credibility is always on the line. We want them to know that we're being forthright.

Q. If there's one central theme in brief writing, is there something you would give a new lawyer?
A. When you're involved in a high volume practice as we are, you do have to be succinct. If it's a novel issue, one that hasn't been addressed here in New Mexico and we have to draw in out-of-state law, it's going to require development. But if you have a discrete issue that we have law on in New Mexico go that route because that's the way the court is going to resolve the issue.

(WHEREUPON, the interview was concluded)

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