In the early 1860’s an unknown official adopted a territorial seal. It featured the American bald eagle, its outstretched wings shielding a smaller Mexican eagle. When New Mexico became a state in 1912, the legislature named a commission for the purpose of designing a state seal. In June 1913, the commission, which consisted of Gov. William C. McDonald, Attorney General Frank W. Clancy, Chief Justice Clarence J. Roberts, and Secretary of State Antonio Lucero, filed its report adopting the general design of the Territorial Seal.

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Special Insert:

Bill Kitts Mentor Program
STATE BAR LENDING LIBRARY
A Free Membership Service

Visit the Lending Library at the State Bar or online at www.nmbar.org.

New title now available!

Entertainment Law in a Nutshell
by
Sherri L. Burr

Books and Tapes may be borrowed for two weeks; shipping is available for members who reside outside the Albuquerque area.

Browse Materials alphabetically or by topic on www.nmbar.org. Click on "Attorney Services/Practice Resources" in the top navigation bar and select "Lending Library."

Place an Order by using the e-mail link membership@nmbar.org, visiting the State Bar Center or by calling (505) 797-6033.

www.nmbar.org
### DECEMBER

#### 7

**Evidentiary Issues at Trial**  
8:30 a.m. - 3:45 p.m.  
5.3 General and 1.0 Ethics CLE Credits  
This seminar will address current legal issues concerning the rules of evidence and related case law. It will specifically address topics such as evidence regarding hedonic damages, the current law concerning experts, computer and electronic evidence, objections and evidentiary hearings, a hearsayresher, as well as an ethics component.  
**Presented by:** Seth L. Sparks, Esq., The Hon, Theodore C. Baca, Eric R. Burris, Esq., Jeffrey M. Croasdell, Esq., Max J. Madrid, Esq., S. Carolyn Ramos, Esq., and John S. Stiff, Esq.

#### 14

**Toil and Trouble: Avoiding Common Pitfalls in the Practice of Law**  
12:30 - 3 p.m. • 1.0 Ethics and 2.0 Professionalism CLE Credits  
This seminar focuses upon how to choose and satisfy clients, as well as how to avoid common ethical and professional pitfalls that result in equally common complaints.  
**Presented by:** Tanya Hering Noonan, Esq., Anne Taylor, Esq. and Christine Long, Esq.

#### 21

**DWI: Adequacy of Proof from Opposing Sides (2004)**  
9 a.m. - Noon • 3.6 General CLE Credits  
This seminar features speakers from the prosecution and defense sides regarding updates in the law and the proof needed for trial. The judicial view is also represented by a Judge who has handled a multitude of DWI cases in Albuquerque’s Metro Court.  
**Presented by:** Judge Kevin Fitzwater, Pete Ross, Esq., Roger Smith, Esq. and Jack Mastenbrook, Esq. (Facilitator)

#### 21

**Annual Review of Civil Procedure (2004)**  
9 a.m. - 5:30 p.m. • 8.4 General CLE Credits  
Knowledge of Civil Procedure can make all the difference to you and your clients. This seminar provides in-depth coverage of the significant changes in the New Mexico and Federal Rules of Civil Procedure, New Mexico case law affecting civil procedure, and United States Supreme Court and Tenth Circuit opinions dealing with procedural matters in the federal courts. The UNM School of Law faculty noted review these developments and explain how those changes will affect your practice.  
**Presented by:** Professors Michael Browde, Ted Occhialino, and Adjunct Professor Andy Schutza

#### 28

**Engagement Letters: The Gateway to Better Client Relations and Professionalism**  
10:20 a.m. - Noon • 2.0 Professionalism CLE Credits  
The Rules of Professionalism Responsibility make reference to disclosures and client waivers. In this day and age, those disclosures and waivers should all be in writing. The responsibility of the lawyer is to employ effective client communications and client relation skills in order to increase service to the client and foster understanding of the expectations of the representation, to include accessibility of the lawyer and the agreement to fees with the client. The primary purpose of this seminar is to discuss the effective use of engagement letters as a means to enhance communications and reduce the liability risks associated with your practice.  
**Presented by:** John A. Bannerman, Esq.

**Factual and Forensic Development of Evidence**  
9 a.m. - 3:30 p.m. • 8.4 General CLE Credits  
What began in Albuquerque in September of 1999 as a special grand jury investigation into the disappearance of a young Malaysian woman, culminated three years later in the ultimate prosecution and conviction of two capital murder co-defendants in a trial that captured international attention. This seminar examines the evidentiary development of this case to include direct, circumstantial, and forensic considerations. Reference is made to the working inter-relationship between forensic mitochondrial DNA and reverse parentage analyses, issues of sample securement from a foreign sovereign, and its relationship to the prosecution of a No Body Capital Murder case. Prosecutor, Lead Investigative Detective, and Lead Forensic Scientist perspectives are examined.  
**Presented by:** Paul H. Spiers, Esq., Mike Fox, Brent Johnson and Catherine Dickey

### Video Replay Tuesday Registration

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<tr>
<th>Name</th>
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Note: Lunch included for all programs. If attending an afternoon program ONLY, lunch is available 30-minutes prior to program.

#### Annual Review of Civil Procedure, 8.4 G  
- $209 Dec. 21, 9 a.m. - 5:30 p.m.
- $109 Dec. 14, 9 a.m. - Noon
- $109 Dec. 28, 9 a.m. - Noon
- $209 Dec. 21, 8 a.m. - 3 p.m.

(DWI): Adequacy of Proof from Opposing Sides, 3.6 G  
- $59 Dec. 28, 10:20 a.m. - Noon
- $169 Dec. 7, 8:30 a.m. - 3:45 p.m.
- $199 Dec. 28, 9 a.m. - 3:30 p.m.
- $99 Dec. 14, 12:30 - 3 p.m.

**Payment Options**
- Enclosed is my check in the amount of $  
- (Make Checks Payable to: CLE State Bar of NM)
- Purchase Order (Must be attached to be registered)  
- VISA  
- Master Card  
- American Express  
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Credit Card Acct. No.  
Exp. Date  
Signature  
Internet: www.nmbar.org

Phone (505)797-6020; Mon. - Fri., 9 a.m. - 4 p.m.  
(Please have credit card information ready)

Mail: CLE of the SBNM, P.O. Box 9289, Albuquerque, NM 87199-2860  
Fax: (505) 797-6071; Open 24 Hours (Please include credit card information.)

Call for details at (505) 797-6020, or Register Online at www.nmbar.org
Solo and Small Firm Practitioner Annual Meeting, Seminar and Reception

Seminar: Professional Liability and The Solo and Small Firm Practitioner
Thursday, December 2 - Annual Meeting: 1 p.m. | Seminar: 2 - 3:40 p.m. | Reception: 4 p.m.
State Bar Center • 1.0 General, 1.0 Ethics CLE Credits

Presenters: Maureen Sanders, John Bannerman, Jack Brant, Briggs Cheney, and Jerry Dixon

This seminar is designed for those who are looking for some insights into a potpourri of topics related to professional liability. Following a wildly popular session at this year’s Bridge The Gap, several members of the Lawyers Professional Liability Committee are back for an encore presentation. The current agenda includes The Top Ten Reasons Lawyers Get Sued; Everything You Could Ever Want to Know About Retainer Agreements; Not Quite Fifty Ways to Leave a Client; The Ins and Outs of Professional Liability Insurance; and a concluding medley on Shopping for Professional Liability Insurance, When Disciplinary Comes Calling, and the Troubled Lawyer.

The seminar will immediately be followed by a reception at the State Bar Center.

☐ $59 Standard and Non-Attorney ☐ $49 Solo & Small Firm Section, Government and Paralegal

Employment and Labor Law Annual Meeting, Professionalism Video Replay and Reception

Engagement Letters: The Gateway to Better Client Relations and Professionalism
Thursday, December 2, 2004 • La Posada de Albuquerque • Video Replay – 3 p.m. • 2.0 Professionalism CLE Credits

Annual Meeting & Reception – 5 p.m.
Presented by: John Bannerman, Esq.

The Rules of Professional Responsibility make reference to disclosures and client waivers. In this day and age, those disclosures and waivers should all be in writing. The responsibility of the lawyer is to employ effective client communications and client relation skills in order to increase service to the client and foster understanding of the expectations of the representation, to include accessibility of the lawyer and the agreement to fees with the client. The primary purpose of this program is to discuss the effective use of engagement letters as a means to enhance communications and reduce the liability risks associated with your practice.

☐ $59 Standard and Non-Attorney ☐ $49 Employment and Labor Law Section Member

Fact Finding on the Internet

Tuesday, December 7, 2004 • 9 a.m. - 4:30 p.m. • State Bar Center • 6.9 General CLE Credits

Presenters: Carole A. Levitt and Mark Rosch

From nationally recognized Internet trainers and the authors of the 2nd edition ABA publication The Lawyer’s Guide to Fact Finding on the Internet comes this exciting seminar. Whether you are a litigator preparing for discovery or trial or a transactional attorney conducting due diligence, at some point, you will find the information from this course to be a great resource. While using the Internet can save time and money, it is only for those who effectively know where to search that the Internet’s greatest benefits are received. Come learn to find what you need, FAST and FREE (or at lower costs) when you need it! Please note that this course includes a copy of the 2nd edition ABA publication (a $79.95 value).

☐ $199 Standard and Non-Attorney ☐ $179 Government and Paralegal

FOUR WAYS TO REGISTER

Phone: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready)
Fax: (505) 797-6071, Open 24 hours • Internet: www.nmbar.org, click CLE, then Educational Programs
Mail: CLE of the SBNM, PO Box 92860, Albuquerque, NM 87199
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**Professionalism Tip**

With respect to other judges:

In all written and oral communications, I will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about other judges.

**Meetings**

**December**

1 Committee on Women and the Legal Profession, noon, Lewis & Roca, Jontz Dawe, LLP

2 Criminal Law Section Annual Meeting, noon, State Bar Center

2 Solo & Small Firm Practitioners Section Annual Meeting, 1 p.m., State Bar Center

2 Employment & Labor Law Section Annual Meeting, 5 p.m., La Posada

2 Health Law Section Annual Meeting, 5 p.m., Petroleum Club, Rio Grande Room

6 Attorney Support Group, 5:30 p.m., First Methodist Church

8 Senior Lawyers Division Board of Directors, 4:30 p.m., State Bar Center

**State Bar Workshops**

**December**

1 Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces

1 Consumer Debt/Bankruptcy Workshop*, 6:00 p.m., State Bar Center

2 Consumer Debt/Bankruptcy Workshop, 5:30 p.m., Branigan Library, Las Cruces

10 Lawyer Referral for the Elderly Workshop TOPIC: Credit/Debt Issues, 9:30 a.m., Munson Senior Center, Las Cruces

**January**

26 Consumer Debt/Bankruptcy Workshop*, 6:00 p.m., State Bar Center

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227, or visit the SBNM Web site, www.nmbar.org.
NOTICES

COURT NEWS

NM Supreme Court Law Library
Notice of Closing

The Supreme Court Law Library has extended its hours to include 8 a.m. to 6:30 p.m. Monday to Thursday, 8 a.m. to 5:30 p.m. Friday, and 8 a.m. to 3 p.m. Saturday. However, the library will be closed or have restricted hours on the following days:

- Dec. 23: 8 a.m. to 1 p.m.
- Dec. 24 to 25: Closed
- Dec. 27 to 29: 8 a.m. to 5 p.m.
- Dec. 30: 8 a.m. to 1 p.m.
- Dec. 31 to Jan. 1: Closed

Open House

The director and staff of the New Mexico Supreme Court Law Library will be hosting an open house from 5 to 6 p.m., Dec. 3 in the main floor of the library located at 237 Don Gaspar, Santa Fe. Light refreshments will be served. Call (505) 827-4850 for more information.

Proposed Revision of District Court Civil Rule 1-053.2

The Supreme Court is considering proposed revisions to Rule 1-053.2 of the Rules of Civil Procedure for the District Courts. Attorneys who would like to comment on the proposed revisions should send written comments by Dec. 10 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed revisions were printed in the Nov. 18 (Vol. 43, No. 46) Bar Bulletin.

Proposed Revision to the Rules of Criminal Procedure for the District Courts and Supreme Court General Rules

The Supreme Court is considering proposed revisions to the Rules of Criminal Procedure for the District Courts and Supreme Court General Rules. Attorneys who would like to comment on the proposed revisions should send written comments by Dec. 10 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed revisions were printed in the Nov. 18 (Vol. 43, No. 46) Bar Bulletin.

Proposed Revisions to UJI Civil

The Supreme Court is considering proposed new UJI Civil 13-413, 13-1650 and 13-651 and proposed amendments to UJI Civil 13-1718 NMRA. Attorneys who would like to comment on the proposed revisions should send written comments by Dec. 10 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed revisions were printed in the Nov. 18 (Vol. 43, No. 46) Bar Bulletin.

Proposed Revision to the Rules of Appellate Procedure

The Supreme Court is considering proposed revisions to the Rules of Appellate Procedure. Attorneys who would like to comment on the proposed revisions should send written comments by Dec. 10 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed revisions were printed in the Nov. 18 (Vol. 43, No. 46) Bar Bulletin.

N.M. Board of Legal Specialization Comments Solicited

The following attorneys are applying for certification as specialists in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The Rules of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon the applicant’s qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 92860, Albuquerque, NM 87199.

Federal Indian Law
Catherine Baker Stetson
Jennifer L. Bradley

First Judicial District Court
Family Law Brownbag Meeting

The First Judicial District Court will host its family law brownbag meeting at noon, Dec. 14 in the Grand Jury Room, second floor, of the Steve Herrera Judicial Complex in Santa Fe. It will be the annual holiday potluck luncheon so attendees should bring food to share. For more information, contact Elege Simons, (505) 982-3610 or esimons@rubinkatzlaw.com.

Second Judicial District Court
Children’s Court Monthly Judges’ and Managers’ Meeting

The Second Judicial District Children’s Court will hold its monthly judges’ and managers’ meeting at noon, Dec. 7 in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, Albuquerque. Children’s Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

Designated Presiding Judges
Effective Nov. 30, Chief Judge William F. Lang has designated the court’s presiding judges as follows:

- Family Court: Judge Nan Nash
- Children’s Court: Judge Marie Baca
- Civil Division: Judge Ted Baca
- Criminal Court: Judge Neil Candelaria

For more information contact the court administrator at (505) 841-7458.
Family Court Open Meetings
Second Judicial District Family Court judges will hold open meetings to discuss ongoing concerns and projects at noon on the first business Monday of each month in the Conference Center located on the third floor of the Bernalillo County Courthouse. The next regular meeting will be held on Dec. 6. Contact Mary Lovato, (505) 841-6778, for more information or to have an item placed on the agenda.

Fourth Judicial District Court Fax Filings Number
The correct fax number for fax filings to the Fourth Judicial District Court is (505) 454-8611. This is also the fax number for the Fourth Judicial District Court Clerk’s Office.

Bernalillo County Metropolitan Court Judges’ Meeting
The Bernalillo County Metropolitan Court judges will conduct their monthly judges’ meeting at noon, Dec. 7 in the Judicial/Administrative Conference Room (Room 849) of the Metropolitan Court Building, 401 Lomas NW, Albuquerque. The meeting is open to the public. Call the Court Administrator’s Office at (505) 841-8105 for more information or if you need accommodations for disabilities.

Swearing-In Ceremony for Judge Benjamin Chavez
Members of the bar and legal community are invited to the swearing-in ceremony of Benjamin Chavez as Metropolitan Court Judge, Division XIII at 5:15 p.m., Dec. 8 at the Bernalillo County Metropolitan Courthouse in the Rotunda, at 401 Lomas NW, Albuquerque. A reception will follow at La Posada de Albuquerque. The Bernalillo County Metropolitan Court prohibits cell phones. Call (505) 841-8193 for more information.

State Bar News
Attorney Support Group Monthly Meeting
The next Attorney Support Group meeting will be held at 5:30 p.m., Dec. 6 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

Barristers Toastmasters Club Open House
The Barristers Toastmasters Club will hold a holiday open house at 5:45 p.m., Dec. 13 at the State Bar Center. The event is being sponsored by Romo & Associates and members are encouraged to attend. Contact Joe Conte, (505) 797-6099 or jconte@nmbar.org, to R.S.V.P. for more information.

Criminal Law Section Annual Meeting
The Criminal Law Section will hold its annual meeting at noon, Dec. 2, at the State Bar Center. Contact Chair David Crum, (505) 764-5400 or David@newmexlaw.com, to place an item on the agenda.

Employment and Labor Law Section CLE, Annual Meeting and Reception
The Employment and Labor Law Section and the Center for Legal Education of the State Bar of New Mexico will present a professionalism program at 3 p.m., Dec. 2, La Posada, Albuquerque. The program will be a video replay of Engagement Letters: The Gateway to Better Client Relations and Professionalism, which is worth 2.0 professionalism CLE credits. The annual membership meeting and social will follow from 5 to 7 p.m. Members are encouraged to attend either or both events. Contact Chair Eric Miller, (505) 995-1017 or ermsf@aol.com to place an item on the agenda.

Health Law Section Annual Meeting
The Health Law Section will hold its annual meeting from 5 to 8 p.m., Dec. 2 in the Rio Grande Room at the Petroleum Club, 500 Marquette, Albuquerque. Program to be announced. Contact Chair Jennifer Stone, (505) 343-1776 or jennifer@emhpc.com, to place an item on the agenda.

Lawyers Assistance Committee Wanted: Lawyers in Recovery
The Lawyers Assistance Committee is looking for lawyers in recovery, especially in towns outside ABQ, who would be willing to participate in 12-Step calls on attorneys with alcohol/drug problems. Lawyers willing to help should call Bill Stratvert at 242-6845.

Paralegal Division Brownbag CLEs for Attorneys and Paralegals
The Paralegal Division of the State Bar is offering lunchtime brownbag CLEs at the State Bar Center the second Wednesday of every month. The next brownbag is on Dec. 8 and is titled Ethics for Legal Assistants and Paralegals. The cost is $16 for attorneys and $15 for paralegals, legal assistants and office staff. Each meeting has been approved for 1.0 G CLE credits. Registration begins at the door at 11:30 a.m. each month, and the presentation will follow from noon to 1 p.m. For more information contact Debi Shoemaker-Scott at Rothstein Donatelli, (505) 243-1443.

Public Law Section Board Meeting
The next Public Law Section board meeting will be held at noon, Dec. 9 in the Risk Management Division Legal Bureau Conference Room on the first floor of the Montoya Building, 1100 St. Frances Dr., Santa Fe. Contact Deborah Moll, (505) 827-2000, for more information.

Real Property, Probate and Trust Section CLE and Annual Meeting
The Real Property, Probate and Trust Section and the Center for Legal Education of the State Bar of New Mexico will present The Art of the Real Estate Deal Dec. 10 at the State Bar Center. Attendees will receive 5.1 general, 1.2 ethics and 1.2 professionalism CLE credits. See page 8 of the Nov. 11 CLE insert for registration information.

The annual membership meeting will be held at 12:45 p.m. All section members are encouraged to attend the meeting regardless of whether or not they are registered for the CLE program. Contact Chair R. Max Best, max@rmaxlaw.com, to place an item on the agenda.
Trial Practice Section CLE, Annual Meeting and Reception

The Trial Practice Section and the Center for Legal Education of the State Bar of New Mexico will present a video replay of Toli and Trouble: Avoiding Common Pitfalls at 3 p.m., Dec. 9 at the State Bar Center. Attendees will receive 1.0 ethics and 2.0 professionalism CLE credits. See page 8 of the Nov. 11 CLE insert for registration information. The annual membership meeting and reception will follow at 5:30 p.m. Contact Chair Rick Shane, (505) 883-5030 or rshane@rshabqlaw.com, to place an item on the agenda.

Solo and Small Firm Practitioners Section Annual Meeting, CLE and Reception

The Solo and Small Firm Practitioners Practice Section will hold its annual membership meeting at 1 p.m., Dec. 2 at the State Bar. Avoiding Malpractice in the Solo and Small Firm presented by the State Bar’s Lawyers Professional Liability Committee, will follow at 2 p.m. Attendees will receive 1.0 general and 1.0 ethics CLE credits. See page 4 of this week’s issue for registration information.

The afternoon will conclude with a reception from 4 to 5:30 p.m. Gourmet food and drinks will be provided free of charge. Members are encouraged to attend any or all three events. To assist in planning for the reception, R.S.V.P. to thorvat@nmbar.org by Nov. 29.

OTHER BARS

Albuquerque Bar Association Monthly Luncheon

The Albuquerque Bar Association will hold its monthly luncheon and annual meeting noon, Dec. 7 at the Petroleum Club in Albuquerque. The 2004 Outstanding Attorney and Judge Awards will also be presented at the luncheon. A seminar will follow from 1:30 to 4:30 p.m. that will include an Ethics Update and Professionalism CLE. Attendees will receive 1.0 ethics and 2.0 professionalism credits for the seminar. Visit the Albuquerque Bar Association’s Web site at www.abqbar.com or call (505) 243-2615 for more information.

American Bar Association 2005 Thurgood Marshall Award

The American Bar Association Section of Individual Rights and Responsibilities is requesting nominations for its 2005 Thurgood Marshall Award. The Thurgood Marshall Award is the only ABA award recognizing long-term contributions to the furtherance of civil rights, civil liberties and human rights in the United States. The section is soliciting nominations of individuals who, through their unique talents and long-term contributions, have shown dedication and leadership in establishing and expanding civil and human rights in the U.S. Nomination forms are available online at www.abanet.org/irr. E-mail irr@abanet.org or call (202) 662-1030 for more information. The nomination deadline is Jan. 7, 2005.

NM Hispanic Bar Association Holiday Scholarship Fundraiser

The New Mexico Hispanic Bar Association will host its Fourth Annual Holiday Scholarship Fundraiser from 6 to 9 p.m., Dec. 3 at the Sheraton Old Town, 800 Rio Grande Blvd. NW. A reverse drawing will be held with prizes being awarded as follows: last ticket drawn $5,000; second to last ticket drawn $2,000 and third to last ticket drawn $1,000. Door prizes will also be provided. In addition, this year the NMHBA will host a silent auction in conjunction with the drawing. Funds raised from the silent auction will be dedicated to awarding scholarships to high school students throughout New Mexico who intend to pursue their post-secondary studies in New Mexico and who have an interest in a legal career. Tickets for the reverse drawing are $100. Anyone interested in purchasing a ticket can contact Brian Colón, (505) 242-6677 or Tina Cruz, (505) 248-0500.

NM Women’s Bar Association Mid-State Chapter Monthly Networking Luncheon

The mid-state chapter of the New Mexico Women’s Bar Association will hold a networking lunch meeting from noon to 1:30 p.m., Dec. 8 at Conrad’s in the La Posada Hotel, Albuquerque. Visitors are welcome and advance reservations are required. Lunch prices range from $6 to $11 and payment is to be made to the restaurant. Anyone interested in attending this meeting should contact Virginia R. Dugan, vrd@atkinsonkelsey.com or Rendie Baker-Moore, martren@eb-b.com.

OTHER NEWS

American Civil Liberties Union of New Mexico Bill of Rights Dinner

The American Civil Liberties Union of New Mexico will host its 2004 Bill of Rights Dinner Dec. 4 at 6 p.m. at the Albuquerque Marriott Hotel. Cathy Ansheles will receive the Civil Libertarian Lifetime Achievement Award for her leadership and commitment in working to end the death penalty in New Mexico. George Bach, Kari Morrissey and Lee Peifer will receive the Cooperating Attorneys of the Year Award for fighting against the unconstitutional elements of the Sunshine Law and the Albuquerque Sex Offender Registration and Notification Act. The keynote speaker at the event will be Anthony Romero, the ACLU executive director since September 2001. He is the ACLU’s sixth executive director, and the first Latino and openly gay man to serve in that capacity. Visit the ACLU’s Web site at www.aclu-nm.org or call (505) 266-4622 for registration information.

NM Workers’ Compensation Administration Public Hearing

Notice is hereby given that at 1:30 p.m., Nov. 30 the New Mexico Workers’ Compensation Administration (WCA) will conduct a public hearing on changes to the medical fee schedule and Part 7 of the WCA Rules. The hearing will be at the WCA, 2410 Centre Ave. SE, Albuquerque. Video conferencing may also be made available in WCA field offices upon request.

Copies of the changes to the medical fee schedule and Part 7 of the WCA Rules are available. Written comments pertaining to the medical fee schedule will be accepted until the close of business on Dec. 15. Written Comments pertaining to the amendments to Part 7 will be accepted until the close of business on Dec. 8.

For further information call (505) 841-6000. Copies of the draft rules can be obtained through the WCA clerk’s office, 2410 Centre Ave. SE, Albuquerque, NM
Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by 5 p.m., Monday the week of publication.

COURT REGULATED PROGRAMS

DON'T WAIT

UNTIL IT'S TOO LATE...

MCLE COMPLIANCE DEADLINE: 12/31/04

MCLE – mcle@nmbar.org or www.nmmcle.org

Locating Approved Courses
• Access all approved courses on www.nmmcle.org. Choose “Course Search” on the menu.
• Look in the CLE Calendar in this issue of the Bar Bulletin.
• Can’t find the course you want to take? Contact MCLE at (505) 797-6015 or email mcle@nmbar.org.

LEGAL SPECIALIZATION – ls@nmbar.org

The Board of Legal Specialization certifies those attorneys who have met rigorous standards and encourages attorneys to strive toward excellence. Specialization certification denotes achievement. The procedure of becoming a Board Certified Specialist is available to all qualified attorneys.

The Board of Legal Specialization is accepting applications for 2004 certification and 2005 certification and recertification in all 14 specialization areas. New specialization areas that have become available in 2004 are Federal Indian Law and Local Government Law.

Board Certified Specialists please note: All Legal Specialization Specialty Standards have been updated. If you haven’t received an updated set of standards, please go to the Legal Specialization sub-site on www.nmbar.org, Other Bars/Legal Groups or contact us at (505) 797-6057.

87106. If requesting a copy by mail, include a postage-paid, self-addressed envelope.

Disabled individuals who are in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aide or service to attend or participate in the hearing, contact Renee Blechner, (505) 841-6083, or the New Mexico relay network, (800) 659-8331.

UNM Law Library

Holiday Hours

UNM Law Library Hours
Monday-Thursday 8 a.m. to 11 p.m.
Friday 8 a.m. to 5 p.m.
Saturday 9 a.m. to 5 p.m.
Sunday Noon to 11 p.m.

Library Holiday Closures
The Law Library will be closed during the following UNM holidays:
Dec. 23 to Jan. 2
Call the Reference Desk, (505) 277-0935 if you have any questions.
New Mexico attorneys and judges declared a cease fire to courtroom conflicts as they congregated in the Sheraton Old Town hotel Nov. 5 and 6 for the 2004 Bench and Bar Conference.

The conference is a chance for members of the bench and bar to come together on a level playing field to tackle issues facing the court system as equals.

“The whole idea behind Bench and Bar is to bring together judges and attorneys and allow them to openly dialogue about issues facing the legal system in an informal setting,” said Rob Koonce, the director for the Center for Legal Education of the State Bar of New Mexico.

“The importance of programs like our Bench and Bar Conference cannot be underscored enough,” said New Mexico Supreme Court Chief Justice Petra Jimenez Maes in her opening remarks. “The opportunity to gather together in an informal, open setting helps members of the bar and bench tremendously.

“In working together and understanding each other’s challenges and concerns the Bench and Bar Conference helps bring us closer as individuals and as professionals,” she said.

“What Price Justice?” was the title of this year’s conference and the question more than 230 members of the state’s legal community attempted to answer.

The conference actually started Nov. 4 with a special reception to honor Chief Justice Maes for her work with Access to Justice before the continuing legal education events of the next morning.

After the opening remarks of the chief justice, Roger Warren, president of the National Center for State Courts in Williamsburg, Va., gave a presentation on “The Quality of Justice.” Warren’s speech looked at the “price” of justice from several angles and was well received by the crowd.

Participants then separated into the first of several breakout sessions to discuss issues dealing with the topic of “Delivering Justice to Clients,” before reassembling to honor State Bar award recipients at a luncheon.

The afternoon saw attendees going to their second breakout session dealing with the topic of “Funding the Legal System.”

The evening’s activities started off with a State Bar President’s Reception before the conference dinner buffet.

Afterwords, the evening’s entertainment was in the form of the lawyer-bands Curio Cowboys; Fiasco Brothers; Lawyers, Guns and Money; and The Woodpeckers competing in a round-robin battle of the bands.

“The entertainment is the best that I’ve seen,” said Thirteenth Ju-
Judge John Pope, who took advantage of the live music to try out some dance steps. “It was really good.”

The next morning saw the final breakout session dealing with “Ethics, Professionalism and Justice,” and then the second awards luncheon before the conference adjourned.

“One of the most important things, whether we ever accomplish anything or not, is the fact that this is one of the few places that lawyers and judges get to talk together directly,” said Pope. “The judges get to find out in a general way what’s bothering the lawyers in terms of the judicial system, and what we can do to change it. It’s always been real helpful that way.

“I thought we had really good attendance and I thought the program worked very well,” said Pope. “All the comments we’ve heard so far about the breakout sessions are that they were very lively and that people enjoyed them.”

“The conference was a great success,” said Koonce. “Even before the event actually began, we knew that our members were very interested in this event due in large part to the sponsorships that we received in advance for the conference.

“In talking with exhibitors following the conference, they were also very pleased,” he said. “The responses from sponsors, exhibitors, and attendees has been overwhelmingly positive.”

One of the keys to the conference’s success was the contribution of vendors who attended the conference. Their patronage allowed the State Bar’s Center for Legal Education to reduce the overall cost for conference participants.

For the vendors who attended, pedaling everything from insurance to the latest in legal research, the conference was a unique chance to interact with their legal clientele.

“This is a good way for me to reach a lot of prospects that I wouldn’t normally be able to see from other parts of the state,” said Keith Dupree, a sales representative for Westlaw. “The turnout was better than I expected. I was happy to see as many attorneys show up as they did. It’s been great for me.”

And now that the conference is over and the attorneys and judges have resumed their titles and appropriate places is the courtroom to wrangle the law – maybe they do so with a little more understanding of each other.

**Second Day Award Winners**

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<thead>
<tr>
<th>Distinguished Bar Service Award</th>
<th>Professionalism Award</th>
<th>Fifty-Year Practitioners</th>
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<tr>
<td>Russell D. Mann (Posthumously)</td>
<td>Toby Grossman (Posthumously)</td>
<td>Malcolm W. Devesty</td>
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<tr>
<td>Outstanding Judicial Service Award</td>
<td>Joseph P. Paone (Posthumously)</td>
<td>George F. Stevens</td>
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<td>The Honorable Grace Duran</td>
<td>Seth D. Montgomery</td>
<td>Louis E. Depauli</td>
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<tr>
<td>Outstanding Program Award</td>
<td>Distinguished Judicial Service</td>
<td>Oscar L. Donisthorpe</td>
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<td>The Lawyers Assistance Committee</td>
<td>The Honorable Frank H. Allen, Jr.</td>
<td>David G. Housman</td>
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<tr>
<td>Pioneer Award</td>
<td>(Posthumously)</td>
<td>James T. Martin, Jr.</td>
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<td>Arturo L. Jaramillo</td>
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<td>Chester A. Pasnewski</td>
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Robert H. Lafollette Pro Bono Award winner Garnett R. Burks, Jr., from the law firm of Sage and Burks, PC, exchanges a few words with State Bar of New Mexico President Daniel J. O’Brien during the first day’s award luncheon. Although his firm was being honored for their pro bono work, Burks reminded everyone that they represented paying clients as well.
Samantha Adams has become an associate at the Modrall Sperling law firm. As a member of the firm’s litigation department, her practice focuses on employment, education and insurance law. As a former senior claims adjuster with Farmers Insurance Company of Arizona, she draws on her experience with both liability and property lines, as well as complex coverage issues, to complement her insurance practice. Adams is also an instructor for the Council on Education in Management, which provides core legal education and updates for Human Resources Personnel, some of whom earn their certificates in HR Management.

Cathy Ansheles will be honored by the American Civil Liberties Union of New Mexico at their 2004 Bill of Rights Dinner Dec. 4. Ansheles will receive the Civil Libertarian Lifetime Achievement Award for her leadership and commitment to working to end the death penalty in New Mexico. George Bach, Kari Morrissey and Lee Peifer will receive the Cooperating Attorneys of the Year Award for fighting against the unconstitutional elements of the Sunshine Law and the Albuquerque Sex Offender Registration and Notification Act.

Cynthia E. Aragon, G. Michelle Brown-Yazzie, Cheryl Demmert Fairbanks and Helen B. Padilla were recently featured in the November issue of New Mexico Woman magazine as “American Indian Women Attorneys – Changing the Face of Law for their People.”

Manny Aragon has been named president of New Mexico Highlands University. He became the 16th person to lead the university, and as a result, he resigned his seat in the New Mexico Senate, which he had held for 30 years. Aragon graduated in 1970 from the University of New Mexico with a bachelor’s degree in political science. He received a Juris Doctor degree in 1973 from the University of New Mexico School of Law.

Prof. Barbara Bergman from the UNM School of Law has been awarded the Dismas House New Mexico’s annual Father Charlie Driscoll Award. Modrall Sperling was also named as the winner of the Law Firm Challenge. Dismas House is a local nonprofit organization that assists motivated adults on probation and parole to transition into society. It provides a transitional home with opportunities to interact with community volunteers, life skills training, and links to community resources. The Driscoll award is named after the renowned criminal defense lawyer who in later life became a Catholic priest. It’s given to a supporter in the legal community who shows a commitment to Dismas House, advocacy, compassion and faith in action. The Law Firm Challenge is a new initiative designed to recruit volunteers. Albuquerque law firms cook once a month for Dismas House residents. The residents then vote for their favorite firm.

Jack Burton, a director at the Rodey Law Firm, has been named Business Lawyer of the Year by the Business Law Section of the State Bar. Burton has been with Rodey for 36 years and has a state-wide commercial practice involving transactions, litigation and alternative dispute resolution. The Business Law Section chose Burton not only for his reputation and skills as a lawyer, but because he has successfully represented New Mexico in the National Conference of Commissioners on Uniform State Laws.

Roxanna Chacon, Michael G. Duran and Joseph L. Romero have been hired by Miller Stravert as associates. Chacon has practiced law since 2001. She graduated from UNM Law School in 2001 and was named the Outstanding Young Lawyer of the Year by the State Bar. Duran has a law degree from UNM and a bachelor’s degree in business management and information technology from the University of Phoenix. He is also a member of the Hispanic Bar Association. Romero joined the company’s Santa Fe office. He has a law degree and bachelor’s degree with a double major, both from UNM. He will practice primarily in the area of litigation.

John Darden was elected chair of the New Mexico Public Education Commission. Darden, an attorney with the Darden Law Firm, PA in Las Cruces, is on his second term with the commission, formerly known as the New Mexico State Board of Education.

Michelle Dotson has been named legal counsel to the Navajo Nation’s president and vice president. Previously, she was executive director of the tribe’s Office of Navajo Government Development and before that worked as legal counsel for that office.
Linda L. Ellison has joined Atkison & Kelsey, PA. Ellison will practice in divorce arbitration and mediation, family law and matrimonial bankruptcy law. She is the Family Law Section chair-elect, a member of the Women’s Bar Association, the Albuquerque Bar Association and the New Mexico Collaborative Law Group. She has a law degree from the University of New Mexico and a bachelor’s degree from St. Mary’s College.

Nate Gentry has been named to the staff of the Senate Energy and Natural Resources Committee. He works on water policy issues. He previously worked for U.S. Sen. Pete Domenici prior to attending UNM Law School.

First Assistant U.S. Attorney Larry Gomez received the New Mexico Distinguished Public Service Award at the annual awards presentation. This year marks the 35th anniversary of the New Mexico Distinguished Public Service Awards. The awards are an annual celebration, recognizing citizens throughout the state for their outstanding contributions to the public service, and to improve government at all levels by both government and private citizens. Monies are also raised through sponsors and are distributed to New Mexico universities for scholarships for students pursuing education in public service fields.

Bernalillo County Metropolitan Court Judge Victoria Grant addressed the Second National Homeless Court Conference in Bakersfield, Calif. in October. Grant established the Homeless Court here as part of Metro Court’s Community Involved Programs Division in the summer of 2002. The Homeless Court is designed to help those who are attempting to break the cycle of homelessness. It does not deal with defendants accused of serious crimes, DWI or domestic violence, but is structured to help clients achieve self-sufficiency. Grant, who has served in Metro Court since 1996, addressed the conference on “Collaborating to Bring Order and Justice to Society.”

Stan Harris has become a shareholder in the firm of Modrall Sperling. Harris practices in the areas of natural resources law and commercial litigation, advising clients at the judicial, administrative, and legislative levels on federal, state and local environmental issues. His practice involves the representation of parties in oil and gas industry disputes, mining transactions, cultural property and Indian lands disputes. Prior to joining Modrall Sperling, he was environmental counsel to U.S. Sen. Pete Domenici.

Michael Hart has been elected president of the New Mexico Trial Lawyers Association. He is a partner in the Albuquerque firm of Eaton, Martinez & Hart. He has been an active member of numerous organizations, including the American Professional Society on the Abuse of Children, the Child Welfare League, the International Society for Prevention of Child Abuse and Neglect, the Juvenile Justice Act Advisory Committee, Human Rights Advocacy, Inc., the Sexual Assault Nurse Examiners Board of Directors and the Professional Society on the Abuse of Children.

Christa Hazlett has joined the firm of Keleher & McLeod. She focuses her litigation practice in the areas of employment, personal injury and contract disputes. Previously, she worked as an attorney advisor for the U.S. Department of Housing and Urban Development.

Jessica M. Hernandez has rejoined Rodey, Dickason, Sloan, Akin & Robb, PA as an associate attorney in the litigation department. Hernandez temporarily left the firm in 2003 to clerk for Judge James O. Browning in the U.S. District Court. She practices primarily in liability and general civil defense. She has a law degree from the University of New Mexico.

Danny Jarrett has become president and director of Nicholas J. Noeding & Associates. The firm is now known as Noeding & Jarrett, a Professional Corporation. The firm will continue to emphasize labor law and employment law.

Nancy M. King was named the chair of the State Capital Global Law Firm Group at the group’s 2004 annual meeting. The State Capital Global Law Firm Group is a network of capital-based attorneys, former government officials, state government practitioners and international law attorneys whose members are strategically positioned to serve the most diverse business needs in today’s global economy. King is a shareholder and practices with the commercial section of Montgomery & Andrews, PA.

Legal FACS recently received a two-year grant from The U.S. Department of Justice – Office on Violence Against Women as part of their Legal Assistance for Victims Grant Program. This program provides legal services to victims of domestic violence, sexual assault, and/or stalking. Legal FACS is a 501(c)(3) non-profit self-help legal program whose primary focus is legal assistance and domestic violence advocacy to low-income residents in Bernalillo, Sandoval, Torrance and Valencia counties.

Antonio Maestas has opened the MoeJustice Law Office in Albuquerque, a general sole practice focusing on criminal law, personal injury law and political consulting.
Ocean Munds-Dry has joined Holland & Hart as an associate. Munds-Dry will be a member of the Natural Resources Department and the Minerals Practice Group. She received a Juris Doctor degree from the University of New Mexico School of Law where she was a member of the New Mexico Law Review, the UNM National Appellate Advocacy Team and was President of the Women’s Law Caucus.

Raul Sedillo has become an associate with the firm of Butt Thornton & Baehr.

Whitney Warner has been elected to the American Academy of Appellate Lawyers. Membership to the national organization is by invitation only, after being nominated by a current academy member, approved by a review committee and elected by members. Ricco becomes one of 259 members.

The University of New Mexico School of Law recently received the American Bar Association’s Henry J. Ramsey Award for diversity. UNM’s law school received the award because of its effort to address diversity through its programs and activities.

Robert Perovich has been elected president of the Sandia Kiwanis Club. Perovich has been a member of the Sandia Kiwanis since 1981 and is an attorney with Kehler & McLeod, PA.

Erin Elizabeth Schaden has joined Atkinson & Kelsey, PA in the practice of divorce and family law. Her practice focuses on domestic relations, domestic violence, family law and marital bankruptcy law. Schaden practiced law in the District of Columbia and Maryland prior to moving to New Mexico. The Maryland native received a law degree and a bachelor’s degree from Florida State University.

Ed Ricco has been elected to the American Academy of Appellate Lawyers. Membership to the national organization is by invitation only, after being nominated by a current academy member, approved by a review committee and elected by members. Ricco becomes one of 259 members.

Quentin Smith has joined Gilkey & Stephenson, PA as an associate. Smith has a law degree from UNM and a bachelor’s degree from Texas Christian University. He recently clerked for Supreme Court Justice Pamela Minzner.

The New Mexico Hispanic Bar Association was awarded the “Local Bar Association of the Year Award” by the Hispanic National Bar Association at a reception held at the Central Park Boathouse on Oct. 10. The NMHBA was recognized for its efforts in support of Hispanics in New Mexico as well as for its support of HNBA initiatives.

William “Bill” Flanagan, 84, passed away Oct. 6 in Albuquerque. He was born Sept. 20, 1920 in Schenectady, N.Y., and graduated from the University of Florida in 1942 with a bachelor’s degree and a commission in ROTC. He proudly served in the U.S. Army Air Corps from 1942 until 1948. Flanagan was with the first 306th bomb group that flew over Germany in World War II. Upon his return to service in the U.S., he became disabled, and as a paraplegic, he attended the University of Miami Law School and graduated with an LL.B. and a Juris Doctor degree. He started his own law practice in 1953, and was an attorney until his retirement in 1982. Flanagan is survived by his wife of 51 years, Helen Flanagan; daughter, Sandra Schroeder, of Belleville, Ill.; sister, Rosemary Browne, of Austin, Texas; and granddaughter, Jill Nichole Schroeder, of Los Angeles.

J. Richard Baumgartner, 77, a resident of Albuquerque since 1948, died Aug. 27. He is survived by his daughter, Patsy Baumgartner of Clovis; sons, David Baumgartner of Laughlin, Nev., and Bruce Baumgartner and wife, Yolanda of Albuquerque; granddaughter, Alexis Baumgartner of Scottsdale, Ariz.; brother, Jack Baumgartner of Lubbock, Texas; and sister, Joan Boisvert of Michigan. He was preceded in death by his wife, Sarah Baumgartner; and brothers, Paul and Bill Baumgartner. Baumgartner was an avid golfer and patron of the arts. He was a graduate of the University of New Mexico and the UNM School of Law. He worked as a labor lawyer for the State of New Mexico for most of his career and was a member of the State Bar of New Mexico.

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Father Robert Edward Harding, Jr., 77, husband of Iola W. Harding, died Aug. 26 at home. A son, Robert E. Harding, III; two daughters, Roberta M. Harding, Esq., and Olivia V. Harding; two grandchildren, Robert and Anne Harding; and two sisters, Geraldine and Florine of New York City, survive him. He is preceded in death by parents, Robert, Sr., and Olivia; a sister, Berniece: and an infant son, Vincent. Harding was a retired National Labor Relations Board attorney. He was also a part of the Federal Mediation and Conciliation Service and the American Arbitration Association panel of arbitrators. Harding was a member of the Kentucky and New Mexico Bars as well as a past president and member of the legal counsel for the NAACP. He was an adjunct professor in Afro-American Studies at the University of New Mexico. Having experienced the cutting edge of segregation and “Jim Crow” laws, Harding devoted his retirement to helping others combat discrimination and disparate treatment in many areas of life.
many people. and human rights advocate who profoundly touched the lives of
treasure time spent with Gary. Gary was an avid environmentalist
ents, Leo Pilkington, Grace and Floyd Blow of Binghamton, N.Y.;
O’Dea and Kimberly MacKnight of Ashburn, Va.; his father and
Sean and Kim O’Dea of Albuquerque; his mother and sister, Janet
son, Sean, 6. He will be very deeply missed by his loving family,
tablishing the O’Dea Law Group. He was a devoted father to his
the City of Albuquerque in environmental concerns prior to es-
Manufacturers Association in Washington, D.C. before moving
College in Rochester, N.Y. and received a law degree from George
Palmyra-Macedon High School and Finger Lakes Community
Colo., died Sept. 9 in Massachusetts General Hospital after a brief
died Sept. He is survived by his wife, Joyce.
Niki Martin, 46, a resident of Placitas for the last 12 years, passed
away Sept. 11. Martin was born Nov. 21, 1957 in Chicago. She
was a retired attorney, member of Southwest Writers Association
and enjoyed scuba diving. She is survived by her loving husband,
Greg Krenik; her parents, Jerry and Sharon Martin of Arizona; two
brothers, Loren and Ira Martin; father- and mother-in-law, Jim and
Dee Krenik of Minnesota; and sister-in-law, Mary Jo.
Attorney Glenn B. Neumeyer, 78, a resident of Albuquerque for 14
days, died Sept. He is survived by his son, Nick Neumeyer and wife,
Lisa of Torrance, Calif.; sister, Kaye Krause and husband, Gayle of
El Dorado, Kan.; cousin, Joanne Cooley and husband, Daryl of El
Paso, Texas; three grandchildren, Scott, Royce, and Teah; and two
great-grandchildren, Castin and Elyssa. Neumeyer was preceded in
death by his wife, Joyce.
Gary A. O’Dea, age 41, of Albuquerque and Pagosa Springs,
Colo., died Sept. 9 in Massachusetts General Hospital after a brief
illness. Gary was born in Binghamton, N.Y. He was a graduate of
Palmyra-Macedon High School and Finger Lakes Community
College. He graduated Magna Cum Laude from St. John Fisher
College in Rochester, N.Y. and received a law degree from George
Washington University School of Law. O’Dea worked for Chemical
Manufacturers Association in Washington, D.C. before moving
to Albuquerque where he devoted his career to environmental law
and was a noted expert on clean water rights. O’Dea represented
the City of Albuquerque in environmental concerns prior to es-
ablishing the O’Dea Law Group. He was a devoted father to his
son, Sean, 6. He will be very deeply missed by his loving family,
Sean and Kim O’Dea of Albuquerque; his mother and sister, Janet
O’Dea and Kimberly MacKnight of Ashburn, Va.; his father and
step-mother, Gary and Julie O’Dea of Fairport, N.Y.; his grandparents,
Leo Pilkington, Grace and Floyd Blow of Binghamton, N.Y.;
as well as many aunts, uncles, nephews, nieces, and cousins who
treasure time spent with Gary. Gary was an avid environmentalist
and human rights advocate who profoundly touched the lives of
many people.
Lee E. Teitelbaum, a longtime professor at the University of
New Mexico School of Law in the 1970s and 1980s, died Sept.
22 in Salt Lake City, after a yearlong battle with cancer. He was
63. Teitelbaum, a native of New Orleans, went north to earn his
undergraduate and law degrees at Harvard. He earned a law de-
gree in 1968 from Northwestern University, where he was a Ford
Foundation fellow. He began his teaching career at the University
of North Dakota, followed by stints at the UNM Law School from
1973 to 1985, State University of New York at Buffalo Law School
and Indiana University at Bloomington, where he was director
of the Center for the Study of Legal Policy Relating to Children.
He was at the University of Utah Law School first as a visiting
professor and then as dean from 1990 to 1998, when he became
dean at Cornell University Law School in New York. He returned
to Utah in 2003 after he and his wife, Herta, bought a home in
Albuquerque that they planned to use during summers and in his
eventual retirement.
Dale B. Walker passed away in the peace and comfort of the
family home on Oct. 1. He was born in Raton Nov. 13, 1925
to Dale B. and Iva Bess Walker. His parents; son, Jason; brother,
David; and sister, Mary preceded him in death. He is survived by
Dorothy Anderson Walker; daughter, Julie; sons, Cody and Kitry;
sister, Robin Walker; and very special friends Jimmie and Barbara
Goldstein. He served in the U.S. Army Air Corps at Lowrey Field
during World War II. He entered the University of New Mexico in
1946 and received a law degree from George Washington University
in 1948. While in Washington he served as secretary and clerk
for Sen. Dennis Chavez. Walker developed lifelong friendships
all over the state when the senator visited his constituents. Upon
graduation, he returned to Albuquerque to practice law. Walker
formed a partnership with Peter Gallagher and they practiced law
together for 18 years. After Gallagher retired, Walker enjoyed a
solo practice for 14 years. He was instrumental in working with
Wilhelmina Caw in developing the Heights YMCA. He served on
the Western Streams Commission and enjoyed working closely
with the late Steve Reynolds. Walker was very involved with his
children in Little League, YAFI and Boy Scouts. He taught all his
children how to hunt fish and set up a comfortable camp. He retired
in 1989 to his cabin in Ute Park. He enjoyed fishing Eagle Nest
Lake, reading western history, biographies of the founding fathers
and presidents and watching the New York Yankees. He also made
sure that all the birds and squirrels and foxes had plenty to eat. He
loved his family his country, and especially New Mexico.
Charles Alan Young, 54, of Placitas, born in Kalamazoo, Mich.
on Dec. 28, 1949, passed away on Aug. 28 in a tragic bicycle ac-
cident in Colorado. Young died while doing what he loved more
than anything else in this world. A strong and courageous runner
and cyclist, full of spirit, sportsmanship, and compassion, he was a
true champion. Young got a bachelor’s degree from the University
of Michigan and two graduate law degrees from the University of
British Columbia. A brilliant and energetic lobbyist, husband, and
father, he leaves behind his wife of 30 years, Lucy Fox, M.D.; his
daughter (and shining star of his life), Justine Colette Fox-Young;
his brother, Jim and sister-in-law, Lisa Young; brother-and sister-
in-law, Jim and Meg Fox; and beloved Labrador Retrievers, Cosmo,
Peaks, and Sidney.
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<th>Date</th>
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<td>Expert Opinions - Adjudication or Legislation?</td>
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## WRITS OF CERTIORARI

**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk
New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective November 24, 2004**

### CERTIORARI GRANTED BUT NOT SUBMITTED:

(Submission = date of oral argument or briefs-only submission)

| No. 28,665 | State v. Self (COA 23,588) | 7/19/04 |
| No. 28,664 | State v. Lopez (COA 23,531) | 7/19/04 |

### CERTIORARI GRANTED AND SUBMITTED:

(Submission = date of oral argument or briefs-only submission)

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### PETITION FOR WRIT OF CERTIORARI DENIED:

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| No. 28,947 | Grado v. Romero (COA 27,408) | 11/17/04 |
From the New Mexico Supreme Court

Opinion Number: 2004-NMSC-036

OPINION

PAMELA B. MINZNER, JUSTICE

1. Defendant Ramon Paredez pleaded guilty to criminal sexual contact of a minor in the third degree, contrary to NMSA 1978, § 30-9-13(A)(2) (2001). After sentencing, Defendant filed a motion to withdraw his guilty plea on the basis he was not adequately informed of the immigration consequences of his plea. The district court entered an order denying his motion, which was affirmed by the Court of Appeals in a memorandum opinion. State v. Paredez, No. 24,082 (N.M. Ct. App. Aug. 20, 2003). We granted certiorari pursuant to NMSA 1978, § 34-5-14(B) (1972) and Rule 12-502 NMRA 2004. In this opinion, we hold that the district court’s admonition to Defendant that his guilty plea “could” affect his immigration status was sufficient advice to satisfy federal due process and Rule 5-303(E)(5) NMRA 2004; however, Defendant’s attorney had an affirmative duty to determine his immigration status and provide him specific advice regarding the impact a guilty plea would have on his immigration status. A prima facie case of ineffective assistance of counsel is established by the appellate record; thus, we remand to the district court for an evidentiary hearing on Defendant’s claim.

2. On October 30, 2002, Defendant was charged by information with criminal sexual contact of a minor thirteen to eighteen years of age. A plea agreement was entered on February 4, 2003, which the district court accepted. Defendant’s attorney advised the court at the plea hearing that his client was a permanent resident alien from Guatemala and that the attorney had advised him the plea “could” affect his immigration status. Before accepting the plea, the district court addressed Defendant and also informed him his plea “could” affect his status under immigration laws. On February 25, Defendant was sentenced to three years incarceration in the New Mexico Department of Corrections. Consistent with the plea agreement, he received a suspended sentence and was placed on supervised probation for a period of three years. Six days later, on March 3, Defendant filed a motion to withdraw his guilty plea alleging he was not fully informed as to the effect his plea would have on his immigration status. A hearing was held on the motion, after which the district court issued an order denying the motion. Defendant appealed.

3. The Court of Appeals noted that the district court complied with Rule 5-303(E), which prohibits the district court from accepting a guilty plea without first informing the defendant that the conviction may affect his or her immigration or naturalization status. Paredes, No. 24,082, slip op. at 2. The Court rejected Defendant’s argument that the district court was required to provide a more specific explanation of the immigration consequences of Defendant’s guilty plea. Id. at 3. Furthermore, the Court stated that the record was insufficient to address on direct appeal the issue of ineffective assistance of counsel and refused to remand the case for an evidentiary hearing on the issue. Id. at 3-4.

4. If Defendant’s guilty plea for criminal sexual contact of a minor stands, he almost certainly will be deported back to Guatemala. Under federal law, “[a]ny alien . . . in and admitted to the United States shall, upon order of the Attorney General, be removed” if the alien is within a statutorily defined class of deportable aliens. 8 U.S.C. § 1227(a) (2000) (emphasis added). One class of deportable aliens includes those who are convicted of an “aggravated felony.” 8 U.S.C. § 1227(a)(2)(A)(iii). Criminal
sexual contact of a minor is an “aggravated felony” as that term is used in § 1227. See 8 U.S.C. § 1101(a)(43)(A) (2000) (listing “murder, rape, or sexual abuse of a minor” as within the term). Furthermore, not only did Defendant’s plea render him deportable, he is ineligible for discretionary relief from deportation. See 8 U.S.C. § 1229b(a)(3) (2000) (“The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien has not been convicted of any aggravated felony.”) (emphasis added). Defendant was not informed by the district court of these consequences of his guilty plea. Also, the record reflects that Defendant’s attorney likewise may have failed to inform him that his guilty plea would result in his virtually automatic deportation. We now turn to whether the district court erred in refusing to allow Defendant to withdraw his plea.

II

[5] “A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court, and we review the trial court’s denial of such a motion only for abuse of discretion.” State v. Garcia, 1996-NMSC-013, 121 N.M. 544, 546, 915 P.2d 300, 302. The district court abuses its discretion in denying a motion to withdraw a guilty plea “when the undisputed facts establish that the plea was not knowingly and voluntarily given.” Id. The relevant inquiry is whether Defendant’s plea was voluntary and knowing, which requires this Court to examine whether Defendant should have been informed that his guilty plea in this case almost certainly would result in his deportation, and if so, whether it was the responsibility of the district court or his defense attorney to inform him of that consequence.

A

[6] We first address the district court’s role in informing criminal defendants of the immigration consequences of a guilty plea. Whether a district court must advise a defendant of certain consequences of a guilty plea prior to accepting the plea is an issue of law that we review de novo. See State v. Moore, 2004-NMCA-035, ¶ 12, 135 N.M. 210, 86 P.3d 635. For the following reasons, we hold that the district court’s admonition to Defendant that his plea “could” have an effect on his immigration status was sufficient to satisfy both our Rule 5-303 and the Due Process Clause of the federal constitution. Defendant does not provide any reason for interpreting our state due process clause, N.M. Const. art. II, § 18, differently from its federal counterpart; therefore, we decline to address his argument under our state constitution. See Compton v. Lytle, 2003-NMSC-031, ¶ 23 n.4, 134 N.M. 586, 81 P.3d 39.

[7] By entering a guilty plea, a criminal defendant waives a number of constitutional rights, including his or her privilege against compulsory self-incrimination, right to a jury trial, and right of confrontation. Boykin v. Alabama, 395 U.S. 228, 243 (1969). Therefore, the United States Supreme Court has held that these waivers “not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” Brady v. United States, 397 U.S. 742, 748 (1970). Defendant contends that his plea was not voluntary or knowing because the district court informed him he “could” be deported as a consequence of his guilty plea, rather than advising him that deportation would automatically result from his plea.

[8] The procedures established in Rule 5-303 “are designed to ensure a guilty plea is made knowingly and voluntarily.” Garcia, 121 N.M. at 546, 915 P.2d at 302. In this case, the district court strictly complied with Rule 5-303, which provides:

E. Advice to defendant. The court shall not accept a plea of guilty, no contest or guilty but mentally ill without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following:

. . . .

(5) that, if the defendant is convicted of a crime, it may have an effect upon the defendant’s immigration or naturalization status.

We deem it advisable for the Rules of Criminal Procedure Committee to review the language of Rule 5-303 and consider whether the district court prior to accepting a defendant’s guilty plea must inquire into the immigration status of the defendant and affirmatively determine whether the defendant has been advised by his attorney of the immigration consequences of the plea. See Wash. Rev. Code § 10.40.200(2) (2002) (“Prior to acceptance of a plea of guilty . . . the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.”) (emphasis added). However, we cannot conclude that Rule 5-303 as written required more of the district court than informing Defendant that the plea “could” affect his immigration status. We next consider whether the Due Process Clause of the federal constitution required the district court to have been more specific when informing Defendant of the immigration consequences of his guilty plea.

[9] Neither the Supreme Court nor the federal circuits have held that the trial court must inform defendants of all possible consequences flowing from a guilty plea. The trial court only has a duty to ensure that the defendant understands the “direct” consequences of the plea but is under no duty to advise the defendant of the plea’s “collateral” consequences. United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982). Each federal circuit that has directly considered the issue has held that deportation is a collateral consequence of pleading guilty so that the trial court is not required to inform the defendant of the immigration consequences of his or her plea. El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002); United States v. Amador-Leal, 276 F.3d 511, 517 (9th Cir. 2002); United States v. Gonzales, 202 F.3d 20, 27-28 (1st Cir. 2000); United States v. Osiemi, 980 F.2d 344, 349 (5th Cir. 1993); United States v. Montoya, 891 F.2d 1273, 1292-93 (7th Cir. 1989); United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir. 1988); United States v. Campbell, 778 F.2d 764, 767 (11th Cir. 1985); Russell, 686 F.2d at 39; Michel v. United States, 507 F.2d 461, 464-66 (2d Cir. 1974); Cathrell v. Dir., Pattuaxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973). Furthermore, the remaining federal circuits that have not directly addressed the issue have signaled that they would reach the same holding. See Broomes v. Ashcroft, 358 F.3d 1251, 1257 n.4 (10th Cir. 2004) (citing with approval cases from sister circuits holding that the trial court is under no duty to inform defendants of the immigration consequences of their guilty pleas); Kandiel v. United States, 964 F.2d 794, 796 (8th Cir. 1992) (same).

[10] The circuit courts have reached their conclusions notwithstanding relatively recent federal changes in the law that make deportation virtually automatic for certain offenses. In Gonzalez, the First Circuit recently stated:

What renders [a] plea’s immigration effects “collateral” is not that they arise “virtually by operation of law,” but the fact that deportation is
“not the sentence of the court which accept[s] the plea but of another agency over which the trial judge has no control and for which he [or she] has no responsibility.”

202 F.3d at 27 (quoted authority omitted); accord El-Nobani, 287 F.3d at 421 (“[I]t is clear that deportation is not within the control and responsibility of the district court, and hence, deportation is collateral to a conviction.”). Thus, the federal circuits generally agree that the Due Process Clause of the federal constitution does not require the trial court judge to even inform the defendant that his or her plea “may” have deportation consequences.

{11} If the district court’s silence regarding the immigration consequences of a defendant’s guilty plea does not violate that defendant’s federal constitutional right to due process, then it would be illogical for this Court to conclude that the district court’s admonition to Defendant in this case that his plea “could” affect his immigration status was constitutionally defective. Accordingly, it would be illogical for the defendant’s guilty plea to a conviction. (“...renders deportation a possibility, then the attorney’s performance would be deficient. Also, when a defendant’s guilty plea almost certainly will result in deportation, his guilty plea to criminal sexual contact of a minor almost certainly would result in his deportation.

B

{12} Our conclusion that the district court did not err in its admonition to the Defendant does not mean that Defendant’s attorney was relieved from informing him that he almost certainly would be deported if his guilty plea was accepted by the court. In fact, “[d]efense counsel is in a much better position to ascertain the personal circumstances of his [or her] client so as to determine what indirect consequences the guilty plea may trigger.” Michel, 507 F.2d at 466. As the California Supreme Court recently noted, a sufficient advisement from the trial court regarding the immigration consequences of a defendant’s plea “does not entail that [the defendant] has received effective assistance of counsel in evaluating or responding to such advisements.” In re Resendiz, 19 P.3d 1171, 1178 (Cal. 2001). Therefore, we now address the role of criminal defense attorneys in informing their clients of the immigration consequences of a guilty plea.

{13} The United States Supreme Court has stated that “[v]here ... a defendant is rep-

resented by counsel during the plea process and enters his [or her] plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases.’” Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). The two-part standard delineated in Strickland v. Washington, 466 U.S. 668 (1984), applies to ineffective-assistance claims arising out of a plea agreement. Hill, 474 U.S. at 58. To establish ineffective assistance of counsel, a defendant must show: (1) “counsel’s performance was deficient,” and (2) “the deficient performance prejudiced the defense.” Strickland, 466 U.S. at 687.

{14} As for the deficient performance prong of the Strickland test, the inquiry is whether the “counsel’s representation fell below an objective standard of reasonableness.” 466 U.S. at 688. This inquiry requires us to “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

{15} We agree with those jurisdictions that have held that “[a]n affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable.” United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002); accord State v. Rojas-Martinez, 73 P.3d 967, 970 (Utah Ct. App. 2003), cert. granted, 80 P.3d 152 (Utah 2003). If a defendant’s attorney informs him or her that deportation will not be a consequence of a guilty plea when the guilty plea renders deportation a possibility, then the attorney’s performance would be deficient. Also, when a defendant’s guilty plea almost certainly will result in deportation, an attorney’s advice to the client that he or she “could” or “might” be deported would be misleading and thus deficient. As the Oregon Court of Appeals recently noted while relying on the state constitutional protection of the right to counsel:

[S]tating that a person “may” be subject to deportation implies there is some chance, potentially a good chance, that the person will not be deported. That is an incomplete and therefore inaccurate statement if made to an alien considering whether to plead guilty to an aggravated felony. 

Gonzalez v. State, 83 P.3d 921, 925 (Or. Ct. App. 2004); accord Rojas-Martinez, 73 P.3d at 970 (addressing the advice that conviction of the aggravated felony of sexual abuse of a minor “might or might not” result in deportation).

{16} We go one step further, though, and hold that an attorney’s non-advice to an alien defendant on the immigration consequences of a guilty plea would also be deficient performance. In reaching this holding we recognize that the Tenth Circuit has held “deportation remains a collateral consequence of a criminal conviction, and counsel’s failure to advise a criminal defendant of its possibility does not result in a Sixth Amendment deprivation.” Broomes, 348 F.3d at 1257. We refuse to draw a distinction between misadvice and non-advice; therefore, we depart from the Tenth Circuit’s holding for three reasons.

{17} First, in many cases, there will only be a tenuous distinction between the two. Whether an attorney provides no advice regarding immigration consequences or general advice that a guilty plea “could,” “may,” or “might” have an effect on immigration status, the consequence is the same: the defendant did not receive information sufficient to make an informed decision to plead guilty. Second, distinguishing between misadvice and non-advice would “naturally create a chilling effect on the attorney’s decision to offer advice,” because if the attorney’s advice regarding immigration consequences is incorrect, the attorney’s representation may be deemed “ineffective.” John J. Francis, Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?, 36 U. Mich. J.L. Reform 691, 726 (2003). Third, not requiring the attorney to specifically advise the defendant of the immigration consequences of pleading guilty would “place[] an affirmative duty to discern complex legal issues on a class of clients least able to handle that duty.” Id.; see also In re Alvernaz, 830 P.2d 747, 753 (Cal. 1992) (“Although [the decision to plead guilty] ultimately is one made by the defendant, it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain.”).

{18} Deportation can often be the harshest consequence of a non-citizen criminal defendant’s guilty plea, so that “[i]n many misdemeanor and low-level felony cases . . . [he or she] is usually much more concerned about immigration consequences than about the term of imprisonment.” Jennifer Welch,
Comment, Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively, 92 Cal. L. Rev. 541, 545 (2004). The American Bar Association has recognized as much by stating that “it may well be that many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction.” ABA Standards for Criminal Justice: Guilty Pleas § 14-3.2 cmt., at 127 (3d ed. 1999). Therefore, under the ABA Standards for Criminal Justice, “defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.” Id. § 14-3.2(f).

[19] We hold that criminal defense attorneys are obligated to determine the immigration status of their clients. If a client is a non-citizen, the attorney must advise that client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain. Proper advice will allow the defendant to make a knowing and voluntary decision to plead guilty. Furthermore, requiring the attorney to give such advice is consistent with the spirit of Rule 5-303(E)(5), which prohibits the district court from accepting a guilty plea without first determining that the defendant has an understanding of the immigration consequences of the plea. An attorney’s failure to provide the required advice regarding immigration consequences will be ineffective assistance of counsel if the defendant suffers prejudice by the attorney’s omission.

[20] As for the prejudice prong of the Strickland test, the inquiry is “whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59. “In other words . . . the defendant must show that there is a reasonable probability that, but for counsel’s errors, he [or she] would not have pleaded guilty and would have insisted on going to trial.” Id. In this case, Defendant must show “he would not have entered into the plea agreement if he had been given constitutionally adequate advice about the effect that his guilty plea would have on his immigration status.” Gonzalez, 83 P.3d at 925; accord In re Resendiz, 19 P.3d at 1187.

[21] The record on appeal contains the following statement by Defendant’s attorney at the plea hearing: “[M]y client is . . . an alien from Guatemala, and I have advised him that the plea agreement, as he has approved, could affect his status as an immigrant.” There is a strong inference to be drawn from this statement that Defendant’s attorney failed to advise him that he almost certainly would be deported if the district court accepted his plea agreement. It also would be logical to infer from the fact that Defendant filed a motion to withdraw his guilty plea only six days after he was sentenced that Defendant would not have pleaded guilty if he had known beforehand of this dire consequence. However, we cannot conclusively determine from the facts in the appellate record that the defense attorney failed in his duty to advise Defendant of the immigration consequences of pleading guilty to criminal sexual contact of a minor or that Defendant would not have pleaded guilty to that offense if he had been given adequate advice.

[22] In past cases, we have held when the record does not contain all the facts necessary for a full determination of the issue, “an ineffective assistance of counsel claim is more properly brought through a habeas corpus petition, although an appellate court may remand a case for an evidentiary hearing if the defendant makes a prima facie case of ineffective assistance.” State v. Royalal, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. “Such a prima facie case is not made when a plausible, rational strategy or tactic can explain the conduct of defense counsel.” State v. Swavola, 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct. App. 1992). In this case, Defendant received substantial benefit from his plea agreement—he received a suspended sentence and was placed on probation. It is conceivable that a non-citizen might opt to plead guilty and accept deportation to avoid serving a prison sentence, rather than face the possibility of both incarceration and deportation. A defense attorney could rationally advise the client to accept this type of plea agreement. However, we can conceive of no tactical reason for an attorney’s failure to inform the client that accepting the plea almost certainly would result in the client’s deportation. The record indicates that there is a distinct possibility that Defendant’s attorney failed to adequately inform him of the immigration consequences of his plea, and if Defendant had been properly advised, he would not have pleaded guilty. Thus, we believe Defendant has established a prima facie case of ineffective assistance of counsel.

[23] Furthermore, in this case, habeas corpus would not be a viable alternative to remand. Once Defendant has exhausted his direct appeal, he could be immediately deported to Guatemala. See 8 U.S.C. § 1229(d)(1) (2000) (“In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.”); Montilla v. INS, 926 F.2d 162, 164 (2d Cir. 1991) (stating that “conviction is considered final and a basis for deportation when appellate review of the judgment—not including collateral attacks—has become final”).

[24] For these reasons, we conclude it is appropriate to remand to the district court for an evidentiary hearing on Defendant’s ineffective assistance of counsel claim. At the evidentiary hearing, Defendant may present evidence supporting his claim. After applying the standards articulated in this opinion, if the district court finds that Defendant in fact received ineffective assistance of counsel, then Defendant must be allowed to withdraw his guilty plea. The court shall retain jurisdiction over Defendant until his appeals have been exhausted.

III

[25] We hold in this case that the district court fulfilled its duty in informing Defendant that his guilty plea “could” affect his immigration status, but Defendant’s attorney had an affirmative duty to determine his immigration status and advise him that he almost certainly would be deported if he pleaded guilty to criminal sexual contact of a minor. The facts in the appellate record are insufficient for this Court to conclude that Defendant received ineffective assistance of counsel. However, the appellate record establishes a prima facie case of ineffective assistance; thus, we remand to the district court for an evidentiary hearing on the matter.

[26] IT IS SO ORDERED.

PAMELA B. MINZNER, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

PATRICIO M. SERNA, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice
Certiorari Granted, No. 28,867, Oct. 19, 2004

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-125

Topic Index:
Criminal Procedure: Double Jeopardy
Juries: Improper Juror Communication

STATE OF NEW MEXICO, Plaintiff-Appellee, versus CONRADO RODRIGUEZ, Defendant-Appellant. No. 23,455 (filed: July 23, 2004)

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
JAY W. FORBES, District Judge

PATRICIA A. MADRID
Attorney General
ANITA CARLSON
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

JOHN B. BIGELOW
Chief Public Defender
JENNIFER BYRNS
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

The trial court then stated that it was “going to incorporate these verdicts into the records of our Fifth Judicial District” and asked counsel if there was a need to poll the jury. The attorneys for the State and Defendant both declined the opportunity to poll the jury. The trial court then stated, “All right. I’m going to discharge the jury. And thank you for working with us and for us today. Please call the Code-a-Phone over the weekend. Thank you.” The bailiff then asked everyone to stand for the jury, and the transcript states, “Jury out at 3:15 p.m.” Thereafter, the transcript contains the following exchange:

THE BAILIFF: One moment, Your Honor. I’m moving the jury back into the jury room. They’re saying that a verdict was read wrong.

THE COURT: All right. That’s fine.

THE BAILIFF: Let us see what’s going on. Okay? I’ll be right back with you in just a moment.

THE COURT: It was not read wrong.

THE BAILIFF: They were saying the DWI verdict was read wrong.

Believing that the jury was “still intact,” the trial court decided to recall the jury. But before bringing the jury back into the courtroom, the trial court and attorneys agreed to poll the jury to determine if the not guilty verdict was correct. The transcript reflects that the jury returned to the courtroom at 3:20 p.m., five minutes after the transcript showed the jury as out of the courtroom.

{3} Upon its return, the trial court advised the jury that it “ha[d] been told by the bailiff, before you people exited, that the verdict had been read wrong as to” the DWI charge. After confirming that the jury foreman had indeed signed the not guilty verdict form for the charge of DWI, the trial court proceeded to poll the jury. The members of the jury individually confirmed that their verdict on the charge of DWI was guilty. The trial court therefore concluded that the jury foreman’s act of signing the not guilty verdict form was a clerical error and ordered the record corrected to reflect a verdict of guilty on the DWI charge.

DISCUSSION

{4} Defendant argues that the trial court’s decision to change the verdict on the DWI charge from acquittal to conviction violated his right to be free from double jeopardy. Because Defendant does not make a distinction between his double jeopardy protections under our state and federal constitutions, we limit our discussion to the federal constitution. See State v. Reyes, 2002-NMSC-024, ¶ 10 & n.2, 132 N.M. 576, 52 P.3d 948 (limiting the consideration of a double jeopardy claim to the federal constitution where the defendant failed to argue that the state constitution provides greater protection). Although the State questions whether Defendant adequately preserved his double jeopardy argument below, the State nevertheless recognizes that Defendant may raise a double jeopardy challenge on appeal regardless of preservation. See NMSA 1978, § 30-1-10 (1963) (providing that “double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment”). We therefore proceed to address the merits of Defendant’s argument.

{5} We review a claim of double jeopardy de novo. See City of Albuquerque v. One (1) 1984 White Chevy Ut., 2002-NMSC-014, ¶ 5, 132 N.M. 187, 46 P.3d 94. However, to the extent that a double jeopardy claim involves factual determinations, we give

OPINION

LYNN PICKARD, JUDGE

{1} Defendant challenges the district court’s decision to change the jury’s verdict from not guilty to guilty on a charge of driving while under the influence of intoxicating liquor (DWI). Defendant argues that changing the verdict violated his right to be free from double jeopardy. Defendant also argues that the district court’s jury polling procedure violated his due process rights. Concluding that it was improper for the district court to change the jury’s verdict under the circumstances of this case, we reverse Defendant’s DWI conviction.

BACKGROUND

{2} The State charged Defendant with committing the crimes of DWI, driving while license suspended or revoked, and concealing identity. The case was tried to a jury. At the conclusion of jury deliberations, the jury returned to the courtroom to deliver the verdicts. Upon receiving the verdict forms from the jury foreman, the trial court asked the clerk to publish the verdicts. The clerk then read the verdicts, stating that the jury found Defendant guilty of driving while license suspended or revoked and concealing identity, but not guilty of DWI.
the trial court wide latitude in its fact-
finding function. See State v. Salazar,
1997-NMCA-088, ¶ 9, 124 N.M. 23, 946
P.2d 227.

[6] To decide whether the guilty verdict
in this case subjected Defendant to double
jeopardy, we must first determine whether
the trial court erred in reassembling the
jury to inquire into the validity of the not
guilty verdict signed by the jury foreman
and announced by the trial court. Compare
Brown v. Gunter, 562 F.2d 122, 124-25 (1st Cir. 1977) (ruling that there is no double
jeopardy violation when a state adopts and
applies a procedural rule that allows the
trial court to reassemble a discharged jury
to correct its verdict under limited circum-
stances), with People v. Henry, 639 N.W.2d
that a double jeopardy violation occurs
when the trial court improperly reassembles
a discharged jury to change its verdict).
The question, therefore, is whether the trial
court acted properly in reassembling the
jury in this case for the ostensible purpose
of correcting the verdict.

[7] Whether a trial court may reassemble
a discharged jury to amend, clarify, or correct
a verdict is the subject of a surprising num-
er of cases throughout the country. See
generally David J. Marchitelli, Annotation,
Criminal Law: Propriety of Reassembling
Jury to Amend, Clarify, or Otherwise
Change Verdict After Jury Has Been
Discharged, or Has Reached or Sealed Its
Verdict and Separated, 14 A.L.R.5th 89
(1993). Some courts take the view that a
jury cannot be reassembled to revise its
verdict once the trial court pronounces the
jury formally discharged. See, e.g., West
Other courts take a fact-intensive view
that the moment of discharge depends on
when the jury actually leaves the pres-
ence or control of the court and disperses
rather than when the trial court formally
pronounces the jury discharged. See, e.g.,
State v. Brandenburg, 120 A.2d 59, 61 (N.J.
Hudson County Ct. Ct. 1956).

[8] New Mexico case law has long rec-
ognized that a trial court should not reas-
semble a jury to change its verdict after
the jury has been discharged. See Murry
v. Belmore, 21 N.M. 313, 319, 154 P. 705,
707 (1916) (“After a verdict has been re-
ceived and entered upon the minutes, and
the jury has been dismissed, they have not
the power to reassemble and alter their
verdict.”). Although Murry was a civil case,
a criminal case warrants at least the same
precautions against improperly inquiring
into a jury verdict. See People v. Rushin,
1971) (recognizing that special precautions
must be taken when recalling the jury after
formal discharge in a criminal case because
of double jeopardy concerns and the “dif-
ferring nature of the criminal process”); see
also State v. Perez, 95 N.M. 262, 265, 620
P.2d 1287, 1290 (1980) (recognizing that
the trial court does not abuse its discretion
denying a defendant’s request to poll a
discharged jury).

[9] The State contends that Murry does
not require reversal in this case because
the Murry jury was not reassembled until
the day after it was formally discharged,
while the jury in this case was reassembled
shortly after it was formally discharged.
We acknowledge that the time from dis-
charge to reassembly was much longer in
Murry than in this case. However, we do
not believe the record in this case supports
the trial court’s decision to reassemble
the jury.

[10] The State cites to a number of cases
from other jurisdictions upholding trial
court decisions to reassemble a jury and
allow it to change its verdict in some
manner. Common to all of these cases is a
functional approach to determining when
a jury is discharged regardless of when
the court formally pronounces the jury as
discharged. Because this approach is factu-
ally driven by the extent to which the jury
remained under the control of the court
and the extent to which the jury actually
dispersed upon being formally discharged,
the State argues that we should defer to the
district court’s statements indicating that
the jury remained “intact” and was recalled
as it was leaving and before it “exited” the
courtroom. Despite the trial court’s belief
that the jury remained intact and could be
recalled to correct its verdict, we disagree
that the record supports such conclusions.
See State v. Taylor, 2000-NMCA-072, ¶
18, 129 N.M. 376, 8 P.3d 863 (stating that
although the appellate court views the trial
jury’s decision in the light most favor-
able to the ruling, “the review requires
scrutiny of the evidence and supervision
of the fact-finding process to determine”
whether there is evidence in the record to
satisfy “the relevant burden of proof”); cf.
State v. Edwards, 552 P.2d 1095, 1097-
98 (Wash. Ct. App. 1976) (indicating the
ways in which an evidentiary record may
be made by separate evidentiary hearing
or otherwise).

[11] The record indicates that the jury
dispersed at 3:15 p.m., upon being formally
discharged. Although the bailiff remarked
that he was moving the members of the jury
back into the jury room, upon hearing from
some members of the jury that the verdict
had been read wrong, the record is silent
regarding where the jury had moved, upon
its formal discharge, and there is no indica-
tion whether there were bystanders near
the members of the jury before they were
moved back into the jury room. See State v.
Green, 995 S.W.2d 591, 613 (Tenn. Crim.
App. 1998) (recognizing that the relevant
inquiry is whether formally discharged
jurors were exposed to the possibility of
outside contact or influence). Because
the trial court remarked on several occasions
that the jury was still intact, had not yet
exited the court, “didn’t even get out of the
[chute],” and was only just beginning
to leave, the State suggests that we should
defy to the trial court’s view of the situa-
tion and uphold the decision to reassemble
the jury. However, we cannot conclude
from the silent record that the jury was not
within proximity to bystanders and other
members of the public upon its formal
discharge. See Melton v. Commonwealth,
111 S.E. 291, 294 (Va. 1922) (declining to
presume no improper juror contact from
a silent record); see also Montanez v.
People, 966 P.2d 1035, 1037 (Colo. 1998)
en banc (recognizing that the defendant
does not carry the burden of showing that
discharged jurors communicated with oth-
ers). While the State emphasizes that a very
short period of time passed from when
the jury was formally discharged to when it
was moved back into the jury room, even
the slightest possibility of juror contamination
should preclude reassembling the jury to
inquire into the validity of its verdict. See
Rushin, 194 N.W.2d at 721-22 (“The Court
cannot ascertain the influence to which
the jury has been subjected after it has left
the courtroom, be it for two minutes or two
days.”). We also note that even after the jury
was moved back into the jury room by the
bailiff, there is no indication in the record
that the jury was free from any unauthor-
ized contact. See Green, 995 S.W.2d at 613
(declining to consider presence of court
officers with jurors after formal discharge
as a basis for concluding that the jurors
were not in fact discharged); Melton, 111 S.E.
at 294 (noting possibility of improper
communications between formally dis-
charged jurors and court personnel because
jurors are no longer restricted by customary
admonitions and the relationship between
court officers and jurors is then one “of
third persons”).
While it is tempting to minimize the risks associated with allowing the jury to reassemble and revisit the correctness of its verdict under the circumstances of this case, we must take every precaution to avoid casting even the slightest doubt on the propriety of jury verdicts in criminal proceedings. See Montanez, 966 P.2d at 1037 (emphasizing that the jury should not be allowed to reassemble whenever there is any possibility of improper contact because “[a]ny rule to the contrary would invite doubt regarding the integrity of verdicts and raise legitimate concerns as to the reliability of the jury system”); Melton, 111 S.E. at 294 (“The sanctity of jury trials cannot be thus subjected to the hazard of suspicion.”).

Although the trial court characterized its actions as correcting a clerical error in the jury’s verdict, we question whether changing the verdict from not guilty to guilty may be characterized as fixing a clerical error. See Montanez, 966 P.2d at 1037 n.2 (rejecting the characterization of the change of a verdict from acquittal to conviction as the simple correction of a clerical error).

In sum, we agree with the State that adopting the functional approach is most consistent with New Mexico law. Nonetheless, our cases involving possible contamination of juries emphasize the sacrosanctity of the jury’s processes, see State v. Ramming, 106 N.M. 42, 49, 738 P.2d 914, 921 (Ct. App. 1987), and follow the rule that a presumption of prejudice arises which the State must specifically rebut before a verdict, questionable even only in the slightest degree, will be upheld. See State v. Coulter, 98 N.M. 768, 768-70, 652 P.2d 1219, 1219-21 (Ct. App. 1982) (reversing conviction when alternate juror went into jury room with deliberating jury, but was then removed after ten minutes). In this case, the possibility of contamination by bystanders or court officials, unbound by the usual admonitions, was not even addressed, much less excluded. Accordingly, we must hold that the jury was separated, dispersed, and not otherwise under the control of the court sufficiently to allow the change in verdict to stand. To the extent that cases such as Masters v. State, 344 So. 2d 616, 620-21 (Fla. Dist. Ct. App. 1977), suggest an opposite result, we note that these cases are inconsistent with our presumption of prejudice approach.

Because the trial court erred in reassembling the jury and allowing it to change its not guilty verdict, Defendant’s right to be free from double jeopardy is plainly implicated. Once jeopardy has attached and the accused has been acquitted, the prohibition against double jeopardy precludes the government from placing the accused in jeopardy a second time for the same offense. See Green, 995 S.W.2d at 614 (holding that the improper reassembly of a discharged jury to change a verdict from not guilty to guilty violated the defendant’s right to be free from double jeopardy); Rushin, 194 N.W.2d at 722 (same). That is precisely what happened in this case. The jury returned a verdict of not guilty on the charge of DWI, and no objections to the verdict were raised before the jury was discharged. Under these circumstances, we hold that the district court’s decision to change the jury’s verdict from one of acquittal to one of conviction was a violation of the constitutional prohibition against double jeopardy.

CONCLUSION

Based on the foregoing, we reverse and remand with instructions to vacate Defendant’s conviction for DWI. Because Defendant did not challenge his other convictions, we remand for the preparation of a new judgment and sentence on these convictions only. In light of our decision, we need not address the remainder of Defendant’s arguments on appeal.

IT IS SO ORDERED.
LYNN PICKARD, Judge

WE CONCUR:  
CELIA FOY CASTILLO, Judge  
IRA ROBINSON, Judge
OPINION
LYNN PICKARD, JUDGE

{1} In this appeal from two orders of summary judgment, we consider whether a reversionary clause in a 1935 deed prohibiting any use for “immoral purposes” was triggered by conduct alleged to have taken place on part of the original property, which has long since been subdivided. Appellees in this case are factually distinct. The Vigils and Holguins own property that does not involve any allegations of conduct that would trigger the reversionary clause. As to these Appellees, we hold that their properties would not be subject to forfeiture under the doctrine of partial reversion, which limits reversion to the property where the prohibited conduct took place. The other Appellee, Mia S. Prieskorn, is the owner of a mobile home park where the alleged “immoral” activities took place. Based on a strict construction of the reversionary clause and the lack of any proof that Prieskorn herself used the property in a manner that would trigger the reversionary clause, we affirm the district court to her as well.

BACKGROUND
{2} Plaintiff, Edward Maloof, filed a complaint for ejectment and recovery of real property based on his status as a successor-in-interest to a reversionary clause contained in a 1935 warranty deed that conveyed 71.5 acres to the City of Las Vegas, New Mexico, by Najeeb and Mentaha Gallegos. The 1935 deed contains the following restriction:

Provided however that this conveyance is hereby made and the land conveyed under the following conditions: That no building now on said premises or to be erected on said land shall at any time be used for immoral purposes, or for the manufacture and/or sale of any intoxicating liquor by the grantee, its successors, heirs, and assigns, and that in the event of said condition being broken, then this deed shall become null, void, and of no effect, and all right, title and interest of, in and to the premises of said above described land hereby conveyed, shall revert to the grantor, his successors and assigns.

{3} This Court affirmed the validity of this restriction in Prieskorn v. Maloof, 1999-NMCA-132, 128 N.M. 226, 991 P.2d 511, based on the conclusion that it amounted to a restraint on use, as opposed to an impermissible restraint on alienation. That litigation had been initiated by a quiet title suit brought by Prieskorn, now one of the defendants in the present case, in an effort to remove the restriction. As we observed in that opinion, the original 71.5 acres was subdivided beginning in 1961 and now has a thirty-home subdivision on one end and a 204-unit mobile home park owned by Prieskorn on the other end, separated by undeveloped land. Id. ¶ 4. Because Prieskorn was limited to the narrow issue of the validity of the reversionary clause and a related changed conditions argument, we did not consider any specific allegations of prohibited use or the legal issue of whether reversion on a single parcel would cause reversion as to the entire 71.5 acre tract.

{4} In August 2001, Maloof filed a complaint that placed these issues squarely before the district court. Maloof named as defendants all of the individual owners of the subdivided properties. However, the alleged prohibited conduct occurred only on the Prieskorn property, the Enchanted Hills Mobile Home Park. Two of the Enchanted Hills residents had been convicted of trafficking cocaine, and one had been convicted of trafficking heroin, all of which was alleged to have taken place on the Prieskorn property. The complaint further alleged that some of the Enchanted Hills residents were not married, but were cohabitating together as husband and wife. Based on the drug trafficking and the cohabitation, Maloof claimed that the “immoral purposes” clause had been triggered as to the entire 71.5 acre original conveyance.

{5} Several of the individual property owners were granted summary judgment prior to the orders involved in the current appeal. In its order granting summary judgment to defendants Carlos Gallegos, Sr., and Ronald L. Diehl, the district court noted that all of the alleged conduct took place on the Prieskorn property and that Maloof had not come forward with evidence to show that either the individual property owners or Prieskorn had knowledge of or consented
received approval from the plaintiffs to use part of one tract for a sewage plant. Id. In the mid-1980’s, however, the plaintiffs had come to believe that part of the land was not being used for either airport or sewage plant purposes, and they filed suit seeking a partial reversion as to that property. Id. at 458, 816 P.2d at 527. In rejecting the City’s contention that a blanket prohibition against partial reversions should apply, our Court in Thomas observed: “[a]lthough explicit authority on the question is scant, the few cases that directly address the question appear to favor partial reversion in appropriate circumstances.” Id. at 460, 816 P.2d at 529. The guiding force behind the doctrine is the principle that reversionary language will be strictly construed so as to avoid forfeiture. Id.; see also 1 Joyce Palomar, Patton and Palomar on Land Titles § 208, at 494 (3d ed. 2003) (stating that “a condition or covenant is likely to be strictly construed and any doubts resolved against the condition”). As such, conduct that affects only a portion of land that is subject to a reversionary clause will either lead to no forfeiture, or forfeiture of the affected property only. Thomas, 112 N.M. at 460, 816 P.2d at 529. The critical inquiry concerns the intent underlying the reversionary language in the deed. See id.

In construing remainderman language in a deed, “[t]he current flow of decisions indicates that courts are using donative intent as the lode star for decision making, looking at the specific facts in each case rather than applying the systematic, somewhat mechanical, rules of older courts.” 3 Richard R. Powell, Powell on Real Property § 20.04(6), at 20-74 (Michael Allan Wolfd., rel. 92, 2000).

{9} In Thomas, the requisite intent to allow partial reversion was determined to be lacking. 112 N.M. at 461, 816 P.2d at 530. There was no express language in the condition addressing the issue, the language used was too broad to allow for an implicit recognition of this possibility, and there was no extrinsic evidence of the parties’ intent. Id. Applying a strict construction of the condition to avoid forfeiture thus led to the conclusion that no partial forfeiture would be allowed.

{10} In the present case, we have an issue that was not directly addressed in Thomas: whether facts that might lead to a partial forfeiture, i.e., prohibited conduct on a single tract of the original grant, could result in forfeiture of all of the properties subject to the 1935 reversionary clause. We believe that this is implicitly addressed by Thomas in two ways. First, the cases relied on in Thomas support the view that where there is a partial failure to comply with a reversionary clause, the judicial desire to avoid forfeiture will either lead to no forfeiture or will limit reversion to the affected property only. See, e.g., Bornholdt v. S. Pac. Co., 327 F.2d 18, 20-21 (9th Cir. 1964) (holding is similar to Thomas in that partial non-conforming use deemed insufficient to even trigger partial forfeiture); Tamalpais Land & Water Co. v. Northwestern Pac. R.R., 167 P.2d 825, 832 (Cal. Dist. Ct. App. 1946) (holding partial reversion appropriate where railroad had subdivided property); Quatman v. McCray, 60 P. 855, 856 (Cal. 1900) (concluding, in considering the non-conforming use of one of appellants’ two lots, “[w]e think the case is clearly one where justice and equity forbid the forfeiture beyond the lot on which the dwelling was placed”); Marthens v. B & O R.R., 289 S.E.2d 706, 713 (W. Va. 1982) (observing that some courts require non-conforming use of entire property to justify full forfeiture, but holding that doctrine of partial reversion is the better approach).

{11} Second, Thomas also indicates that there must be strong language that will support any forfeiture. Thomas, 112 N.M. at 461, 816 P.2d at 530. Here, like Thomas, there is no express language in the 1935 deed indicating that the grantor intended to trigger a full reversion based on conduct that only affected a single, severed parcel. The scope of the condition refers to “said premises.” However, in light of our strict construction to avoid forfeiture, this language is insufficient to be read to mean that “said premises, even if subdivided into different ownership”; nor is there any extrinsic evidence that would support this interpretation. In addition, as pointed out by the Vigils and Holguins in their answer brief, the practical effect of such an interpretation would be unworkable, requiring them to either forfeit their property without any misconduct on their part or to monitor the activities of other landowners and actively seek injunctive relief to prevent forfeiture. By its very terms, the reversionary clause is punitive in nature, punishing the grantees for choosing to put the land to “immoral” use. Given this principled, character-based, stance, the grantor could not have intended to punish individuals who were acting in conformance with these stated goals. As such, we conclude that the district court properly granted summary judgment to the Vigils and Holguins because Maloof has not made any claim that they engaged in conduct on their properties that would have
triggered the reversionary clause.

{12} This still requires us to consider whether a partial reversion would be allowed for the Prieskorn property, and we conclude that it can be allowed if the facts support it. Our analysis initially is similar to our consideration of the total forfeiture claim. There is no language expressly allowing for a partial reversion. Likewise, the reference to “said premises” indicates that the effect of subdivision was not even considered. However, unlike Thomas, where the City had retained ownership and the issue was severance in the context of a single owner’s differing use, we believe that the subdivision of the property also subdivided the applicability of the reversionary clause. A similar result was reached in Tamalpais:

Now the defendants, by their own acts, have subdivided what otherwise was a grant of an entire area. See Dickson v. St. Louis & K. R. Co., 168 Mo. 90, 67 S.W. 642 for a case emphasizing the importance of practical construction in such cases. It is the defendants who have torn up the tracks and are now using the terminal area for a use not provided for in the deed. Under such circumstances the contract is clearly divisible and has been made so by the acts of defendants.

167 P.2d at 832.

{13} To hold otherwise would likely have the effect of rendering the reversionary clause meaningless as soon as the grantee began subdividing the property, because conduct on one parcel would rarely justify full forfeiture. Our decision is intended to strike a balance between the objective of giving effect to the intent of the grantor by protecting the reversionary interest and thereby prohibiting specified use, and the obvious equity and practical considerations involved with landowners whose conduct does not offend the grantor’s stated intentions.

C. Prieskorn Property

{14} We next consider whether the reversionary clause was triggered by conduct that occurred on the Prieskorn property. There does not appear to be any dispute that some drug trafficking and cohabitation were taking place at the Enchanted Hills Mobile Home Park. We therefore turn again to the language of the condition in the 1935 deed, which prohibits any present or future buildings from being “used for immoral purposes, or for the manufacture and/or sale of any intoxicating liquors by the grantee, its successors, heirs, and assigns.”

{15} Strictly construing this language to avoid forfeiture, we believe that Maloof had to show that Prieskorn herself had knowledge of and consented to the prohibited conduct. As indicated above, the condition here is character based and punitive, and therefore requires some volitional act by the landowner. It does not make sense to punish an individual for acting immorally by imputing the conduct of another in the absence of some knowledge and ratification of the conduct. Our interpretation is therefore compelled by the equitable factors in this case. See Albuquerque Nat’l Bank v. Albuquerque Ranch Estates, Inc., 99 N.M. 95, 102, 654 P.2d 548, 555 (1982) (noting that forfeiture will be allowed only after equitable factors of the case have been considered).

{16} Based on this reading of the condition, the drug trafficking basis for reversion may be easily dismissed. Although Maloof claimed that the evidence might show that Prieskorn knew of and somehow condoned this activity, this is insufficient to defeat summary judgment. See Dow v. Chilili Coop. Ass’n, 105 N.M. 52, 54-55, 728 P.2d 462, 464-65 (1986) (stating that summary judgment is not refuted by simply arguing that there are evidentiary facts requiring trial). To the contrary, the record reflects that the drug activity was stopped when it was discovered, and the residents who were engaged in the activity were no longer tenants at Enchanted Hills. Again, simply because someone has acted in an “immoral” fashion on one’s property should not be sufficient to trigger the reversion. Otherwise, theoretically, a remainderman under the 1935 deed could trigger the reversion by monitoring the property for any immoral activity by a third party. In the absence of any showing that Prieskorn had knowledge of and to some degree condoned, encouraged, or ratified the drug trafficking, this basis does not serve to trigger reversion, even assuming that drug trafficking is immoral, a questionable assumption in light of the authorities cited below.

{17} The cohabitation ground is somewhat more complicated. Because the history of this litigation shows that it is unlikely to end with this case, we deem it prudent to decide the issue even if Prieskorn may have been unaware that some of her tenants were cohabiting. If we were to decide the issue on grounds of lack of knowledge, it is likely that a new suit would be filed, demonstrating the knowledge that Prieskorn acquired during this suit.

{18} We therefore need to turn again to the language of the deed. The phrase “immoral purposes” is probably a reference to impermissible sexual activity. The phrase had been used in the original enactment of the Mann Act. See 18 U.S.C. § 2421 (Amendments), which prohibited the interstate transportation of “any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose.” See generally 63 C. Am. Jur. 2d Prostitution §§ 31-40 (1997) (discussing the Mann Act). The Supreme Court interpreted the Mann Act language to require transportation for an unlawful purpose involving sexual intercourse. See Hansen v. Huff, 291 U.S. 559, 563 (1934). The phrase also found its way into deed restrictions simultaneously prohibiting the sale of liquor and use of property for “immoral purposes.” See, e.g., Mason v. Farmer, 80 N.M. 354, 355, 456 P.2d 187, 188 (1969). A host of cases confirms that immoral purposes generally connotes illegal sexual activity, such as prostitution and sexual relations with minors. See, e.g., Benson v. Bowman, 6 Cal. Rptr. 455, 457 (Dist. Ct. App. 1960) (involving sale of property with representation that it was not used for immoral purposes when it was in fact used for prostitution); Ron’s Last Chance, Inc. v. Liquor Control Comm’n, 333 N.W.2d 502, 504 (Mich. Ct. App. 1983) (stating that “[a]ny person of ordinary intelligence would reasonably believe that a prohibition against ‘solicitation for immoral purposes’ is intended to prohibit solicitation for prostitution”); C.J.C. v. Corp. of Catholic Bishop of Yakima, 985 P.2d 262, 270 (Wash. 1999) (en banc) (holding that immoral purposes include sexual activity with children).

{19} It is possible, if not probable, that Najeeb and Mentaha Maloof believed that cohabitation was immoral. However, because of the potential forfeiture, we must construe the deed strictly against the grantors. A strict interpretation of the deed and consideration of equitable principles leads to the conclusion that the reversionary clause was not triggered. First, mere cohabitation is not in the same category as illegal sexual activity. Indeed, cohabitation was decriminalized in this state in 2001, before Maloof filed his complaint. See NMSA 1978, § 30-10-2 (repealed 2001).

{20} Second, as a landlord, Prieskorn has a legal obligation to “treat all persons equally in evaluating credit or renting or leasing available space, except that all or any portion of a park may be designated for adult-only occupancy.” NMSA 1978,
§ 47-10-11(E) (1997). Under the Human Rights Act, Prieskorn was prohibited from discriminating on the basis of spousal affiliation or sexual orientation. NMSA 1978, § 28-1-7(G)(1) (2003). Therefore, applying a strict construction to avoid forfeiture and mindful of the equities of Prieskorn’s position, we conclude that she was not “using” the property for an immoral purpose when renting to cohabiting couples, but was simply complying with the law and not acting in a discriminatory fashion. As a result, the district court properly granted summary judgment to her as well.

CONCLUSION

{21} For the reasons set forth above, we affirm the orders of summary judgment.

{22} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

MICHAEL E. VIGIL, Judge

CERTIORARI GRANTED, NO. 28, 908, NOV. 9, 2004

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-127


APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY

JAY W. FORBES, District Judge

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OPINION

MICHAEL D. BUSTAMANTE, JUDGE

{1} While Defendant was detained for a speeding violation, narcotics agents arrived to conduct an unrelated drug investigation which led to his arrest for various drug charges. He entered a conditional guilty plea to the charges pending the outcome of this appeal from the district court’s decision to deny his motion to suppress. Defendant argues that the State violated his constitutional right to be free from unreasonable searches and seizures on four grounds: (1) illegal investigatory detention, (2) unlawful Terry frisk, (3) pretext, and (4) consensual search was involuntary and tainted by the unlawful seizure. Defendant further asserts that in a motion to suppress, the State must show the officer’s radar equipment was scientifically reliable. We hold that the investigatory detention for drugs was unlawful and that it tainted any evidence discovered thereafter. We reverse Defendant’s conviction and remand to vacate the judgment and sentence.

FACTS AND PROCEEDINGS

{2} At the suppression hearing, Agent Randy Pitts testified that the Pecos Valley Drug Task Force (PVDTF), where he was assigned, and the Midland police department in Texas, had been investigating Defendant for possible drug involvement for several months. Defendant drew the PVDTF’s attention after the Midland police contacted Pitts for information on Defendant whom they believed might be involved with persons who were allegedly manufacturing and trafficking methamphetamine in Midland. On the night of this incident, Pitts received information that Defendant might be traveling from Midland, Texas, to Artesia, New Mexico, as well as a vehicle description. Based on this and other information he obtained from his investigation, Pitts thought Defendant might be in possession of a controlled substance. Since he did not believe that he had enough information to justify a stop, however, he had an agent contact the Artesia police department to see if patrol deputies could develop probable cause to stop Defendant.

{3} Deputy Rudy Arrey of the Eddy County Sheriff’s Department testified that on that same evening, he was called in from patrol by a PVDTF agent who told him to be on the lookout (BOLO) for a tan pickup truck with Arizona plates heading west on Highway 82 that “may or may not have some drugs in it.” He understood this to mean that he should stop the vehicle if he felt there was probable cause to do so. Arrey, who was “running radar” that evening, clocked Defendant’s truck doing 72 mph in a 65 mph zone. He called in the stop, approached the driver, whom he later identified as Defendant, and requested his driver’s license, registration, and proof of insurance. Within minutes, Agent Pitts and several other agents, waiting nearby arrived and took over the investigation.

{4} While Arrey ran a warrants check, Pitts approached Defendant, told him to step out of the truck, identified himself as a narcotics agent, told him he had been under investigation, and asked to speak with him. Pitts testified that Defendant was “very cordial and cooperative,” but, as a routine safety precaution, he told Defendant that he intended to pat him down for any weapons. Defendant then told Pitts that he had some pocketknives. After removing five knives from Defendant, an object was located in Defendant’s overall bib, and although it did not feel like a knife according to Pitts, he took over the investigation. The object was a three to four inch vial containing a residue.

{5} After being advised of his Miranda rights, Defendant admitted that the residue was methamphetamine and that there was more in his truck. Defendant signed a written consent to search the truck, wherein officers located a “user quantity” of marijuana, methamphetamine, and a syringe. Deputy Arrey issued a speeding citation to Defendant several hours after his arrest for the drugs.
A Criminal Information was filed charging Defendant with possession of methamphetamine, marijuana, and drug paraphernalia. After his motion to suppress was denied, he entered a conditional plea of no contest to all of the charges and a judgment and sentence was entered. This appeal from the motion to suppress followed.

No Reasonable Suspicion Articulated to Expand the Scope of the Traffic Stop

Defendant argues that Agent Pitts’ suspicions were based on a hunch rather than on specific, incriminating facts to create reasonable suspicion. As such, he contends that the fruits of the unlawful stop must be suppressed. The State urges that reasonable suspicion was established through the earlier investigation and that the “tip” from the Midland police regarding Defendant’s travel plans, including a vehicle description, license plate number, an approximate time, and general direction of travel was verified. Alternatively, they argue that additional, independent reasonable suspicion was not required because Defendant was already lawfully detained and the drug investigation was part of a continuing lawful stop.

The district court’s decision regarding a motion to suppress involves mixed questions of fact and law. State v. Urioste, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964. We review the facts in a light most favorable to the prevailing party and defer to the district court’s findings of fact that are supported by substantial evidence. Id. Legal issues such as whether there was reasonable suspicion to support an investigatory detention are reviewed de novo. Id.

In the context of a Fourth Amendment analysis, an officer may stop a vehicle when he or she has reasonable suspicion that a traffic law has been violated. State v. Lowe, 2004-NMCA-054, ¶ 11, 135 N.M. 520, 90 P.3d 539, cert. granted, 2004-NMCERT-005, 135 N.M. 566, 92 P.3d 11. The scope of the investigatory detention must be “reasonably related to the circumstances that . . . justified the stop.” Id. ¶ 12; State v. Romero, 2002-NMCA-064, ¶ 10, 132 N.M. 364, 48 P.3d 102; State v. Williamson, 2000-NMCA-068, ¶ 8, 129 N.M. 387, 9 P.3d 70; City of Albuquerque v. Haywood, 1998-NMCA-029, ¶ 15, 124 N.M. 661, 954 P.2d 93. During a traffic stop, the officer may conduct a de minimis investigatory detention to inquire about license, registration, and insurance, and to run a wants and warrants check. Lowe, 2004-NMCA-054, ¶ 12; State v. Taylor, 1999-NMCA-022, ¶ 14, 126 N.M. 569, 973 P.2d 246. Contemporaneous or continued investigation beyond the scope of the initial traffic stop is justified only if the officer can articulate specific and particularized factors that give rise to an objectively reasonable suspicion that other criminal activity has been or may be afoot. Lowe, 2004-NMCA-054, ¶ 12; State v. Duran, 2003-NMCA-112, ¶ 19, 134 N.M. 367, 76 P.3d 1124, cert. granted, Sup. Ct. No. 28,241, 134 N.M. 320, 76 P.3d 638; Romero, 2002-NMCA-064, ¶ 10. Generalized suspicions or unparticularized hunches that a person has been or is engaged in criminal activity do not suffice to justify a detention. Taylor, 1999-NMCA-022, ¶ 20.

Reasonable suspicion is measured by the totality of the circumstances. Urioste, 2002-NMSC-023, ¶ 6. We first ascertain “what facts were available to [the officer] and what inferences logically flowed from those facts.” State v. Cobbs, 103 N.M. 623, 626, 711 P.2d 900, 903 (Ct. App. 1985). Next, we determine whether these facts “warrant a person of reasonable caution in believing that criminal activity was possibly afoot.” Id. at 627, 711 P.2d at 904.

In this case, the reasonable suspicion that gave rise to the initial stop was a traffic violation. Although Deputy Arrey was aware of the BOLO, he testified that he stopped Defendant for driving 72 mph in a 65 mph zone. Other than speeding, Arrey discerned no evidence that Defendant was violating any other law. While he was running the warrants check, Pitts arrived on the scene for the express purpose of questioning Defendant about drugs. Since Defendant was not free to leave at this time, this encounter was not consensual. See Taylor, 1999-NMCA-022, ¶ 25 (stating that the defendant could not walk away from questioning unrelated to the rationale for the stop); see also State v. Reynolds, 119 N.M. 383, 386, 890 P.2d 1315, 1318 (1995) (requesting driver’s license, registration, and insurance is a seizure). Therefore, in order to expand the scope of the initial traffic stop, Pitts had to articulate specific and particularized facts that led him to reasonably believe Defendant had drugs in his possession.

What Pitts knew at the time of the encounter was that the Midland police department suspected Defendant might be involved with people in Midland who might be manufacturing and trafficking methamphetamine. Pitts failed to articulate any additional facts from his three-month investigation of Defendant that would create reasonable suspicion for the stop. The only other information he knew was that Defendant was en route from Midland to Artesia in a Ford pickup super cab, the license plate number (from his prior investigation), and that he “might” have methamphetamine. Yet when questioned about the type of drug or amount in Defendant’s possession, he testified that he was not given any specific information. According to Pitts, he based his suspicions on (1) the tip about Defendant’s travel plans, and (2) “some other information that I had received during the course of our prior investigations of him.” Whatever that information was, he did not believe it gave him reasonable suspicion to stop Defendant: “basically, the information was . . . he may be coming through this way;[j] [i]f you are able to develop your own probable cause for anything else to stop him, then that’s what it hinges on.”

We hold that the drug investigation was unreasonable under these facts. Pitts never identified the source of this “tip,” and even if we assume it came from another law enforcement agency, we are still unable to ascertain where or how the tip originated. What we are left with is an anonymous tip that must be corroborated by police to establish its reliability, and create reasonable suspicion to expand the scope of the traffic stop to question Defendant about drugs. See Urioste, 2002-NMSC-023, ¶¶ 7-8; State v. Eskridge, 1997-NMCA-106, ¶ 20, 124 N.M. 227, 947 P.2d 502; State v. Flores, 1996-NMCA-059, ¶ 8, 122 N.M. 84, 920 P.2d 1038; State v. Bedolla, 111 N.M. 448, 450-51, 806 P.2d 588, 590-91 (Ct. App. 1991). “[A]nonymous tips are generally less reliable than tips from known informants and cannot form the basis for reasonable suspicion only if accompanied by specific indicia of reliability.” Urioste, 2002-NMSC-023, ¶ 12 (internal quotation marks and citation omitted). In this

1 Although a BOLO with sufficient corroboration might be sufficient to create reasonable suspicion for a stop, State v. Vandenber, 2003-NMSC-030, ¶ 38, 134 N.M. 566, 81 P.3d 19; State v. De Jesus-Santibanez, 119 N.M. 578, 581, 893 P.2d 474, 477 (Ct. App. 1995), in this case, the BOLO contained essentially the same information as Agent Pitts testified to at the suppression hearing. We, therefore, review the actual testimony for a complete analysis of this issue.
regard, an anonymous tip requires more information than those provided by known informants, such as witnesses or victims of a crime. Id. ¶¶ 12, 17; see Taylor, 1999-NMCA-022, ¶ 8 (presuming crime victim or witness tips are reliable).

{14} We observe that a reliable tip often has two components: “the crucial part of the informant’s story[,] i.e., allegations that criminal activity has occurred and that evidence pertaining thereto will be found in the location to be searched”

and “by specific indicia of reliability, for example the correct forecast of a subject’s not easily predicted movements.” Urioste, 2002-NMSC-023, ¶ 9, 12 (internal quotation marks and citations omitted); see Flores, 1996-NMCA-059, ¶ 9; State v. De Jesus-Santibanez, 119 N.M. 578, 580, 893 P.2d 474, 476 (Ct. App. 1995) (indicating the defendant must challenge “both the veracity of the informant and the trustworthiness of his information”). In Urioste, for example, the Tucumcari police relayed a tip from an anonymous source to the Quay County sheriff’s department: a Hispanic male with a long dark pony tail, driving a green, older model Ford Econoline van was transporting cocaine from Albuquerque to Tucumcari, arriving at 10:30 p.m. and his home address. 2002-NMSC-023, ¶ 2. Police verified that the van was not parked at the defendant’s home, and then spotted a van and driver matching the description traveling on the predicted route at 10:45 p.m. Id. ¶ 3. The Court held that corroboration of “a range of details relating . . . to future actions of third parties ordinarily not easily predicted” was sufficient to create reasonable suspicion. Id. ¶¶ 16-17 (alteration in original) (internal quotation marks and citation omitted).

{15} Similarly, in Flores, the Van Horn, Texas sheriff’s office passed a tip to the Artesia police department that three described vehicles left Van Horn for Artesia about an hour or so earlier carrying 200 to 250 pounds of marijuana, possibly in the tires of one of the vehicles. 1996-NMCA-059, ¶ 2. Officers spotted two of the vehicles headed north on the most direct route from Van Horn and stopped them after they saw them turn off in Artesia. Ten minutes later, the third vehicle arrived and was also detained. Id. ¶ 3 We held that “[d]etails in the tip were sufficiently self-corraborating to establish the overall reliability of the tip even though that information did not, taken alone, necessarily indicate criminal conduct.” Id. ¶ 10.

{16} In De Jesus-Santibanez, a customs agent in Texas passed a tip to the New Mexico state police that the defendant and a man were leaving El Paso, Texas at 9:45 p.m. and driving a load of marijuana and cocaine to Colorado and gave a detailed description of the truck. 119 N.M. at 579, 893 P.2d at 475. An Otero County deputy saw a truck matching the description driving northbound at the anticipated time, the driver pulled into a convenience store parking lot, and went into the store. Id. Upon returning to the vehicle, the deputy had a conversation with the driver about speeding and the suspicion of transporting illegal drugs. Id. Without request, the driver volunteered to let the deputy search the vehicle. Id. After a cursory look at the vehicle, the deputy returned to his patrol car. Id. Before leaving, the deputy thought to ask for the passenger’s name. Id. Upon learning that the passenger’s name matched the BOLO, the vehicle was searched, locating a large amount of marijuana. Id. at 579-80, 893 P.2d at 475-76. We held that corroboration of the vehicle description, license plate, time and direction of travel, and route was reasonable suspicion for both of the deputy’s stops. Id. at 581-82, 893 P.2d at 477-78.

{17} In this case, the police also corroborated the tip to the extent that Defendant was driving the described vehicle, at the approximate time, in the right direction, and on the predicted route. Significantly, unlike the other cases, what is missing from this mix are crucial details and particularized information regarding the alleged criminal activity that was occurring. All Agent Pitts knew, or at least all that he articulated, was that Defendant was associating with possible drug dealers in Midland, Texas and for some unknown reason he might have drugs in his possession. His investigation yielded no new information beyond a license plate number. Guilt by association and generalized suspicions are insufficient grounds upon which to base an investigatory detention. In the absence of specific and particularized incriminating information about the criminal activity that defendant is or is about to engage in, generalized suspicions and mere corroboration of innocent activity, even if it is not readily available to the general public, is insufficient to create reasonable suspicion for an investigatory detention.

{18} To the extent the State relies on Taylor to support its argument that Agent Pitts did not need independent, additional reasonable suspicion for a “continuing investigation” once he was lawfully detained, we disagree. Taylor is distinguishable on several levels. First, the informant was both a witness and a victim of the alleged crimes who was presumed reliable unlike the anonymous source in this case. 1999-NMCA-022, ¶ 8. Second, the tip created reasonable suspicion to detain defendant to investigate two crimes: littering that the informant witnessed and a theft that occurred at the informant’s home six months earlier involving a vehicle that resembled the defendant’s car. The informant also directed the officers to a location where he pointed out the defendant’s car. Id.

{19} Although the officers in this case freely admitted that there were two reasons for stopping Defendant, the critical distinction from Taylor is that they did not have reasonable suspicion to detain him for the drug investigation. Even though Defendant was lawfully detained at the time, this was an independent investigation that required additional reasonable suspicion to be lawful. Officers may not use a lawful stop to fish for evidence of other crimes where there is insufficient reason to detain a defendant beyond the purpose of the initial detention. See id. ¶¶ 20, 22-23.

Consent and Evidence Seized was Fruit of Unlawful Stop

{20} Having determined that the stop was unlawful, we next consider whether the exclusionary rule should be employed to suppress the evidence obtained as a result of the consensual search of Defendant and his car. For evidence to be admissible, consent must be both voluntary and purged of all taint from a prior illegality. Taylor, 1999-NMCA-022, ¶ 27; State v. Jutte, 1998-NMCA-150, ¶ 21, 126 N.M. 244, 968 P.2d 334. The facts of this case give rise to a Fourth Amendment taint analysis to determine whether the consent was an exploitation of the illegal detention. See Taylor, 1999-NMCA-022, ¶ 27. “[C]onsent removes the taint of an illegal detention only if there was sufficient attenuation between the detention and the consent to search.” Lowe, 2004-NMCA-054, ¶ 19 (internal quotation marks and citation omitted). In other words, “there must be a break in the causal chain from the [illegality] to the search[.]” Taylor, 1999-NMCA-022, ¶ 28 (alterations in original) (internal quotation marks and citation omitted). To this end, we consider the “temporal proximity, [of the arrest and the consent, the presence of] intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct . . . [including] whether the evidence was obtained as a result of the

{21} In this case, there is a direct causal relationship between the illegal detention and the consent which is underscored by flagrant misconduct. The PVDTF agent used a lawful traffic stop to perform an unrelated drug investigation when he himself knew there was no reasonable suspicion to detain Defendant for such purpose. There was no break in the causal chain, either in terms of temporal proximity or intervening circumstances. Agents arrived within minutes of the stop, removed Defendant from his vehicle, subjected him to a search for weapons, even though he was completely cooperative. They located an object that did not appear to be a weapon, but which they removed anyway after obtaining Defendant’s consent. Immediately thereafter, Defendant admitted what it was and where officers could find more in his truck. His consent to search both his person and his truck flowed directly from, and was an exploitation of, the unlawful investigatory detention.

CONCLUSION

{22} Having determined that the investigatory detention for drugs was unlawful, we do not reach the other issues raised in this appeal. We reverse Defendant’s conviction and remand to the district court to vacate the judgment and sentence.

{23} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge
MICHAELE E. VIGIL, Judge
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9:45 a.m.  Break
10:00 a.m. Addressing Key Evidentiary Issues in Criminal Domestic Violence Cases
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