The piñon (Pinus edulis) was adopted as the state tree on March 16, 1949. When the New Mexico Federation of Women’s Clubs was asked to select a state tree, the piñon was their choice. It was adopted the same day the roadrunner was adopted as the state bird. The piñon is a small, drought-hardy, long-lived tree widespread in the southwestern United States. Its heavy, yellow wood is used primarily for fuel, but its delicately flavored seeds are very popular.

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2004-NMCA-134: Elaina Brooks, Lesley Donovan, Vikki and Mike Mayhew v. Norwest Corporation; Norwest Services, Inc.; and Norwest Bank of New Mexico, N.A.
Get Involved in
State Bar Committees

By joining you will:
• Help Strengthen the Legal Profession
• Work on Legal Causes of Interest
• Increase Access to the Legal System

Each year the State Bar president appoints members to committees that accomplish these goals. Review the descriptions and complete the form below to request an appointment for 2005.

Please check the committee(s) you wish to join.

- Alternative Methods of Dispute Resolution (ADR) – Promotes and provides legal education and training in the use of alternative dispute resolution processes.

- Bench and Bar Relations – Plans the statewide Bench and Bar Conference.

- Client Relations - Advises the State Bar Client Attorney Assistance Program (CAAP), which attempts to resolve minor problems that clients may have with their attorneys. CAAP includes the State Bar’s Client Protection Fund, fee arbitration panel, peer assistance program and unauthorized practice of law complaints.

- Delivery of Legal Services to People with Disabilities – Provides information and assistance to ensure access to counsel for persons who have a disability.

- Diversity in the Legal Profession – Promotes opportunities for minorities in the legal profession and encourages participation by minorities in bar programs and activities.


- Historical – Acquires, maintains and submits for publication historical information relating to the bar.

- Law Office Management – Develops and provides resources for attorneys, especially solo and small firm practitioners and young lawyers, to more effectively manage law practices.

- Lawyers Assistance – Provides confidential peer assistance to State Bar members in need of help because of substance abuse, mental illness or emotional distress.

- Lawyers Professional Liability – Advises the State Bar regarding risk management activities.

- Legal Services and Programs: Planning Subcommittee – Recommends to the State Bar and other appropriate legal service organizations systemic approaches to the effective and efficient delivery of legal services to the poor.

- Legal Services and Programs: Pro Bono Subcommittee – Facilitates cooperation and coordination of pro bono opportunities available to the State Bar and the UNM School of Law.

- Legal Services and Programs: Funding Subcommittee – Encourages and explores ways to fund non-profit organizations that provide free civil legal services for low-income New Mexicans.

- Membership Services – Evaluates and makes recommendations regarding in-house programs. Advises the State Bar on alliance program agreements with vendors of products and services.

- NM Medical-Legal - Addresses issues of mutual concern to both professions.

- Public Legal Education – Provides information and education about the legal profession, the law and services available through the State Bar and other law-related entities.

- Quality of Life – Examines issues such as depression, dissatisfaction and balance in order to provide recommendations that will help to alleviate the stress of modern law practice.

- Technology Utilization – Assists with the development and promotion of electronic technology applications for the legal profession.

- Women and the Legal Profession – Addresses issues affecting women as lawyers and judges and monitors substantive issues of women served by the legal system.

Name: ____________________________
Address: __________________________
City/State: _________________________ Zip: __________
Telephone: __________ Fax: __________
E-mail: __________________________
Mail To: State Bar of New Mexico,
Membership and Communications Department,
PO Box 92860, Albuquerque, NM 87199-2860
Fax: (505) 828-3765
Request by E-mail: membership@nmbar.org
HATS OFF TO OUR VOLUNTEERS

The Board of Bar Commissioners and staff would like to express our appreciation to the 2004 section chairs whose terms expire on December 31, 2004. We welcome the volunteers who will serve as chairs in 2005.

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<th>Section</th>
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<tr>
<td>Appellate Practice</td>
<td>Frances C. Bassett</td>
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<td>Alice Nystel Page</td>
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<td>Business Law</td>
<td>Cheryl Pick Sommer</td>
<td>Bradley D. Tepper</td>
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<td>Children’s Law</td>
<td>Linda Yen</td>
<td>Anthony J. Ferrara</td>
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<td>Thomas P. Gulley</td>
<td>Stephen J. Lauer</td>
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<td>Criminal Law</td>
<td>David G. Crum</td>
<td>Michael W. Kiernan</td>
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<td>Elder Law</td>
<td>Elaine S. Wright</td>
<td>Kevin D. Hammar</td>
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<td>Employment &amp; Labor Law</td>
<td>Eric R. Miller</td>
<td>Cindy J. Lovato-Farmer</td>
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<td>Family Law</td>
<td>John D. Watson</td>
<td>Linda Ellison</td>
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<td>Jennifer L. Stone</td>
<td>John A. Bannerman</td>
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<tr>
<td>Indian Law</td>
<td>J. Pamela Ray</td>
<td>Rosemary Maestas-Swazo</td>
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<tr>
<td>Natural Resources, Energy</td>
<td>Brian Howard Lematta</td>
<td>Daniel W. Long</td>
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<td>&amp; Environmental Law</td>
<td>Julie Ann Meade</td>
<td>Michael P. Sanchez</td>
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<td>Prosecutors</td>
<td>Frank Murray</td>
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<td>R. Max Best</td>
<td>James J. Widland</td>
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<tr>
<td>Real Property, Probate &amp; Trust</td>
<td>Beate Boudro</td>
<td>Brian Escobedo</td>
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<td>Solo &amp; Small Firm Practitioners</td>
<td>Marjorie A. Rogers</td>
<td>Marjorie A. Rogers</td>
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<tr>
<td>Taxation</td>
<td>Richard J. Shane</td>
<td>Martin Esquivel</td>
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Section membership provides networking and educational opportunities in these areas of law and types of practices. Sign up by February 1 on the 2005 State Bar of New Mexico Dues and Licensing Form or join at any time online at www.nmbar.org.
Electronic Discovery and Evidence - Part 1 and 2
Tuesday, January 11 and Wednesday, January 12, 2005 • (Teleseminar)
11 a.m. - Noon • State Bar Center • 2.4 General CLE Credits [1.2 G available for each day]
Helen Bergman Moure, Preston, Gates & Ellis, LLP, Seattle; David Neff, Navigant Consulting, Chicago.
Individuals and businesses are connected as never before, electronically exchanging information in documents, e-mail notes and, more recently, instant messages. No longer tethered to desktops, information is now transmitted via ubiquitous wireless devices. The volume of information is unprecedented and raises a series of issues for litigators: Is this information discoverable in litigation? If so, what are the rules and principles that limit its discovery? How is the information managed? Are instant messages discoverable, too? Courts and litigators are still working toward answers to these and many other questions that will substantially impact litigation. Both from the perspective of the defense and plaintiff’s bar, this two-part program will examine developing case law and review ongoing efforts to adopt new rules governing electronic evidence.
☐ $129 Standard and Non-Attorney

Tax Treatment of Contingency Fee Awards After Banaitis v. Commissioner
Tuesday, January 18, 2005 • (Teleseminar) 11 a.m. - Noon • State Bar Center
1.2 General CLE Credits
Participants: Kenneth W. Gideon, Skadden, Arps, Slate, Meagher & Flom, LLP, Washington, D.C.; and James Serven, Moyer Giles, LLP, Denver
The federal income tax treatment of contingency fees is in dispute. Today, geography – the location of the client – determines how taxable damage awards are treated for federal income tax purposes. Some federal appellate circuits have adopted the rule that contingency fees are taxable twice – once to the taxpayer and again to the attorney who drafted the contingency fee arrangement. Other circuits hold that a taxable damages award is taxable only once. Where a client resides has a dramatic impact on their tax position and impacts how an attorney should draft contingency fee arrangements to reduce their adverse tax impact. This program will discuss the majority and minority rule, the role of state law, and the Supreme Court’s pending decision on this matter in Banaitis v. Commissioner.
☐ $67 Standard and Non-Attorney

The Basics of Real Estate Transactions from Negotiation to Closing
Saturday, January 22, 2005 • 9 a.m. - 4:30 p.m. • State Bar Center
5.6 General and 1.0 Ethics
Co-Sponsor: Paralegal Division
Who better to address fundamental real estate issues in New Mexico than two well-recognized New Mexico attorneys with extensive real estate experience. John F. McCarthy of White, Koch Kelly & McCarthy PA and John Patterson of Scheuer, Yost & Patterson will take you through a real estate transaction in New Mexico from contract to closing. This extensive program will cover such issues as merchantable title, liens, easements, encroachments, boundary disputes, surveys, water and mineral rights, environmental compliance, financing, title commitments and policies, and title conveyance.
☐ $159 Standard and Non-Attorney  ☐ $139 Government and Paralegals

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, PO Box 92860, Albuquerque, NM 87199  

Name ___________________________  NM Bar # __________________________  
Street ___________________________  City/State/Zip ________________________  
Phone ___________________________  Fax ___________________________  Email ___________________________  
Purchase Order (Must be attached to be registered)  
☐ Check enclosed $ ___________  Make check payable to CLE of the SBNM  
☐ VISA  ☐ MasterCard  ☐ American Express  ☐ Discover  
Credit Card # ___________________________  Exp. Date ________________________  
Authorized Signature ___________________________
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← Professionalism Tip →

With respect to my clients:

I will advise my client against pursuing matters that have no merit.

Meetings

January

5 Employment and Labor Law Section Board of Directors, noon, State Bar Center

5 Trial Practice Section Board of Directors, 4:30 p.m., State Bar Center

6 Elder Law Section Board of Directors, 11:30 a.m., State Bar Center

8 Ethics Advisory Committee, 10 a.m., Dines & Gross, PC.

10 Taxation Board of Directors, noon, via teleconference

State Bar Workshops

January

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

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

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

February

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

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

*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
Statewide Alimony Guidelines Committee Pilot Projects
The Supreme Court has appointed a committee to study implementation of alimony guidelines statewide. The committee is collecting data on the use of alimony guidelines in pilot projects established in the First, Second, Third and Eighth Judicial Districts. During this study, the guidelines are to be referred to only for settlement purposes and they should not be cited as authority in court proceedings. There are lengthy commentaries explaining the guidelines that should be reviewed. Commentaries can be purchased at the District Court Clerk’s office in the First, Second, Third, and Eighth Districts.

Every person who has an alimony case, whether settled or tried, is urged to fill out an Alimony Survey Sheet. Survey sheets may be obtained from the district court clerks in the pilot project districts or the committee’s pilot project coordinators:
Albuquerque:
Muriel McClelland
murielmcclelland@aol.com
Las Cruces:
Carolyn J. Baca Waters
bacawaters@zianet.com
Santa Fe:
Sandra E. Rotruck
mgpa@cybermesa.com
Taos:
Catherine E. Oliver
coliver@newmex.com

The Board Governing the Recording of Judicial Proceedings
Notice Regarding Taking of Depositions
According to the Rules of Civil Procedure 1-030, Subparagraph E, “Review by witness; changes; signing,” it is the deponent or a party’s responsibility to request, before completion of the deposition, that the deponent review the transcript within 30 days after being notified by the court reporter that the transcript is available. The court reporter is not allowed to request, instruct, suggest or otherwise inform the deponent or parties about this Rule. If the subject of this Rule does not occur before the completion of the deposition, the court reporter shall indicate “Not Requested” on the Certificate of Completion inserted at the conclusion of the transcript. Contact (505) 821-1440 or ccr@ccrboard.com for more information.

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, Jan. 4 in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, Albuquerque.

The Supreme Court has appointed a committee to study implementation of alimony guidelines that should be reviewed. Commentaries can be purchased at the District Court Clerk’s office in the First, Second, Third, and Eighth Districts.

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Santa Fe:
Sandra E. Rotruck
mgpa@cybermesa.com
Taos:
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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 Jan. 3. Contact Mary Lovato, (505) 841-6778, for more information or to have an item placed on the agenda.

Fifth Judicial District Court
Judicial Nominations
Two applications have been received in the Judicial Selection Office as of 5 p.m., Dec. 22 for the judicial vacancy on the Fifth Judicial District Court due to the retirement of the Honorable Alvin F. Jones.

The District Judges Nominating Commission will meet at 9 a.m., January 13 at the Fifth Judicial District Interim Court Facilities, 1597 S. Main Street, Roswell, to evaluate the applicants for this judicial position. The Commission meeting is open to the public. The names of the applicants are: Thomas E. Dow and Freddie J. Romero

Eleventh Judicial District Court
Notice to Attorneys
Effective Jan. 1, 2005, Judge Sandra Price will assume all of the court cases that are assigned to Judge Douglas Echols in Division III. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Jan. 3, 2005 to challenge or excuse Judge Price pursuant to Supreme Court Rule 1-088.1.

Bernalillo Country Metropolitan Court
Judges’ Meeting
The Bernalillo County Metropolitan Court will conduct their monthly Judges’ Meeting at noon, Jan. 11 in the Judicial/Administrative Conference Room (Room 849) of the Metropolitan Court Building, 401 Lomas NW, Albuquerque. The meeting is open to the public. For more information, or to arrange accommodations for individuals with a disability, contact the court administrator’s office at (505) 841-8105.

STATE BAR NEWS
Attorney Support Group Monthly Meeting
The next Attorney Support Group meeting will be held at 5:30 p.m., Jan. 12 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month, but because of the New Year’s holiday the January meeting date has been changed. The group will resume its regular schedule in February.

For more information, contact Bill Stratvert, (505) 242-6845.

Bankruptcy Law Section
Brownbag Luncheon
Learn about the internet while having some lunch at the Bankruptcy Law Section’s Brownbag at noon, Jan. 21, 2005 in the training room on the 10th floor (10327) of U.S. Bankruptcy Court. The State Bar’s Web master, Veronica Cordova, will give a presentation on how attorneys can better use the SBNM’s Internet resources including the attorney/firm finder, discussion groups, legal forms, career center and online registration/shopping features.
Board of Editors

Vacancy

The State Bar Board of Editors will have one attorney-position vacancy to fill beginning in 2005. The Board of Editors serves as the editorial board for the Bar Bulletin, reviewing content, topics for articles and substantive legal articles. The opening is a two-year term, beginning Jan. 1, 2005 and ending Dec. 31, 2006, and could be renewable for one additional two-year term.

Interested attorneys should have previous publishing/editing experience and be able to attend board meetings in person or by teleconference quarterly.

If interested, send resumes to Keith Thompson, PO Box 92860, Albuquerque, NM 87199; or e-mail to kthompson@nmbar.org.

Children's Law Section

Notice of Annual Meeting

The Children's Law Section will hold its annual meeting at 3 p.m., Jan. 12, 2005, in conjunction with the 2005 New Mexico Children's Law Institute. The section's Board of Directors will meet at 11:30 a.m. that day. All events will take place at the Marriott Pyramid North in Albuquerque, 5151 San Francisco Rd. NE. The annual meeting provides section members the opportunity to meet each other and to discuss future section activities. Section members are encouraged to attend the annual meeting whether or not they attend the conference, and members need not be registered for the conference in order to attend the meeting.

Questions can be directed to outgoing Chair Linda Yen, (505) 841-5164.

Employment and Labor Law Section

Board Meetings Open to Section Members

The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Jan. 5. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Cindy Lovato-Farmer, section chair, (505) 667-3766.

Family Law Section

Guardian Ad Litem Statute

The Board of Directors of the Family Law Section hereby notifies all members of the section that it is considering taking a position in regards to amending the Guardian Ad Litem Statute, Section 40-4-8 for the purpose of providing technical assistance and of lobbying the 2005 Legislative Session.

State Bar policy provides that a section may support or oppose legislation, provided that the section members are notified in advance and have an opportunity to express their views to the members of the section board. If anyone is interested in reviewing the proposed legislation, the text may be found online at http://tinyurl.com/6ulx5.

Section members who wish to comment on the section's intent to support the legislation should direct their comments by Jan. 14, 2005 to Linda Ellison, PO Box 3070, Albuquerque, NM 87190, or lle@atkinsonkelsey.com. Any comments, suggestions and objections received will be discussed and the Board of Directors of the Family Law Section will take a final vote regarding endorsement and/or lobbying for the passage of this legislation on Jan. 21, 2005.

Lawyers Assistance Committee

Wanted: Lawyers in Recovery

The Lawyers Assistance Committee is looking for lawyers in recovery, especially in towns outside Albuquerque, 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

Annual Meeting

The 2005 Annual Meeting of the State Bar Paralegal Division will be held at noon on Jan. 22 at the State Bar Center in Albuquerque. Lunch will be served courtesy of LexisNexis. As in previous years, the Annual Meeting will be held in conjunction with a full day of CLE. This year's CLE program is being presented by two well-known New Mexico attorneys, John F. McCarthy and John Patterson, who will share their knowledge and expertise in the area of real estate. For information on the Annual Meeting and CLE opportunities, check the Paralegal Division section on the State Bar's Web site at www.nmbar.org. The registration form for the Annual Meeting can be downloaded from the Web site to be mailed to the Division at PO Box 1923, Albuquerque, NM 87103 or emailed to PD@nmbar.org. See page four of this Bar Bulletin for more information. Members of the Paralegal Division will receive a discount on the CLE registration fee. NOTE: Registration for the Annual Meeting luncheon will be separate from the CLE seminars.

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 Jan. 12, 2005 and is titled Paralegal-Courthouse Interactions: Conflict-Free Litigation Strategies. 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, Jan. 13 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.

Other Bars

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., Jan. 12 at Conrad's in the La Posada Hotel, Albuquerque. Anyone interested in attending this meeting should contact Rendie Baker-Moore, martren@eb-b.com.
2005 Children’s Law Institute

The annual New Mexico Children’s Law Institute will be held Jan. 12 to 14, 2005, at the Marriott Pyramid North in Albuquerque. The conference, sponsored by the University of New Mexico Institute of Public Law and the New Mexico Court Improvement Project, among others, is intended for judges, attorneys, volunteer advocates, social workers, juvenile probation officers and others who work with children and families. The workshops being offered include a workshop approved for 2.0 professionalism CLE credits as well as one eligible for 1.8 ethics CLE credits. Attorneys can earn a total of 14.4 CLE credits overall. The conference brochure can be downloaded from http://ipl.unm.edu/childlaw or obtained from Hepsi Barnett at the Administrative Office of the Courts, 505-827-4808.

Center for Civic Values Mock Trial Coach Needed

Attorney coaches are needed for the West Mesa High School and Del Norte High School mock trial teams in Albuquerque and Pojoaque High School in Pojoaque. Attorneys interested in participating in this exciting and rewarding program, should call 764-9417, extension 13, or send e-mail to mocktrial@civicvalues.org. The mock trial program is a cosponsored activity of the Center for Civic Values, the State Bar of New Mexico and the UNM School of Law.

New Mexico Workers’ Compensation Administration Judicial Appointment

The Director of the New Mexico Workers’ Compensation Administration hereby announces the expiration of the initial one-year term of Workers’ Compensation Judge Helen Stirling. Judge Stirling is eligible to apply for a five-year appointment, pursuant to NMSA 1978, Section 52-5-2 B of the Workers’ Compensation Act. Persons wishing to make information available to the director for the statutory review of the judge’s performance should submit comments in writing on or before Jan. 10, 2005.

UNM Law Library Holiday Hours

Jan. 4-7 8 a.m. to 5 p.m.
Jan. 8 9 a.m. to 5 p.m.
Jan. 9 Closed

Call the Reference Desk, (505) 277-0935 if you have any questions.

To find the most current contact information regarding active and inactive State Bar members go to www.nmbar.org and click on the Attorney/Firm Finder link.
Free Legal Advice

(For Attorneys)
Questions and Answers from the Law Office Management Committee

Q. I like my client contact information on the computer. Should I also have a paper source of the information?

A. There are several reasons why it is a good idea to create a “cheat sheet” notebook for all client matters. First, the cheat sheet contains valuable information about clients, including fax numbers, assistant’s names, e-mail addresses, experts, opposing counsel and much more.

Secondly, the cheat sheet can be kept in a three-ring binder or notebook in alphabetical or numerical order and is easily accessible in the event the computer malfunctions and you are not able to access the information.

Once a cheat sheet is created it can be printed and maintained as the top sheet on the correspondence board. It saves time and energy in locating names and telephone numbers for various parties involved in the suit and can easily be updated as the case progresses.

Additionally, the cheat sheet is created and stored in the client’s matter file within the computer so that anyone working on the case can easily pull up the cheat sheet and obtain names and phone numbers without having to search for the hard copy of the file.

Q. How long do I have to keep a client’s files before destroying them?

A. Files should not be discarded until the applicable statute of limitations is past, and special care should be taken to know the applicable statute of limitations in other states, if the cause of action arose there or if the client has contractually agreed to a choice of law provision in another state.

The New Mexico statute of limitations for legal malpractice is four years, as is that for cases involving unwritten contracts, property damage, and all actions not specifically provided for in the state statutes. The six year written contract statute of limitations would apply for issues under a written retainer agreement. Personal injury claims must be brought within three years. Attorneys are also required to keep complete records concerning a client’s funds for five years after the termination of representation. Don’t destroy any file without a final review.

Q. How can I practice smarter, not harder? It seems as though I am always struggling to keep up. Hiring an associate sometimes works, and other times it doesn’t. Training an associate could take time I seldom have, not to mention the extra money for salary. I’ve heard that too often an associate may stay just long enough to learn enough to set up his or her own practice and then leave.

A. There are a couple of ways to do this:

One very effective way to work smarter rather than harder is to hire competent and well-trained staff.

Many attorneys have hired properly trained paralegals to ease the burden of a busy practice. They can take on many duties and responsibilities that bog down an attorney and that don’t need a law school degree to perform. They can be excellent gatherers, evaluators, organizers and producers.

Recognize the value of having a good support staff, and paying that staff well, can help immensely to solve this problem - just ask the attorneys who have already caught onto this.

A second way is to take advantage of automation. There is more automation for practicing law than you can imagine. How to use it: Subscribe to Law Technology News, which is free at www.lawtechnologynews.com.

Q. Can I use a trust check to pay my office expenses?

A. No. While the client the funds belong to the client, the attorney needs to maintain the funds in a trust account (a fiduciary duty). See: Comment to Model Rules, Rule 16-115 Safekeeping Property. This can be in a general trust account with the bank where the amount is nominal and it will only be held for a short period of time.

However, once the attorney funds belong to the attorney, they must be removed from the trust account. Commingling or lack of proper records risks attorney’s license. In re Turpen, 119 N.M. 227, 228, 889 P.2d 835, 83

Q. Can I pay myself on earned fees from the trust funds I’m holding, when the client doesn’t agree to my payment?


For more advice or to submit a question, visit the State Bar’s Web site at www.nmbar.org, click on the “Attorney Services/Practice Resources” link and then scroll down to “Law Office Management.” The Law Office Management Committee provides “Free Legal Advice (For Attorneys)” as a public service to the legal community in New Mexico. No warranties are expressed or implied and the committee, along with the State Bar of New Mexico, assumes no liability for errors and omissions that may result from the use of the information.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event Title</th>
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<td>Justice in the Jury Room</td>
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<td>TRT, Inc.</td>
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<td>(800) 672-6253</td>
<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>Major Issues in Mediation</td>
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<td>(800) 672-6253</td>
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<td>Enemy Combatants, Civil Liberties and the USA PATRIOT Act VR - State Bar Center, Albuquerque Center for Legal Education of SBNM 7.6 G (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>Factual and Forensic Development of Evidence VR - State Bar Center, Albuquerque Center for Legal Education of SBNM 8.4 G (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>Sales Representation and Distributor Agreements: What Attorneys Advising Business Should Know Teleseminar Center for Legal Education of SBNM 1.2 G (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>The Basics of Real Estate Transactions from Negotiation to Closing State Bar Center, Albuquerque Paralegal Division and Center for Legal Education of SBNM 5.6 G, 1.0 E (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>Fundamentals of Arbitration (ADR) Teleconference TRT, Inc. 2.4 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>Problem Employees: Using Employment Laws to Your Advantage Albuquerque Sterling Education Services 8.0 G (715) 855-0495 <a href="http://www.sterlingeducation.com">www.sterlingeducation.com</a></td>
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<td>Section 1031 Exchanges Albuquerque National Business Institute 7.5 G, 0.5 E (715) 835-8525 <a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>27</td>
<td>What Puts Government Lawyers in Class by Themselves? Teleconference TRT, Inc. 2.4 E (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>Discovery Skills for Legal Staff Albuquerque Lorman Education Services 7.2 G (715) 833-3940 <a href="http://www.lorman.com">www.lorman.com</a></td>
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<td>The High Price of High Billables</td>
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<td>(800) 672-6253; <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>Trial Techniques: Incorporating Credibility from Start to Finish</td>
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<td>3.9 G</td>
<td>(505) 797-6202; <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>31</td>
<td>Coping With Sexual Predators Within the Profession</td>
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<td>(800) 672-6253; <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>How to Help Your Client Survive a Child Custody Evaluation in New Mexico</td>
<td>Albuquerque National Business Institute</td>
<td>6.7 G, 0.5 E</td>
<td>(715) 835-8525; <a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>Documentation Issues for Condominiums, Planned Communities and Urban Development in NM</td>
<td>Albuquerque Lorman Education Services</td>
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<td>(715) 833-3940; <a href="http://www.lorman.com">www.lorman.com</a></td>
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<td>Albuquerque Lorman Education Services</td>
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<td>(715) 833-3940; <a href="http://www.lorman.com">www.lorman.com</a></td>
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<td>10</td>
<td>Constitutional Law</td>
<td>Santa Fe Paralegal Division of New Mexico</td>
<td>1.0 E</td>
<td>(505) 955-9700</td>
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<td>New Mexico Wage and Hour Regulations and Recent Developments</td>
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<td>(715) 835-8525; <a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>Managing Absent Employees So It Doesn’t Make You Absent-minded</td>
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<td>(715) 833-3940; <a href="http://www.lorman.com">www.lorman.com</a></td>
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<td>Document Retention and Destruction</td>
<td>Albuquerque Lorman Education Services</td>
<td>8.0 G</td>
<td>(715) 833-3940; <a href="http://www.lorman.com">www.lorman.com</a></td>
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<td><strong>Note:</strong> Programs have various sponsors; contact appropriate sponsor for more information.</td>
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EFFECTIVE DECEMBER 29, 2004

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

PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

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<th>NO.</th>
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CERTIORARI GRANTED BUT NOT SUBMITTED:

ALL CASES HELD IN ABEYANCE PENDING DISPOSITION IN NO. 28,663, STATE V. DEAN

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<td>Tarin v. Tarin (COA 23,428)</td>
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CERTIORARI GRANTED BUT NOT SUBMITTED:

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NO. 28,038  Paule v. Santa Fe County Commissioners (COA 22,988)  10/27/03
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NO. 28,634  State v. Dang (COA 22,982)  2/28/05
NO. 28,791  State v. Franco (COA 23,719)  2/28/05

PETITION FOR WRIT OF CERTIORARI DENIED:
NO. 28,870  Brooks v. Norwest (COA 23,423)  12/7/04
NO. 28,857  Matrix v. Ricks Exploration (COA 24,211)  12/7/04
NO. 28,946  Lujan v. Richardson (COA 25,074)  12/7/04
NO. 28,939  State v. Reano (COA 24,828)  12/7/04
NO. 28,930  State v. Smith (COA 25,138)  12/8/04

WRIT OF CERTIORARI QUASHED:
NO. 28,598  State v. Brown (COA 23,505)  12/15/04
NO. 04-8300
IN THE MATTER OF THE AMENDMENTS OF RULES 16-102, 16-303 AND 16-701 NMRA OF THE RULES OF PROFESSIONAL CONDUCT

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation from the Code of Professional Conduct Committee to amend Rules 16-102, 16-303, and 16-701, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Rules 16-102, 16-303, and 16-701 of the Code of Professional Conduct hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 16-102, 16-303, and 16-701 shall be effective January 20, 2005;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the Rules 16-102, 16-303, and 16-701 by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 17th day of December, 2004.

Chief Justice Petra Jimenez Maes
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Richard C. Bosson
Justice Edward L. Chávez

16-102. Scope of representation.
(No amendments were made to the rule.)

CODE OF PROFESSIONAL CONDUCT
COMMITTEE COMMENT
Paragraph D
The New Mexico rule differs from the ABA model rule in that the New Mexico version inserts “engage, or” and “or which misleads the court” in Paragraph D.

Paragraph E
Limitations on the scope of representation may include drafting specific, discrete pleadings or other documents to be used in the course of representation without taking on the responsibility for drafting all documents needed to carry the representation to completion. For example, a lawyer may be retained by a client during the course of an appeal for the sole purpose of drafting a specific document, such as a docketing statement, memorandum in opposition, or brief. A lawyer who agrees to prepare a discrete document under a limited representation agreement must competently prepare such a document and fully advise the client with respect to that document, which includes informing the client of any significant problems that may be associated with the limited representation arrangement. However, by agreeing to prepare a specific, discrete document the lawyer does not also assume the responsibility for taking later actions or preparing subsequent documents that may be necessary to continue to pursue the representation. While limitations on the scope of representation are permitted under this rule, the lawyer must explain the benefits and risks of such an arrangement and obtain the client’s informed consent to the limited representation. Upon expiration of the limited representation arrangement, the lawyer should advise the client of any impending deadlines, pending tasks, or other consequences flowing from the termination of the limited representation.

[Revised, effective January 20, 2005.]

16-303. Candor toward the tribunal.
(No amendments were made to the rule.)

CODE OF PROFESSIONAL CONDUCT
COMMITTEE COMMENT

The purpose of Paragraph E of this rule is to permit lawyers to appear for clients in a limited manner and to alert the court and opposing counsel of that limited role.

In New Mexico courts, attorneys and self-represented litigants are held to the same standards. New Mexico courts are lenient with both attorneys and self-represented litigants when deemed appropriate so that cases may be decided on their merits. Attorneys may give technical assistance and, when not prohibited by the rules of the tribunal, may prepare, without attribution, papers for filing by a self-represented litigant without violating the duty of candor. Even though an attorney’s role may be limited to drafting a single document, the attorney is, however, bound by all of the rules that govern attorney conduct, including, but not limited to Rule 16-303(A)(1) NMRA (stating that an attorney shall not knowingly make a false statement of law or fact to a tribunal). Caveat: Current Federal practice prohibits the filing of anonymously drafted documents. See, e.g., Duran v. Carris, 238 F.3d 1268, 1271-73 (10th Cir. 2001).

16-701. Communications concerning a lawyer’s services.
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if: it contains a material misrepresentation of fact or law; omits a fact necessary to make the statement considered as a whole not materially misleading; or contains a testimonial about, or endorsement of, the lawyer that is misleading.

ABA COMMENT TO MODEL RULES:
This rule governs all communications about a lawyer’s services, including advertising permitted by Rule 7.2 [16-702 NMRA]. Whatever means are used to make known a lawyer’s services, statements about them should be truthful.

Truthful statements that are misleading are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or that it will lead a reasonable person to formulate a
specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.

An advertisement that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

See also Rule 8.4(e) [Paragraph F of Rule 16-804 NMRA] for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.
From the New Mexico Supreme Court

Opinion Number: 2004-NMSC-038

Opinion

EDWARD L. CHÁVEZ, JUSTICE

{1} The facts of this case raise a question about whether extrinsic evidence may be admitted to prove a grantor’s intent in physically delivering an unambiguous deed to a grantee. Defendant-Petitioner Linn Blancett (“Linn”) appeals from an order rescinding and nullifying two deeds that his father, Plaintiff-Respondent Richard Blancett (“Richard”), physically delivered to Linn’s wife in 1993. In a memorandum opinion upholding the order, the Court of Appeals held that even when a matter of law when made to a grantee, extrinsic evidence may be introduced as to the grantor’s intent in delivering an otherwise unconditional deed to a grantee. Nonetheless, we hold that where the grantor has physically transferred an otherwise unconditional deed to a grantee, the grantee makes out a prima facie case of legal delivery, and the burden shifts to the grantor to rebut the presumption of intent to make a present and complete transfer of rights. Because here Richard rebutted this presumption with substantial evidence that he lacked such intent, we affirm.

I. Background

{2} This case concerns the delivery of two deeds executed by Richard Blancett, a 79-year-old rancher in San Juan County. One of the deeds reserved a life estate in Richard and conveyed to Linn a remainder in the surface estate of much of Richard’s property. The other reserved a life estate in Richard and conveyed a remainder in the mineral estate of the same property to both Linn and his brother Ed. In 1993 Richard physically delivered the two deeds (“the 1993 deeds”) to Linn’s wife. Although Richard had some difficulty reading, he nevertheless understood the deeds, though apparently he failed to notice that the property described encompassed more land than he in fact owned. Richard testified that he had the deeds drafted solely as a “stop-gap estate planning tool” until he could prepare more formal estate documents, and he indicated to Linn that he intended the delivery to be a conditional rather than an immediate conveyance. Specifically, Richard testified that he told Linn not to record the deeds unless Richard died or did something “crazy” before creating formal estate planning documents. While Linn disputes the context of this discussion and claims that the statement was made in jest, the trial judge found Richard’s version to be credible and deemed Richard’s statement to be an oral condition that precluded legal delivery of the deeds.

{3} In addition to his statements to Linn around the time of conveyance, Richard testified that four years following delivery of the deeds, with Linn’s knowledge, he began an extensive process of formal estate planning, including drafting a will and limited family partnership agreement, which disposed of some of the same property covered by the 1993 deeds. Richard testified that during that time he continued to believe that he owned the property at issue in the deeds. Linn did not record the 1993 deeds for over eight years, until after Richard executed his estate documents, which conveyed to Linn less property than did the deeds.

{4} In 2001, Richard filed a complaint to nullify the 1993 deeds, claiming that because he expressly conditioned the conveyance, the physical transfer to Linn did not constitute legal delivery. The trial court denied Linn’s motion to dismiss and ruled that four years following delivery of the deeds, with Linn’s knowledge, Linn had physical delivery of the deeds, which disposed of some of the same property covered by the 1993 deeds. Richard testified that during that time he continued to believe that he owned the property at issue in the deeds. Linn did not record the 1993 deeds for over eight years, until after Richard executed his estate documents, which conveyed to Linn less property than did the deeds.

{5} The Court of Appeals affirmed the
lower court’s rulings in a memorandum opinion. In affirming, the Court of Appeals held that (1) the rule for which Linn argues is contrary to New Mexico law that a grantor must intend to irrevocably part with dominion and control in order to legally deliver a deed; (2) extrinsic evidence is relevant to whether Richard intended to make a present delivery; and (3) substantial evidence supported the trial court’s finding that Richard’s conditional physical delivery did not constitute legal delivery. We affirm.

II. Discussion

[6] On appeal, Petitioner Linn briefed four issues: (1) whether a grantor may impose oral conditions on the delivery of a deed to the grantee when those conditions do not appear on the face of the deed; (2) whether, as a matter of law, the 1993 deeds were legally delivered when Richard physically delivered them, without instruction, to Linn’s wife; (3) whether it was proper for the trial court to consider extrinsic evidence in determining the validity of the 1993 deeds when the deeds were clear and unambiguous on their face; and (4) whether there was sufficient evidence for the trial court to grant recission of the deeds. We focus our discussion on the first issue. Because we find that the rule that Linn advocates is contrary to New Mexico’s requirement of present intent in order to effectuate legal delivery, we decline to adopt it. We affirm the lower court as to the other legal and factual issues raised on this appeal.

A. The Requirement for Effective Legal Delivery of a Deed

[7] An effective legal delivery of a deed requires (1) intent by the grantor to make a present transfer and (2) a transfer of dominion and control. Den-Gar Enters. v. Romeo, 94 N.M. 425, 428-29, 611 P.2d 1119, 1122-23 (Ct. App. 1980). It is well settled in New Mexico that a grantor’s intent is central and may be determined from words, actions or surrounding circumstances during, preceding or following the execution of a deed. Id.; Waters v. Blocksom, 57 N.M. 368, 370, 258 P.2d 1135, 1136 (1953); Martinez v. Martinez, 101 N.M. 88, 91, 678 P.2d 1163, 1166 (1984).

[8] Here, both parties concede that a grantee’s possession of a validly executed deed ordinarily raises a presumption of legal delivery, which a grantor may rebut with evidence negating his or her intent to make a present transfer. See Waters, 57 N.M. at 371, 258 P.2d at 1138; Vigil v. Sandoval, 106 N.M. 233, 236, 741 P.2d 836, 839 (Ct. App. 1987). Linn urges us, however, to hold that when a grantor physically delivers a deed to a grantee and no conditions of delivery appear on the face of the deed, the presumption becomes irrebuttable. Under such a rule, derived from common law, any oral conditions made by the grantor become void and legal delivery is absolute, regardless of the grantor’s intent. See Ritchie v. Davis, 133 N.W.2d 312, 317 (Wis. 1965) (holding that a grantor may not make a delivery in escrow or upon condition to a grantee); 11 Thompson on Real Property § 94.06(g)(2) (David A. Thomas ed., 2d ed. 2002); Robert G. Natelson, Modern Law of Deeds to Real Property § 17.7 (1992).

[9] The rule that Linn advocates stands in direct contrast to our established case law on deed delivery, which requires a threshold showing of a grantor’s intent to irrevocably transfer title. See Den-Gar, 94 N.M. at 428-29, 611 P.2d at 1122-23; Waters, 57 N.M. at 370, 258 P.2d at 1136; Martinez, 101 N.M. at 91, 678 P.2d at 1166. While Linn attempts to distinguish the above cases because they did not involve oral instructions by the grantor not to record until a future occurrence, the distinction Linn draws is inapposite. In Den-Gar, for instance, the court upheld the trial court’s finding that physical delivery to the grantee was ineffective because the grantor lacked the requisite intent to make a present transfer of title. 94 N.M. at 429, 611 P.2d at 1123. Linn argues that Den-Gar turned not on the grantor’s intent to deliver but on the fact that the grantor had already issued a conflicting deed to his mother. The court’s holding, however, clearly rested on the grantor’s lack of present intent to divest himself of title in the second deed. Id. at 428-29, 611 P.2d at 1122-23 (considering evidence of grantor’s earlier transfer to his mother, in addition to grantor’s words and actions at, prior, and subsequent to delivery, and concluding that the grantor did not intend to convey the title to the subject property).

[10] Similarly, Waters upheld a lower court’s ruling that the grantor lacked the necessary intent to deliver a deed to his brother, the grantee, by considering extrinsic evidence such as the grantee’s insistence that he would not record the deed during the grantor’s lifetime. 57 N.M. at 368, 371-72, 258 P.2d at 1135, 1137-38. In summarily attributing the court’s holding to the fact that the deed was found in the grantor’s possession after his death, Linn overlooks the fact that possession was only one of the many factors the court examined in concluding the grantor lacked intent to make an irrevocable transfer when he passed the deed to the grantee. Id.

[11] Further, in Martinez, this Court expressly rejected the theory that there can be no conditional delivery to a grantee unless the conditions are expressed in the deed itself. 101 N.M. at 90, 678 P.2d at 1165. There the purchaser in a real estate contract argued that the deed was legally delivered when his parents, the sellers, handed it to him to deliver to a mortgagee to hold in escrow until the mortgage had been fully paid. Id. This Court upheld the lower court’s findings that the parents’ statements made the delivery conditional and prevented legal delivery. Id. at 91, 678 P.2d at 1166. Linn argues that the holding in Martinez is consistent with a rule against conditional deliveries of deeds because the parents gave the deed to their son “to transmit to a depositary to hold in escrow,” rather than to the grantee to hold with conditions. However, the Martinez court in fact relied on the same reasoning we reiterate today: a grantor’s intent is controlling, regardless of whether a deed is physically transferred to a grantee. Id. at 90-91, 678 P.2d at 1165-66; see also Nosker v. W. Farm Bureau Mut. Ins. Co., 81 N.M. 300, 301-02, 466 P.2d 866, 867-68 (1970) (holding that the fact that certain contract conditions had to be met before title could pass precluded an effective transfer, even though deed had been manually delivered).

[12] We are similarly unpersuaded by the other New Mexico cases that Linn cites. In Westover v. Harris, 47 N.M. 112, 137 P.2d 771 (1943), upon which Linn relies for the proposition that there can be no oral conditions on delivery because of the “solemnity” of property deeds, this Court upheld a trial court’s determination that a mother’s conveyance to her daughter represented a deed rather than a testamentary document over which the mother retained control, because substantial evidence showed it was made with the intent to create a present interest in the daughter. Id. at 116, 137 P.2d at 773. Rather than refuse to recognize oral conditions on delivery, this Court simply recognized that if the mother had intended to reserve control over the document, she did not adequately express a desire to do so. Id. at 116, 118-19, 137 P.2d at 773-74; see also Vigil, 106 N.M. at 235, 741 P.2d at 839 (citing Westover for the proposition that the language of a deed controls in construing the terms of the deed, while a grantor’s intent to deliver may be determined from the deed’s language or surrounding circumstances).
Constitutional with Martinez and the above cases, we hold that there may be no legal delivery of a deed without intent to make a present transfer. Nonetheless, while we reject a per se rule against conditional deliveries of deeds, we hold that physical delivery of a deed to a grantee creates a presumption of legal delivery, which a grantor may then rebut with evidence that he or she lacked intent to make a present transfer. In doing so, we acknowledge the important policy concerns that Linn cites—protecting third-party purchasers and creditors, and lending certainty and stability to land titles—and believe they will be adequately served by using the rule as a burden-shifting device.

In support of our approach, we note that other jurisdictions that apply the common law rule seem to do so for the purpose of shifting the burden of proof regarding a grantor’s intent to irrevocably deliver a deed. In most of the cases cited by Linn, even when a grantor physically delivered a deed that was unconditional on its face, the grantor was nonetheless able to offer evidence to rebut the presumption of intent to make a present transfer. See, e.g., Walls v. Click, 550 S.E.2d 605, 612 (W. Va. 2001) (acknowledging that delivery requires both transfer and intent to make a present transfer, and determining that the surrounding circumstances were insufficient to rebut—and in fact supported—the grantor’s prima facie proof of intent to irrevocably transfer by physically delivering the deed to grantee); State ex rel. Pai v. Thom, 563 P.2d 982, 987-88 (Haw. 1977) (noting that delivery to the grantee was absolute, but then considering evidence of the surrounding circumstances to evaluate whether grantor indeed intended to make a present transfer); cf. Paoli v. Anderson, 208 So. 2d 167, 168-69 (Miss. 1968) (holding that the presumption of valid delivery from grantee’s possession of a deed, combined with the rule against parol evidence to alter the terms of a deed, was sufficient evidence for a finding of legal delivery, where grantee had died but the deed was found in his safety deposit box and his actions had indicated that he believed he owned the property).

This burden-shifting approach, rather than a per se rule of preclusion, accommodates New Mexico’s strong interest in honoring parties’ intent in land transactions, a policy that finds support in modern property jurisprudence. See Waters, 57 N.M. at 370, 258 P.2d at 1136 (“The intention of the parties, particularly the grantor, is an essential and controlling factor in determining the question of delivery.”); Chillemi v. Chillemi, 78 A.2d 750, 753 (Md. Ct. App. 1951) (“The ancient rule that the mere transfer of a deed from the grantor to the grantee overrides the grantor’s explicit declaration of intention that the deed shall not become operative immediately is a relic of the primitive formalism which attached some peculiar efficacy to the physical transfer of the deed as a symbolical transfer of the land.”); Natelson, supra, § 17.7. At the same time, providing grantees the benefit of such a presumption, and requiring grantors in cases such as this to present evidence of a lack of intent in order to avoid summary judgment, may help to provide certainty and stability in land transactions—policies that Petitioner cites in favor of the common law rule.

Linn also argues that in delivering the deed to Linn’s wife, Richard made an effective delivery because the deed was no longer in Richard’s control. In doing so, Linn asks us to distinguish or expand the common law rule discussed above. We are not persuaded. The fact that Richard handed the deed to someone acting on Linn’s behalf does not alter our analysis: again, the issue is whether Richard intended to make an irrevocable, present transfer to Linn when he physically handed the deed to Linn’s wife. See Vigil, 106 N.M. at 236, 741 P.2d at 839 (“Delivery of a deed to a third person by a grantor, with intent to create a present interest in favor of the grantee, is held to constitute an effective delivery.”) (emphasis added); Restatement (Second) of Property § 32.1 cmt. g (1922) (stating that, like delivery to a grantee, “delivery of the document by the donor to someone other than the donee is a manifestation that the document is presently operative, unless the circumstances indicate otherwise”) (emphasis added). To the extent that Linn raises a factual challenge as to this issue, we agree with the Court of Appeals that substantial evidence supported a finding that Richard did not intend to effect an absolute transfer when he handed the deeds to Linn’s wife.

Extrinsic Evidence Relevant to Determine that Richard Lacked the Requisite Intent

Our discussion of conditional deliveries emphasizes that the grantor’s intent to irrevocably part with dominion and control is a threshold requirement for a legal delivery. It is well settled in New Mexico that whether the grantor had such intent may be established by the parties’ communications and behavior at, prior to, or subsequent to the time of delivery. Den-Gar, 94 N.M. at 429, 611 P.2d at 1123. In claiming that there must be ambiguity in the four corners of a deed before extrinsic evidence of such intent is admissible, Linn mistakes the analysis for construing the terms of a deed with the determination of whether there has been an effective delivery in the first place.

In Den-Gar the lower court found that the grantor lacked the necessary intent to convey the subject deed to the grantee, based on communications and actions during and subsequent to delivery. The grantee argued that such evidence had been impermissibly admitted as parol evidence to alter the deed’s terms. Id. at 429, 611 P.2d at 1123. The Court of Appeals, however, held the evidence was relevant to whether the grantor possessed the intent to unconditionally part with dominion and control of the deed, rather than to the deed’s terms, and upheld the lower court’s ruling as supported by substantial admissible evidence. Id.

Here, evidence of the parties’ communications and subsequent actions was relevant to determining Richard’s intent at the time he physically delivered the deeds, rather than to the terms of the deed or whether he had changed his mind subsequently. Thus, it is unnecessary in this case to make a threshold determination of whether the deeds were ambiguous or whether the extrinsic evidence contradicted the written terms of the deeds. Consequently, we affirm the Court of Appeals as to this issue.

Trial Court’s Finding that Richard Lacked Intent to Make an Absolute Transfer Is Supported by Substantial Evidence

Linn challenges the trial court’s recission of the deeds as unsupported by sufficient evidence that Richard lacked the requisite intent for legal delivery. Because the question of whether Richard intended to deliver the deed is an issue of fact, we disturb the trial court’s relevant findings and conclusions only if they are unsupported by substantial evidence. See Vigil, 106 N.M. at 237, 741 P.2d at 840. In doing so, we resolve disputed facts in Richard’s favor, as the successful party below, indulge all reasonable inferences that support the lower court’s determination, and disregard any contrary evidence and inferences. Id.
evidence. Specifically, the record shows that (1) Richard told Linn not to record the 1993 deeds unless Richard died without a will or did something “crazy”; (2) Richard testified as to his lack of intent to make a present transfer; (3) Richard offered evidence that he subsequently conducted formal real estate planning, including executing a will and family limited partnership, that were inconsistent with the terms in the 1993 deeds; and (4) Linn did not record the deeds for eight years, until he learned that he stood to receive less property than the deeds had provided.

{22} Linn disputes the admissibility of much of this evidence. Specifically, he argues that Richard’s subsequent estate planning is legally irrelevant to Richard’s intent at the time of delivery. We are not persuaded that the evidence offered was irrelevant. See Rothrock v. Rothrock, 104 S.W.3d 135, 138 (Tex. Ct. App. 2003) (not-relevant.

{23} Further, Linn argues that other “documentary” evidence, which he claims may be equally evaluated by the fact finder and appellate courts, contradicts the evidence offered by Richard. For example, he points to language in a lease that Richard executed to Linn following the 1993 deeds that referred to Richard’s “life estate” in the same property described in the deeds,

arguing that this demonstrated Richard’s belief that his delivery of the deeds had been complete. However, the trial court did not find the language in the lease to bear on Richard’s intent in conveying the earlier deeds, and we leave such weighing of evidence to the fact finder.

{24} Because we find substantial evidence to support the lower court’s determination that Richard lacked the intent to make a present conveyance, we affirm.

III. Conclusion

{25} For the foregoing reasons, we affirm the Court of Appeals.

{26} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

PATRICIO M. SERNA, Justice

RICHARD C. BOSSON, Justice

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**Certiorari Denied, No. 28,870, Dec. 7, 2004**

From the New Mexico Court of Appeals

**Opinion Number:** 2004-NMCA-134

ELaina BROOKS, LESLEY DONOVAN, VIKKI and MIKE MAYHEW, individually and on behalf of all others similar situated,

Plaintiffs-Appellants,

versus

NORWEST CORPORATION (n/k/a WELLS FARGO & CO.);

NORWEST SERVICES, INC.; and NORWEST BANK OF NEW MEXICO, N.A.,

Defendants-Appellees.

No. 23,423 (filed: July 23, 2004)

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

SUSAN M. CONWAY, District Judge

PHILIP C. GADDY

DAVID J. JARAMILLO

Albuquerque, New Mexico

for Appellants

W. SPENCER REID

GARY J. VAN LUCHENE

KELEHER & MCLEOD, P.A.

Albuquerque, New Mexico

for Appellees

**OPINION**

MICHAEL D. BUSTAMANTE, Judge

{1} Plaintiffs appeal the district court’s decision denying class certification under Rule 1-023 NMRA 2004. The appeal raises several issues, including the legal standards for determining whether a class definition is legally sufficient and the standards under which the predominance and superiority criteria of Rule 1-023(B)(3) are tested with regard to manageability. We also review the decision for substantial evidence. We affirm the district court.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

{2} Plaintiffs sued Defendants (Norwest) on behalf of themselves and others who have held checking accounts with Norwest Bank New Mexico (Norwest-NM) alleging violations of the Unfair Practices Act (UPA), NMMSA 1978, § 57-12-3 (1971), breach of the covenant of good faith and fair dealing under the Uniform Commercial Code (U.C.C.), NMSA 1978, § 55-1-203 (1961), and breach of contract. While the initial complaint sought certification of a class covering only New Mexico residents, the First Amended Complaint (FAC) requested approval of a multistate class including members from twelve additional states. Defendants moved the district court for an order denying multistate class certification on March 24, 2000. Before that motion was heard, Plaintiffs filed their motion for class certification, requesting approval of three sub-classes: one sub-class for persons or entities in New Mexico and two sub-classes based on multistate membership. As a matter of efficiency, the district court heard oral arguments on the proposed multistate class certification first, and denied it on June 12, 2000. Perhaps with an eye to expediting matters, Plaintiffs declined the court’s invitation for an evidentiary hearing on the motion for state class certification. Instead, the parties presented oral argu-
ment on the motion on August 30, 2000, submitting exhibits that consisted primarily of interrogatories, deposition excerpts, and documents obtained in discovery. A letter decision denying Plaintiffs’ motion for state class certification was entered by the district court on July 26, 2002. On July 29, 2002, the district court entered an order and findings of fact and conclusions of law denying the multistate class, and a separate order with findings of fact and conclusions of law denying state class certification. Plaintiffs take their appeal solely from the order denying state class certification.

{3} In their motion, Plaintiffs sought certification of:

All persons and/or entities in New Mexico who have incurred insufficient funds or overdraft charges as a result of Norwest posting withdrawals in a highest dollar amount to lowest dollar amount sequence. The claims of these Class Members are based on violations of the New Mexico Unfair Trade Practices Act and breach of contract under common law and applicable U.C.C. provisions imposing obligations of good faith and fair dealing.

The factual basis for Plaintiffs' claims rests on the order in which checks are paid from a customer’s account on a daily basis (posting order). There are several ways a bank can post checks, including for example, random order, order of presentation (the order checks are physically received on any given day), check number sequence, descending amount, and ascending amount. Plaintiffs allege that prior to September 1996, Norwest-NM posted checks in ascending order, from the lowest amount to the largest amount (low-high). Plaintiffs contend that in late 1994, after a review by a subsidiary, Norwest branches in various states began posting checks in descending order, from the highest amount to the lowest amount (high-low). It is undisputed that Norwest Bank-NM adopted the high-low policy in September 1996.

{4} According to Plaintiffs, Defendants’ motive in adopting the high-low policy was not for legitimate business purposes but was driven solely by a desire to force more overdraft and insufficient fund (OD/NSF) events to generate more fees and increase revenues. Plaintiffs rely on Norwest documents that allegedly discuss the financial benefits and projected revenues that would result from posting checks high-low.

Norwest’s own internal memoranda sets forth the following comparison:

<table>
<thead>
<tr>
<th>Posting Order</th>
<th>Posting Order</th>
</tr>
</thead>
<tbody>
<tr>
<td>$10.00 (Pay)</td>
<td>$60.00 (Pay)</td>
</tr>
<tr>
<td>$25.00 (Pay)</td>
<td>$50.00 (OD Notice)</td>
</tr>
<tr>
<td>$25.00 (Pay)</td>
<td>$40.00 (OD Notice)</td>
</tr>
<tr>
<td>$40.00 (Pay)</td>
<td>$25.00 (OD Notice)</td>
</tr>
<tr>
<td>$50.00 (OD Notice)</td>
<td>$10.00</td>
</tr>
<tr>
<td>$60.00 (OD Notice)</td>
<td>$10.00</td>
</tr>
</tbody>
</table>

Under this scenario, assuming a beginning account balance of $100, a customer would pay two OD/NSF fees for checks posted on the same day under a low-high posting order compared to five such fees under a high-low sequence. Plaintiffs assert that Norwest projected this new policy would increase revenues by over $18,000 per month, “a conservative 6% increase,” at Norwest-NM alone. Plaintiffs’ position is that Norwest breached its contract with customers by failing to post items for which there were sufficient funds available in a sequence that allowed the items to be paid, resulting in additional OD/NSF fees.

{5} The crux of Plaintiffs’ statutory UPA and bad faith claims is that Norwest knowingly failed to disclose or adequately explain to its customers its decision to change the ordering policy, the reason for the new policy, or its consequences for the customer. Plaintiffs contend that when Norwest decided to implement the new method, customers were not notified of the new posting order and the deposit agreement did not reflect the change because Norwest wanted to avoid public criticism, adverse customer reactions, and potential lawsuits.

{6} Norwest’s initial response is that it is lawful for them to post checks “in any order.” NMSA 1978, § 55-4-303(b) (1992). It points out that the “no priority rule” is justified because of the impossibility of stating a rule that would be fair in all cases, having in mind the almost infinite number of combinations of large and small checks in relation to the available balance on hand in the drawer’s account; the possible methods of receipt; and other variables.

Id. official cmt. 7. The significance of this rule to Norwest’s position appears to be two-fold: the first goes to the merits—notice is not required because any posting order is lawfully discretionary; and second, for purposes of certification, the Rule’s official comment suggests that the effect of a posting order inherently varies from consumer to consumer, account to account. The latter supports Norwest’s argument that Plaintiffs’ class is too indefinite, individual issues of liability and damages predominate, and case management is impossible.

Standard of Review

{7} Within the confines of Rule 1-023, the district court has broad discretion whether or not to certify a class. Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, ___ N.M. ____, 99 P.3d (No. 23,186) July 23, 2004) 1166. We decline Plaintiffs’ invitation to apply a “less deferential standard” where the district court has denied certification. One circuit that applies a less deferential standard reasons that there is little difference between a review for abuse of discretion and a review for error, and that the judge’s discretion is bounded by applicable rules of law or equity. Abrams v. Interco Inc., 719 F.2d 23, 28 (2d Cir. 1983). In New Mexico, however, a district court abuses its discretion when it misapplies the law or if the decision is not supported by substantial evidence. See N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 6-7, 127 N.M. 654, 986 P.2d 450. Although a misapplication of the law is considered an abuse of discretion, our courts review de novo the initial decision of whether the correct legal standard has been applied. Id. ¶ 7. If the correct law has been applied to the facts, the district court’s decision must be affirmed when it is supported by substantial evidence. See id. ¶ 8; Sims v. Sims, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153 (stating that appellate courts review district court’s findings of fact for substantial evidence; “[a]n abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case.”). We find no need to deviate from this standard.

General Considerations

{8} We begin our analysis by noting that Rule 1-023(A) and, in particular (B)(3), are essentially identical to their federal counterparts. Hence, we can look to the federal law for guidance in determining the appropriate legal standards to apply to the Rule. See Pope v. Gap, Inc., 1998-NMCA-103, ¶ 10, 125 N.M. 376, 961 P.2d 1283.

{9} When assessing whether to certify a class action, the district court should bear in mind the twin objectives of the Rule. The core policy behind the Rule is to provide a forum for plaintiffs with small claims who otherwise would be without any practical
requirement, "a motion for class certi-

fication" (noting that despite the rigorous analysis
in Part III of the opinion, the district court erred as a matter of law because the district court failed to make a determination that certification is appropriate. See id. Of course, the court must bear in mind that plaintiffs are not required to prove their case at the certification stage. Thus, certification is not an appropriate time to examine the merits. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (holding certification is not an occasion for inquiry into the merits); In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 135 (2d Cir. 2001) (noting that despite the rigorous analysis requirement, “a motion for class certification is not an occasion for examination of the merits”) (internal quotation marks and citation omitted)).

{10} Plaintiffs bear the burden to show that all four prerequisites of Rule 1-023(A) and at least one of the requirements of Rule 1-023(B) are met. Amchem Prods., Inc., 521 U.S. at 613-14; O’Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 318 (C.D. Cal. 1998). Failure to establish any one requirement is a sufficient basis for the district court to deny certification. Neumont v. Monroe County, 198 F.R.D. 554, 556 (S.D. Fla. 2000); Coleman v. Cannon Oil Co., 141 F.R.D. 516, 520 (M.D. Ala. 1992).

{11} To satisfy Rule 1-023(A), Plaintiffs must establish four prerequisites, commonly referred to as numerosity, commonality, typicality, and adequacy:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

To qualify as a Rule 1-023(B)(3) class, as Plaintiffs desire, they must establish both “predominance” and “superiority.” Amchem Prods., Inc., 521 U.S. at 615. This means that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
(d) the difficulties likely to be encountered in [its] management.

Rule 1-023(B)(3).

Analysis

{12} In its letter decision, the district court found that Plaintiffs failed to identify an objectively ascertainable class, primarily because Plaintiffs did not propose a baseline of OD/NSF fees for which Norwest would not be liable. Nonetheless, in order to continue its analysis, the district court assumed that the class included persons or entities that had incurred OD/NSF fees as a result of Norwest posting withdrawals from highest to lowest dollar amount instead of either lowest to highest amount or check number sequence. Using its assumption, the district court found that Plaintiffs met the numerosity and commonality requirements of Rule 1-023(A). The court concluded that Plaintiffs’ claims were not typical of members who were subject to counterclaims. Rather than denying certification, the district court excluded those members but noted that their exclusion would add substantial difficulties in ascertaining the class. The district court also excluded Plaintiffs’ claims as not typical of members subject to counterclaims, thereby defeating typicality; and d) individualized liability issues predominate over common issues, making manage-

ment of the class extraordinarily difficult.

{14} Plaintiffs interpret the district court’s decision to mean that they established all of the requirements of Rule 1-023(A) and three of the four factors of Rule 1-023(B)(3), but failed on one ground, manageability. In their view, this was error because there is no practical alternative to litigate their relatively small claims, and because the reasons identified by the court were not legally sufficient.

{15} In Plaintiffs’ view, when there is no reasonable alternative to class litigation, such as here, the district court must find management is impossible based on “hard data” to warrant denial of class certification. Plaintiffs advocate that the district court should be required to (1) express any management difficulties in its findings, explore solutions, and describe its efforts to resolve them; (2) indulge in a presumption against dismissal; (3) state the alternatives and reasons why other methods of adjudication would be superior to a class action; and (4) deny certification only if “hard evidence” establishes that it is impossible to resolve them. Plaintiffs contend the court erred because it did not comply with these standards. Plaintiffs contend the district court erred as a matter of law because the reasons it articulated did not satisfy the “impossibility standard.” They also take issue with the legal standards the district court applied to its analysis of the class definition and the predominance require-
ments, and they maintain that these reasons...
are not a valid basis for denial.  
{16} We disagree with Plaintiffs’ perception that the district court’s decision was based simply on manageability difficulties. Despite the presumption it applied in favor of certification, the district court concluded Plaintiffs’ evidence was insufficient in that it did not provide a reliable way to identify class members, and because individual liability issues promised to overwhelm the lawsuit, thereby making the class unmanageable and not superior. Since neither party disputes the district court’s findings as to Rule 1-023(A) requirements, we limit our analysis to the class definition and Rule 1-023(B)(3) requirements. Our analysis of these two issues subsumes the “member preference” issue listed by the district court as a separate basis for denial. Because we find the grounds for the district court’s decision are otherwise sufficient, we decline to address the issue of whether potential counterclaims might make this case less manageable.  
Class Definition  
{17} Plaintiffs define the class as “all persons and/or entities in New Mexico who have incurred insufficient funds or overdraft charges as a result of Norwest posting withdrawals in a highest dollar amount to lowest dollar amount sequence.” The district court found that Plaintiffs failed to meet their burden to “identify an objectively ascertainable class.” It further found that “[a]ny definition of the class, . . . is not capable of present ascertainement[,] [i]t is nearly impossible [and] . . . even [ascertaining] the number of class members would be a labor intensive and enormously costly undertaking.”  
{18} Plaintiffs believe their definition survives because it proposes an objective “but for” test—a class of persons who were charged OD/NSF fees that could not have been imposed but for Norwest switching to a high-low posting order. They argue that the district court added ambiguity to the definition when it modified it to include “all persons or entities in New Mexico who have incurred [OD/NSF fees] as a result of [Norwest’s] posting of withdrawals from highest-to-lowest dollar amount instead of either lowest-to-highest amount or check number sequence.” Plaintiffs further claim that members could be “readily determined” from Norwest’s records but that the district court prevented their discovery. According to Plaintiffs, the fact it was labor intensive and costly did not make it impossible to ascertain the class, and the district court erred as a matter of law because this was an invalid reason for denial.  
{19} Finally, even if their definition fails, Plaintiffs view it as the district court’s function and duty to determine the extent of class membership and to work with the parties to construct a proper class definition, rather than simply dismiss the case. Plaintiffs view the district court’s conclusion that it was enormously uneconomical in terms of time and money as a “flimsy” reason that violated their constitutional right to access courts.  
{20} We conclude that the district court applied the correct legal standard to the class definition and that its analysis was supported by substantial evidence. An “implicit primary requirement” of Rule 1-023, often referred to as the “definiteness” requirement, is that plaintiffs bear the burden to demonstrate the existence of an identifiable class that is “capable of ascertaining under some objective standard.” Neumont, 198 F.R.D. at 556-57 (internal quotation marks and citation omitted); see Alliance to End Repression v. Rochford, 565 F.2d 975, 978 (7th Cir. 1977) (citing multiple circuits); Caroline C. v. Johnson, 174 F.R.D. 452, 459 (D. Neb. 1996) (“Although not specifically mentioned in the rule, the definition of the class is an essential prerequisite to maintaining a class action.”) (quoting Roman v. ESB, Inc., 550 F.2d 1343, 1348 (4th Cir. 1976)); accord Earnest v. Gen. Motors Corp., 923 F. Supp. 1469, 1473 (N.D. Ala. 1996); Harris v. Gen. Dev. Corp., 127 F.R.D. 655, 658 (N.D. Ill. 1989); Thomas v. Clarke, 54 F.R.D. 245, 248 (D. Minn. 1971). “It is critical that the class represented is ascertainable since the outcome of the class action is res judicata as to all unnamed class members.” Harris, 127 F.R.D. at 658; Alliance to End Repression, 565 F.2d at 978 n.6. Hence, class membership “must be capable of ascertaining under some objective standard so that the court may insure that the interests of the class are adequately represented.” Caroline C., 174 F.R.D. at 459 (internal quotation marks and citation omitted).  
{21} The class definition “provides the court with a framework with which to apply Rule 23 criteria and thus to reach an initial determination whether a class action may be maintained.” 2 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 6:14 at 614 (4th ed. 2002) (hereinafter Newberg). It also serves an important function in Rule 1-023(B)(3) class actions because it allows the court to determine who is entitled to notice. Garrish v. United Auto., Aerospace, & Agric. Implement Workers of Am., 149 F. Supp. 2d 326, 331 (E.D. Mich. 2001). A Rule 1-023(B)(3) action compels “greater precision” defining the class than a Rule 1-023(B)(1) or (2) action. O’Connor, 184 F.R.D. at 319; see Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972) (noting that unlike Rule 23(b)(3) class actions where precise definition is important, less precise definition is required under Rule 23(b)(2) class actions because notice is not required); accord Anderson v. Coughlin, 119 F.R.D. 1, 3 (N.D.N.Y. 1988); see Carpenter v. Davis, 424 F.2d 257, 260 (5th Cir. 1970) (holding that in Rule 23(b)(2) action seeking injunctive and declaratory relief, class members do not need to be so clearly identified that they can be presently ascertained.  
{22} This is not to say that the definition must be so precise that every potential member can be immediately identified or the precise number ascertained at the outset. O’Connor, 184 F.R.D. at 319; In re U.S. Fin. Sec. Litig., 69 F.R.D. 24, 34 (S.D. Cal. 1975) (finding numerosity requirement was met where 50% of the class members could be identified by plaintiffs and the identity of other members could be made available). Nevertheless, given the notice requirement, it is especially incumbent on Rule 1-023(B)(3) plaintiffs to identify “a definable ‘class’ that can be ascertained through reasonable effort.” Earnest, 923 F. Supp. at 1473 (emphasis added); Abrams, 719 F.2d at 30 (indicating that the manageability issue requires a look at the notice requirement, and consideration of whether class members can be identified and the expense of doing so), “[T]he class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.” Garrish, 149 F. Supp. 2d at 330-31 (internal quotation marks and citation omitted); Neumont, 198 F.R.D. at 558; O’Connor, 184 F.R.D. at 319; 5 James Wm. Moore, et al., Moore’s Federal Practice § 23.21[1], 23-56 to 23-57 n.3 (3d ed. 2003) (hereinafter Moore) (citing multiple circuits).  
{23} Whether a class definition is legally sufficient depends on the facts of each case and must be determined on a case-by-case basis. Alliance to End Repression, 565 F.2d at 977; Harris, 127 F.R.D. at 658-59. As a general rule, definitions must bear some relation to defendant’s activities. O’Connor, 184 F.R.D. at 319-20. At minimum, a definition should include a common transactional fact or status predicated on the
cause of action, the appropriate time span, and geographical boundaries, if applicable, or other pertinent facts or characteristics that would make the class readily identifiable and capable of accurate verification. Newberg, supra § 6:17 at 631-32. When defining a class, Plaintiffs must avoid subjective criteria or circular definitions that depend on the outcome of the litigation. Id. § 6:14. Imprecise, vague, or broad definitions that include persons with little connection to the claims will fail to meet the definiteness requirement. See Earnest, 923 F. Supp. at 1473-74 (finding that the class definition was so vague and broad, the minimum standard of definiteness was not met); see also Harris, 127 F.R.D. at 659 (holding the class “too imprecise and speculative to be certified.”). A subjective or merits-based definition can create manageability problems. Moore, supra § 23.21[1] at 23-57 n.4.

{24} Critically, the class definition here lacks any objective criteria from which to gauge membership without first determining the merits of Plaintiffs’ claims. First, it is overly broad because it would include any single OD/NSF event that resulted in a fee which would have been charged under any posting method. Second, Plaintiffs’ proposed class of “[a]ll persons and/or entities in New Mexico who have incurred insufficient funds or overdraft charges as a result of Norwest posting withdrawals in a highest dollar amount to lowest dollar amount sequence” offers no guidance for the district court to gauge who is included and who is excluded from this class. The “but for the high-low posting” formula leaves a range of possibilities given the “almost infinite number of combinations of large and small checks in relation to the available balance on hand in the drawer’s account; the possible methods of receipt; and other variables.” § 55-4-303(b) official cmt. 7.

{25} There is substantial evidence to conclude that there is no general method to determine who falls into this category. Norwest tendered evidence that, depending on the particular OD/NSF event, customers were sometimes charged more, sometimes charged less, and sometimes charged the same fees that they would have been charged under a low-high or check number sequence. As we will describe in more detail below, the evidence indicates that only an individual and thorough analysis of each member’s account and a comparison to other methods would define who was in the class, even under a “but for” standard. Hence, the district court properly considered the administrative feasibility of such an endeavor, including the enormous time and expense involved. Newberg, supra § 4:35 at 307-08 (stating management issues associated with complexity and expense of notice are viable considerations).

{26} Economic feasibility aside, the highly individualized nature of the endeavor, together with all of the potential variables, including the bank officer’s discretion to waive any fees, in whole or in part, and whether the bank would have waived fees under any other method, makes any class definition highly speculative and virtually impossible. As such, we find it reasonable for the district court to conclude that Plaintiffs failed to meet their burden under the definiteness requirement.

{27} To the extent that Plaintiffs argue that the district court has an affirmative duty to define the class, we respond that it is Plaintiffs who bear the burden to properly define the class or any subclasses; any duty on the court is discretionary. U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 407-08 (1980); Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11, 14-15 (2d Cir. 1993) (per curiam). We agree, however, that when possible, the district court should consider exercising its discretion to modify a proposed class definition or create subclasses, although it is under no obligation to do so in situations such as this case where it would be unduly burdensome. Abrams, 719 F.2d at 31 (holding that the district court is under no duty to devise a manageable class, especially where the difficulties with respect to notice and damages are staggering); see Thomas, 54 F.R.D. at 249 (holding that a court should use its discretion to define the class so that class action procedure can be utilized in close cases where certification is favored).

{28} Moreover, the district court did attempt to devise a viable class definition by adding objective criteria and excluding members. As it stated, “[The Court has struggled to discern a proper class definition, and is unable to, based on plaintiffs’ failure to indicate what the proper method of posting would be. See Newberg, supra § 6:17 at 633 (“Courts may redefine the classes themselves, if they possess adequate information.”). In this regard, the terms added by the court did not create any ambiguities, as Plaintiffs contend. It is the highly individualized nature of the case that renders this class incapable of definition. See Lazar v. Herz Corp., 191 Cal. Rptr. 849, 854 (Cal. Ct. App. 1983) (“[W]hether there is an ascertainable class depends . . . [on] the community of interest among class members”) (internal quotation marks and citation omitted)).

{29} We also find Plaintiffs’ claims that the district court impeded its discovery of a “readily identifiable” class to be without merit. This case was “vigorously” litigated by counsel, as Plaintiffs state, for over eighteen months prior to the certification hearing. Plaintiffs not only assured the court that they had all of the facts necessary for certification and that they were ready to go, it was Plaintiffs who urged the court to expedite the matter. In any event, we have found that the information necessary to ascertain membership is not “readily available” given the nature of Plaintiffs’ claims and Norwest’s records, and Plaintiffs proposed no method to extract and compile this information.

**Rule 1-023(B)(3) Requirements**

{30} Plaintiffs’ attempt to conflate the predominance and superiority issues into one criterion is flawed. Under Rule 1-023(B)(3), Plaintiffs must prove two requirements: “[c]ommon [issues must] predominate over any questions affecting only individual members[,] and class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy.” Amchem Prods., Inc., 521 U.S. at 615 (internal quotation marks omitted). “These requirements reflect the fact that special caution must be exercised in class actions of this type because of the loose affiliation among the class members, which is thought to magnify the risks inherent in any representative action.” 7A Charles Alan Wright, et al., Federal Practice & Procedure. Civ. 2d § 1777 at 518 (1986) (hereinafter Wright). It is critical that “plaintiffs must prove both that common legal or factual questions predominate and that a class action is the best means of handling the litigation.” Coleman, 141 F.R.D. at 521. Failure to establish either of these requirements is grounds for non-certification.

{31} Predominance tests whether a proposed class is sufficiently cohesive to warrant adjudication by representation.

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1 We recognize that Lazar was decided under a statute that appears unique to California, but we believe the principle cited is applicable to Rule 1-023.
Amchem Prods., Inc., 521 U.S. at 623. Put another way, predominance asks "whether the individual questions in a case are so overwhelming as to destroy the utility of the class action.” Partain v. First Nat’l Bank, 59 F.R.D. 56, 59 (M.D. Ala. 1973). The predominance inquiry focuses on the relationship between individual and common issues, which necessarily depends on the facts and circumstances of each case. See In re Potash Antitrust Litig., 159 F.R.D. 682, 693 (D. Minn. 1995) (stating that there are no bright lines to determine whether common questions predominate; instead, courts must consider the facts of each case). Consequently, it is essential for the court to understand the substantive law, proof elements of, and defenses to the asserted cause of action to properly assess whether the certification criteria are met. Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996); In re Potash Antitrust Litig., 159 F.R.D. at 693-94.

(32) Superiority, on the other hand, compares the fairness and efficiency of the class action to alternative methods of litigation. Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir. 1974); see Wright, supra § 1779 at 552 (stating that a comparison of possible alternatives is required to “determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court”); see also Partain, 59 F.R.D. at 61 (finding that superiority is a comparative requirement that presumes the availability of alternatives). If no practical alternative exists, the superiority criterion is met, and the class should be certified unless the potential management difficulties are essentially insolvable. In re Motor Vehicle Air Pollution Control Equip., 52 F.R.D. 398, 404 (C.D. Cal. 1970); see also City of Phila. v. Am. Oil Co., 53 F.R.D. 45, 72-73 (D. N.J. 1971) (denying certification of class consisting of six million retail consumers on management grounds where distribution of any award would be “extremely difficult or almost impossible,” even though its decision would leave many consumers without any remedy).

(33) Although Plaintiffs must establish both the predominance and superiority requirements, these criteria are also intertwined, and the manageability issue is relevant to both. Jackson v. Motel 6 Multi-purpose, Inc., 130 F.3d 999, 1006 n.12 (11th Cir. 1997); Katz, 496 F.2d at 762. Once predominance is determined, the superiority and manageability issues “fall into their logical place.” In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1044 (N.D. Miss. 1993); see In re Potash Antitrust Litig., 159 F.R.D. at 699-700 (holding that a showing that common issues predominated also established superiority and a presumption against dismissal for management reasons).

If predominance is met, courts generally find that the class action is superior and will grant certification, even if the case presents difficulties in management, unless the problems are insurmountable. Id.; see In re Catfish Antitrust Litig., 826 F. Supp. at 1044-45; Coleman, 141 F.R.D. at 529; Partain, 59 F.R.D. at 60. The more individual issues that predominate, the less superior and the more manageable the class action. Castano, 84 F.3d at 745 n.19; see Andrews v. Am. Tel. & Tel. Co., 95 F.3d 1014, 1023-25 (11th Cir. 1996) (reversing class certification where predominance of individual issues in classes made the case unmanageable); Newberg, supra § 4:32 at 283 (given the close relationship between the predominance and superiority issues, a court is most likely not to find that superiority is met when common issues do not predominate because of the management difficulties presented by individual questions). When individual issues predominate over common issues, a class action is neither fair nor efficient, and regardless of the impracticability of individual litigation, the certification must fail. Jackson, 130 F.3d at 1006 n.12 (noting that when individual issues predominate, the class action is singularly inefficient and unjust).

(34) The court’s discretion is paramount when it determines whether a class action is manageable. See In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d at 141 (indicating that the certification issue is peculiarly within the discretion of the trial court as management is “always a matter of justifiable and serious concern for the trial court”) (internal quotation marks and citation omitted); Coleman, 141 F.R.D. at 529 (holding that discretion to determine superiority issue is paramount). There is a whole range of practical problems that may render the class action inappropriate in any given case. Eisen, 417 U.S. at 164. Several factors include class size, whether notice can reasonably be effected, and the overwhelming presence of individual issues. Partain, 59 F.R.D. at 61; Wright, supra § 1780 at 574-85. Although the dismissal of a class action because of management difficulties is generally disfavored, In re Potash Antitrust Litig., 159 F.R.D. at 700, dismissal is warranted where individual issues predominate to make the class action unmanageable, even if no alternative remedy exists. Amchem Prods., Inc., 521 U.S. at 615.

The District Court Decision

(35) With these principles in mind, we conclude that the district court properly applied the law to its analysis of the Rule 1-023(B)(3) requirements. The court found that Plaintiffs failed to carry their burden that common issues predominate. It found there were crucial issues as to liability that would require individualized determinations, including what oral or written disclosures were made, the date when members learned or were put on notice of the posting order change, a determination of any individual adjustments to the posting order by Norwest’s staff, and the fact that some members prefer the high-low posting order. The court concluded that these factors, together with the difficulties in determining which members were subject to counterclaims, presented management difficulties that were “almost or totally insurmountable.”

(36) Although the district court identified some of the crucial liability issues that would require individual determinations, it did not identify Plaintiffs’ required proof or how the individual issues related to that proof. While we do not find the district court’s omissions are fatal in this case, we nevertheless remind the district courts that given the highly deferential standard under which we review class certification, and the inherent complexities of the issue, the court should be as specific as possible in its findings of fact and conclusions of law. State v. Ferguson, 111 N.M. 191, 193, 803 P.2d 676, 678 (Ct. App. 1990). Although failure to be specific is not necessarily reversible error, it is preferable for the court to identify the issues and “place on record the circumstances and factors that were crucial to [its] determination. . . . so that counsel and the reviewing court will know and be in a position to evaluate the soundness of [its] decision.” Id. Although the district court identified the legal standards it applied and provided the general reasons for its decision, it would have been helpful to identify at least the essential elements of Plaintiffs’ claims and facts it relied on in reaching the decision. Despite these shortcomings, however, we find the record is sufficient for our purposes.

Plaintiffs’ Legal Claims

(37) Plaintiffs allege that Norwest knowingly deceived and defrauded Plaintiffs

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All breaches of the duty of good faith and fair dealing arise under NMSA 1978, Section 57-12-2(D) (1999): 

Any false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale . . . or services . . . by a person in the regular course of his trade or commerce, which may, tends to or does deceive or mislead any person and includes [but is not limited to]:

. . .

(14) using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive;

(15) stating that a transaction involves rights, remedies or obligations that it does not involve;

(16) stating that services . . . are needed if they are not needed; or

(17) failure to deliver the quality or quantity of goods or services contracted for.

and Section 57-12-2(E):

[A]ny act or practice in connection with the sale . . . of any . . . services . . . or in the extension of credit or in the collection of debts which to a person’s detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

2 The requisite proof for materiality is unclear under the current law. For purposes of this opinion, we assume there is a presumption that any omissions were material.
individual preferences varied between members. Norwest presented evidence that written disclosures were made at various times: effective August 1997, Norwest-NM published notice in its deposit agreement that it could “pay items presented against your account in the order of highest dollar amount to lowest dollar amount,” and, on October 21, 1998, the agreement notified customers that “[t]he Bank may pay Items presented against your account in any order it chooses, including highest dollar amount to lowest dollar amount.” Given that the extent of any customer’s knowledge, experience, and capabilities inevitably vary among customers, and the personal nature of their relationship with a bank, it was reasonable for the district court to conclude that oral disclosures were sometimes made to customers. or even that customers discovered the policy on their own initiative. In fact, the evidence established that the class representatives became aware of the high-low posting order at different times and under different circumstances. There was also evidence that individual preferences varied; one Plaintiff preferred check number sequence, another preferred order of receipt, and a third preferred any method of retrieval, and a third preferred any method that caused the least number of checks to bounce.

(42) There is other evidence in the record supporting the district court’s decision that the case would require a myriad of individualized determinations. Meiboom v. Watson, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (stating trial court’s decision may be affirmed on any ground that is not unfair to appellant when it is supported by substantial evidence). First, there was evidence that the high-low sequence does not always result in more fees than other methods. Depending on any combination of factors, including check amounts, account balances, ordering method employed, and, as the district court correctly pointed out, the bank officer’s discretion, customers might expect to pay the same or more fees under the check number sequence or low-high sequence methods as they would under the high-low posting order. A former Norwest-NM bank officer testified by affidavit that he compiled and analyzed some of the named Plaintiffs’ account statements, but: I perceive no pattern in the fees incurred by the Plaintiffs versus the fees they might have paid under any other posting method which permits reliable generalization with respect to whether and to what extent proposed unnamed class members, individually or collectively, paid more fees than they might have paid had Norwest-NM employed alternative posting methods.

He opined that general conclusions about all accounts were impossible primarily because bank officers have substantial discretion to pay or return an item notwithstanding insufficient funds and there are several individual considerations, unique to each account, that are factored into a decision to charge or waive a fee. There was also evidence from an NSI employee that while Norwest-NM maintained computerized records dating back to May 17, 1997, it has no means to electronically access the records from this point back to September 1, 1996. These records, she testified, are on microfiche and a manual review of some 150,000-200,000 records would be required. In addition, she attested to the fact that the current computer system was not subject to manipulation to determine whether a customer paid more fees under a high-low policy than under any alternative methods on a day-by-day basis, over the course of dealings in any account. She further opined that it might be possible to develop a program to compile a list of all members who had two or more OD/NSF events, but that a manual review of each account and comparison of alternative posting methods would still be required to establish whether those events were the result of high-low posting. According to her, this process still would not determine whether a customer actually paid two or more fees. Although, in her opinion, this information may be compiled from audit reports, each account would have to be manually reviewed for several months after each OD/NSF event to determine whether any fees were refunded, and each event would have to be individually analyzed to determine whether more fees were paid under the high-low method than under other methods. This still would not account for whether the bank officer might employ the same discretion if another posting method were used.

(43) Even if Norwest’s “course of conduct” might be the type of generalized evidence necessary to establish the duty elements as Plaintiffs contend, we conclude that there was sufficient evidence to determine that significant and complex individual issues of liability dominate this class action. Griffin v. Guadalupe Med. Ctr., Inc., 1997-NMCA-012, ¶ 22, 123 N.M. 60, 933 P.2d 859 (“When the trial court’s findings of fact are supported by substantial evidence, . . . refusal to make contrary findings is not error.”).

Superiority

(44) Plaintiffs’ failure to establish that common issues predominate and the difficulty with identifying the class are sufficient to deny certification, without addressing superiority. See Amchem Prods., Inc., 521 U.S. at 615. For the sake of completeness, however, we address the issue and find that the district court was reasonable to conclude that a class action was not a superior method of adjudication.

(45) Plaintiffs emphasize that their claims are too small to justify the cost of individual actions so there is no other practical alternative to litigate their claims. We disagree with the premise that there is no other practical alternative. It is entirely feasible for Plaintiffs to bring their claims individually under the UPA. Their is the very type of claim the legislature envisioned when it enacted the UPA. See Jones v. Gen. Motors Corp., 1998-NMCA-020, ¶ 25, 124 N.M. 606, 953 P.2d 1104 (observing that the UPA encourages consumers to initiate, and attorneys to handle, claims where the amounts recoverable are small); see also Ashblock, 107 N.M. at 102, 753 P.2d at 348 (interpreting UPA to ensure its broad application to innocent consumers is protected). Significantly, Plaintiffs’ argument concerning the prohibitive cost of bringing individual suits is belied by the fact that the UPA awards attorney fees and costs to a successful litigant. See § 57-12-10(C). Plaintiffs may also recover the greater of actual damages or statutory damages ($100), even if “[p]roof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person” cannot be established. § 57-12-10(A),(B); Jones,1998-NMCA-020, ¶ 23. Where plaintiffs establish that the deceptive or unconscionable trade practice was willful, they may collect treble actual or statutory damages, whichever is greater. § 57-12-10(B). Individuals who sue under the UPA, as opposed to members who sue as a class, are entitled to collect more than their actual damage. § 57-12-10(E)(limiting the recovery of statutory and treble damages in class action to named plaintiffs). Conversely, any relief realized by class members is limited to actual damages; they are barred from collecting statutory or treble damages. Id. Hence, the UPA not only provides a remedy for Plaintiffs, it also appears to be less fair
to those members to pursue their remedy as a class action.

There are other significant benefits to individual actions under the UPA. First, the issues of whether a bank has a duty to disclose its posting order or whether an omission is unlawful appear to be questions that are common to the class. If Plaintiffs are successful in their individual claims, these issues might be sufficiently established to collaterally estop Norwest from raising the same issue in subsequent litigations. See Rex, Inc. v. Manufactured Housing Comm., 2003-NMCA-134, ¶ 5, 134 N.M. 533, 80 P.3d 470; Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor, 115 N.M. 159, 164, 848 P.2d 1086, 1091 (Ct. App. 1993) (“New Mexico recognizes both defensive and offensive collateral estoppel.”). The benefit is two-fold: first it would prevent the potential waste of judicial resources and costs adjudicating uncertain, novel issues in a class action; second, any subsequent litigations would be far less complicated and less costly. Damage issues are inherently less complex and costly on an individual basis than as a class action that requires compilation and analysis of hundreds of thousands of individual accounts. Plaintiffs will often have bank records, and discovering and analyzing their account history will be far less arduous a task than compiling and analyzing the multiple accounts in this case. In light of the foregoing, we find Plaintiffs’ judicial access argument is without merit.

We also disagree with Plaintiffs to the extent they would require the district court to make specific findings regarding the alternative methods of litigating Plaintiffs’ claims and why such alternatives would be superior. Foremost, it is Plaintiffs’ burden to establish that the class action is sufficiently effective to justify an expenditure of judicial time and resources and the risk of prejudice to class members who are not before the court. Second, the district court did consider individual actions as an alternative and concluded that an individual action was the only fair and efficient remedy for Plaintiffs. While we encourage the district court to be as specific as possible when it makes findings and conclusions, especially in a class action, the district court is not required to state the reasons why an alternative is superior, particularly in this case where denial of certification is proper in light of Plaintiffs’ failure to satisfy the predominance test.

**CONCLUSION**

In sum, we affirm the district court’s decision to deny class certification in this proceeding. The district court applied the correct legal standards, and its decision is supported by substantial evidence in accordance with those standards.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

CYNTHIA A. FRY, Judge
From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-135


No. 24,211 (filed: July 26, 2004)

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY

GARY L. CLINGMAN, District Judge

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OPINION

CYNTHIA A. FRY, Judge

{1} This oil and gas case arises out of a model form joint operating agreement (JOA) to explore and develop minerals in Lea County, New Mexico, between the co-lessees of the mineral estate. “Form 610 Model Operating Agreement has been in use in the oil and gas industry in one form or another since 1956.” John R. Reeves & J. Matthew Thompson, The Development of the Model Form Operating Agreement: An Interpretive Accounting, 54 Okla. L. Rev. 211, 213 (2001). As this Court observed in Nearburg v. Yates Petroleum Corp., 1997-NMCA-069, ¶ 2, 123 N.M. 526, 943 P.2d 560, “[o]perating agreements are commonly used in the oil and gas industry in New Mexico and other producing states to set forth the arrangement between interest owners as to exploration and development of jointly owned interests.” Two clauses of the JOA are particularly significant in this case: (1) the clause requiring that any party to the agreement who wishes to propose a subsequent drilling operation give notice to the other parties, who then can decide whether they wish to participate in the operation; and (2) the clause exculpating the operator of the drilling operation from losses sustained by any other party to the JOA unless the losses result from the operator’s gross negligence or willful misconduct in the drilling operation.

{2} In this case, one of the parties to the JOA, Plaintiff Matrix Production Company (Matrix) sued another party, the drilling operator, Ricks Exploration, Inc. (Ricks), and other co-lessees of the mineral estate, alleging that it did not receive the required notice of the drilling of a well called “Burrus No. 3.” Matrix claimed it was entitled either to an accounting of its share of the profits from the well’s production, or for damages or specific performance for breach of contract. The trial court granted summary judgment in Defendants’ favor. Because we agree with the trial court that no genuine issues of material fact exist as to whether Matrix received notice, or whether the exculpatory clause applied, we affirm.

BACKGROUND

{3} The following facts are undisputed. On December 16, 1999, Matrix and Defendants entered into a JOA to explore and develop minerals in an area of Lea County, New Mexico, known as the “Contract Area.” The JOA stated that an initial well would be drilled on or before March 31, 2000, at a specified location. The JOA also described the required process for drilling wells within the Contract Area subsequent to the drilling of the initial well. It provided that if a party to the agreement elected not to participate in a proposed operation, that party would be subject to what the JOA described as a non-consent penalty. This penalty prevents a non-participating party from recovering proceeds from a well until the proceeds from the sale of the party’s share in the mineral estate equal 400% of the portion of the costs and expenses of the well that would have been chargeable to that party had it participated in the operation.

{4} On May 4, 2001, Defendant Ricks, the operator, gave Matrix written notice of its intention to drill a third well, Burrus No. 3, at a specified location. The notice gave Matrix the option of either participating in the operation or declining to participate and being subject to the non-consent penalty. Matrix declined to participate in the proposed operation.

{5} In January 2002, after the well had been completed, a surveyor staking new wells determined that the Burrus No. 3 well was not at the exact location where the operator had proposed to drill and which had been stated in the notice. The well had been drilled approximately 500 feet from its intended location; however, Matrix produced no evidence that Defendants knew of the mistake before that time.
Matrix did introduce the testimony of the president of one of the defendants who said that he had driven past the location at some point during July 2001, and that the well appeared not to be in precisely the right place. However, this co-lessee further testified that he notified Ricks, and that after checking with field personnel, Ricks confirmed that the well was in the right place. Indeed, Defendants produced evidence that in July 2001, Ricks’ production foreman went to the site and read the tag and confirmed the location with a company geologist. There was also evidence that the contractor hired to build the location for the well also checked the evidence that the contractor hired to build the well was intentional or resulted from willful misconduct. The trial court determined the JOA’s exculpatory clause was applicable and no liability resulted from the mistake. The trial court also denied Matrix’s motion to file a second amended complaint, stating that Matrix had not requested a hearing on the motion and had not brought its motion to the court’s attention until ten days before trial. This appeal followed.

**DISCUSSION**

{8} Matrix raises four main issues on appeal: (1) that it is entitled to equitable relief because it was not given proper notice of the Burrus No. 3 well; (2) alternatively, that it is entitled to contract damages because Defendants breached the JOA and were not shielded by the exculpatory clause in the JOA; (3) that it was entitled to amend its complaint; and (4) that it is entitled to remand for consideration of the issues in the amended complaint.

{9} “Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. The issue on appeal is whether [the defendant] was entitled to [judgment] . . . as a matter of law. We review these legal questions de novo.” S. Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 (citations omitted). Summary judgment is proper where there is no evidence raising a reasonable doubt that a genuine issue of material fact exists. Cates v. Regents of the N.M. Inst. of Mining & Tech., 1998-NMSC-002, ¶ 9, 124 N.M. 633, 954 P.2d 65.

**Matrix’s Claim for Equitable Accounting**

{10} Matrix argued below, and now on appeal, that it is entitled in equity to an accounting of its interest in the mineral estate because it never received notice of the drilling of the Burrus No. 3 well because the well was actually drilled approximately 500 feet from the intended location of the well described in the notice. Matrix contends that without notice, it had no opportunity to participate in the drilling operation and cannot be subject to the penalty provision of the JOA. See Nearburg, 1997-NMCA-069, ¶ 17 (stating that the penalty provision is a “covenant triggered by a condition precedent,” namely, “the election not to participate in the proposed operation”). Defendants respond that the notice complied with the JOA and gave Matrix notice of Ricks’ intent to drill.

{11} The JOA describes the procedure for notifying parties to the agreement of subsequent operations as follows:

> Should any party hereto desire to drill any well on the Contract Area other than the well provided for in Article VI.A., or to rework, deepen or plug back a dry hole drilled at the joint expense of all parties or a well jointly owned by all the parties and not then producing in paying quantities, the party desiring to drill, rework, deepen or plug back such a well shall give the other parties written notice of the proposed operation, specifying the work to be performed, the location, proposed depth, objective formation and the estimated cost of the operation.

There was no dispute about this notice requirement in the JOA. There was also no dispute that Ricks sent a notice to the parties to the JOA, proposing to drill a well described as Burrus No. 3, no dispute that Matrix declined to participate in the operation, and no dispute that the well was not drilled in the precise location intended as described in the notice. Matrix contends the discrepancy invalidates the notice while Defendants contend the discrepancy is not one of notice, but whether the drilling operation itself was properly conducted in compliance with the notice that was given.

{12} Matrix refers to several cases from other jurisdictions in support of its argument that the notice was deficient. Matrix does not specifically analyze how these cases relate to the current facts before us, and we are not persuaded by the holdings of these cases because they are grounded in very different facts. For example, in Stable Energy, L.P. v. Kachina Oil & Gas, Inc., 52 S.W.3d 327, 330 (Tex. Ct. App. 2001), the operator notified the working interest owners that a “well had ceased production and that the lease would terminate if production did not resume” and proposed a cleaning operation. However, that operator never conducted the cleaning operation, and a different operator began its own cleaning operation without providing separate notice. Id. At issue in Stable Energy, L.P. was whether the work of the second operator was the same as that proposed by the first operator, for the purposes of determining
the rights of a party who had consented to the initial operation. Id. at 330-33. The court concluded that notice of the first operation did not constitute notice of the second because, as the court determined, the operations were different. While discussions were still in progress regarding the initially proposed operation, another operator began a separate, more expensive cleaning operation. Id. at 332-33. In this case, in contrast, one operator notified all parties of one operation.

{13} The other cases cited by Matrix are similarly unpersuasive. In Dorsett v. Valence Operating Co., 111 S.W.3d 224, 230 (Tex. Ct. App. 2003), at issue was the timeliness of a notice when an operator began operations before providing the required thirty days notice to non-operators. In AcadiEnergy, Inc. v. McCord Exploration Co., 596 So. 2d 1334, 1342 (La. Ct. App. 1992), one of the parties to a JOA was not provided with information it requested in order to decide whether to participate in a drilling operation. In Hamilton v. Texas Oil & Gas Corp., 648 S.W.2d 316, 323-34 (Tex. Ct. App. 1982), the operator intentionally changed the drilling location without notifying the other parties to the operating agreement, conduct which the jury found constituted gross negligence in the operation of the well. In our view, Hamilton adds support to Defendants’ position that any error in this case was not in the notice provided but in performing the drilling operation. As noted above, the Hamilton jury found that an intentional change in the location of a well demonstrated gross negligence in the operation of the well. Finally, in El Paso Production Co. v. Valence Operating Co., 112 S.W.3d 616, 623 (Tex. Ct. App. 2003), it was undisputed that the operator did not give written notice of a drilling operation.

{14} The undisputed facts in this case demonstrate that Ricks, the operator, gave Matrix notice of its intent to drill the Burrus No. 3 well at an intended location, triggering the requirement that Matrix either choose or decline to participate in the operation. As we wrote in Nearburg, when Matrix declined to participate, it agreed “to temporarily relinquish the specified amount of its interest in production in exchange for the consenting party bearing the risk of the operation.” Nearburg, 1997-NMCA-069, ¶ 17. We therefore agree with the trial court’s conclusion that there was no dispute about the material fact that Ricks gave Matrix notice of the drilling operation, as required by the JOA, and that any subsequent error that occurred was in performing the drilling operation itself. Accordingly, because Ricks provided Matrix with the required notice of the drilling operation, and because Matrix declined to participate in the drilling operation, we hold that Matrix temporarily relinquished its interest in the mineral estate in accordance with the terms of the JOA. The trial court properly granted summary judgment on Matrix’s claim for an accounting.

Matrix’s Alternative Claims for Breach of Contract and for Non-enforcement of the Exculpatory Clause

{15} Matrix alternatively argues that by failing to provide notice of the actual location of the Burrus No. 3 well, Ricks breached the notice requirement in the JOA and damaged Matrix by depleting the mineral estate. Because we have concluded that Ricks properly gave notice to Matrix, this argument fails.

{16} Matrix then turns its attention to the JOA’s exculpatory clause. It asserts first that the clause does not apply to actions for breach of contract, but only to actions in tort. However, because the trial court correctly ruled that there was no breach of the JOA’s notice provision, this argument is moot. Matrix next appears to argue that, even if the error in locating the well occurred during the drilling operation, the clause does not shield Ricks from liability for such error because the clause protects only the operator, and Ricks was not acting as the operator. The exculpatory clause reads as follows:

Ricks Exploration, Inc. shall be the Operator of the Contract Area, and shall conduct and direct and have full control of all operations on the Contract Area as permitted and required by, and within the limits of this agreement. It shall conduct all such operations in a good and workmanlike manner, but it shall have no liability as Operator to the other parties for losses sustained or liabilities incurred, except such as may result from gross negligence or willful misconduct.

{17} As we understand them, Matrix’s arguments are as follows: the exculpatory clause only protects operators; the JOA states that “any party” to the JOA (including a non-operator) who wants to drill a well must give written notice to the other parties and that, consequently, giving notice (or failing to give notice) is not a function of the operator; therefore, when Ricks failed to give notice of its intent to drill, it was not acting as the operator and is not shielded from liability by the exculpatory clause. In addition, relying on Commercial Warehouse Co. v. Hyder Brothers, Inc., 75 N.M. 792, 798, 411 P.2d 978, 984 (1965), Matrix contends that exculpatory clauses are disfavored in New Mexico and are to be strictly construed.

{18} We note that although the parties disagree about the scope of protection afforded by the exculpatory clause, neither party argues that it is ambiguous. Accordingly, this is a question of law that we review de novo. See Nearburg, 1997-NMCA-069, ¶ 7 (“Interpretation of an unambiguous contract is a question of law which we review de novo.”). Both parties appear to agree that the clause exculpates an operator from liability for any losses that occur during operations except those resulting from gross negligence or willful misconduct, and the plain language of the clause supports such an interpretation. See Stine v. Marathon Oil Co., 976 F.2d 254, 260 (5th Cir. 1992) (stating an identical exculpatory clause is clear and unambiguous). We think Matrix’s argument that Ricks was not acting as an operator depends on a strained reading of the JOA. As we stated in our discussion of the notice issue, the error in this case occurred not in the notice, but in the course of the drilling operation when Defendant Ricks was acting as an operator. The error occurred after notice had been given and after Matrix had declined to participate in the drilling operation. The question thus becomes whether Ricks’ error in the location of the well constituted gross negligence or willful misconduct.

{19} We agree with the trial court that “[t]he facts are undisputed that the discrepancy in the location of the Burrus #3 well resulted from an honest, unintended, non-negligent mistake during operations that does not rise to the level of gross negligence or willful misconduct.” Matrix presented no evidence supporting an alternative conclusion. We therefore hold the trial court correctly concluded that Ricks is shielded by the exculpatory clause from liability for any losses caused during operations.

Motion to Amend

{20} Matrix argues that the trial court should have granted it leave to amend its complaint to include claims for gross negligence and conversion. As Defendants point out the court did not, strictly speaking, deny this motion, but refused to consider it because Matrix failed to file a request for
a hearing under LR5-701 NMRA 2004 and did not draw the trial court’s attention to the matter until the hearing on the motion to dismiss, ten days before the case was set for trial. However, as Defendants acknowledge, the effect of the trial court’s ruling was to deny the motion to amend.

{21} Under Rule 1-015(A) NMRA 2004, once an answer has been filed, the decision to allow an amended complaint rests solely within the sound discretion of the trial court. Schmitz v. Smentowski 109 N.M. 386, 390, 785 P.2d 726, 730 (1990); Vernon Co. v. Reed, 78 N.M. 554, 555, 434 P.2d 376, 377 (1967). Although the Rule expressly states that amendments should be liberally allowed, the “den[ial of] permission to amend is subject to review only for a clear abuse of discretion.” Id.; Schmitz, 109 N.M. at 390, 785 P.2d at 730. “[A]n abuse of discretion is said to occur when the court exceeds the bounds of reason, all the circumstances before it being considered.” Clancy v. Gooding, 98 N.M. 252, 255, 647 P.2d 885, 888 (Ct. App. 1982) (internal quotation marks and citation omitted).

{22} The trial court denied Matrix’s motion to file a second amended complaint on the ground that Matrix had not requested a hearing on its motion and had brought the motion before the trial court only ten days before trial on March 21, 2003. Matrix argues that its failure to request a hearing in a timely manner does not justify the court’s decision and that, under Crumpacker v. DeNaples, 1998-NMCA-169, ¶ 17, 126 N.M. 288, 968 P.2d 799, in order to prevail in opposing the motion, Defendants were required to show that they would have been prejudiced by the amendment. As Defendants point out, however, they had argued in their opposition to Matrix’s motion that they would be prejudiced by the motion to amend because discovery was complete and depositions would have to be retaken.

{23} In addition, because Matrix did not alert the trial court’s attention to the motion to amend until ten days before the case was set to go to trial, the trial court’s decision to deny the motion to amend was reasonable, and we find no clear abuse of discretion under these facts. See Slide-A-Ride of Las Cruces, Inc. v. Citizens Bank of Las Cruces, 105 N.M. 433, 436-37, 733 P.2d 1316, 1320-21 (1987) (finding no abuse of discretion in trial court’s denial of second motion to amend under facts of that case when two years had elapsed from filing of complaint, discovery was almost complete, and case had been set for trial three times). {24} In light of our holdings that Ricks complied with the notice requirement of the JOA, that the exculpatory clause shielded Ricks from liability, and that the trial court did not clearly abuse its discretion in denying Matrix’s motion to amend, we do not address Matrix’s request that we remand its conversion and gross negligence claims.

CONCLUSION

{25} For the foregoing reasons, we hold that the trial court correctly ruled that no issues of material fact existed in connection with Matrix’s claims for an accounting and breach of the JOA and that Defendants were entitled to judgment as a matter of law. Accordingly, we affirm the grant of summary judgment.

{26} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:
IRA ROBINSON, Judge
MICHAEL E. VIGIL, Judge
OPINION

MICHAEL D. BUSTAMANTE, JUDGE

{1} Plaintiff appeals the order of the district court granting summary judgment in favor of Defendant. For the reasons that follow, we reverse.

BACKGROUND

{2} Plaintiff in this wrongful death action is Frances Solorzano, personal representative of Nelda Sue Garrett’s estate (Garrett) and guardian of Garrett’s minor children. Garrett was Defendant Frankie Bristow’s daughter. Plaintiff’s claims arise from a sad incident where Garrett either fell or jumped from a van being driven by Defendant.

{3} Defendant was the only witness to the events leading to Garrett’s death. The facts in the record come from Defendant’s depositions and statements. Defendant gave Garrett a ride to Las Cruces, New Mexico from Alamogordo, New Mexico for a dentist appointment where Garrett had several teeth extracted. Garrett was “normal” on the trip to Las Cruces. After the dental procedure, Garrett was confused and disoriented and had a blank look on her face. Garrett did not respond to the receptionist about a follow-up appointment. Garrett was able to get into the van by herself. Part of the time, Garrett did not recognize Defendant. As Defendant drove back to Alamogordo, she became concerned that her daughter “might have had too much medication” or “was having a reaction to the medication.” Because of her concerns, Defendant decided to stop at a park—the Aguirre Springs area located about two miles off the road—to give Garrett a chance “to walk off whatever it was that the dentist had given her.” They stopped and walked around for about half an hour. While they were in the park, Garrett was “logical” or “coherent” twice, but, by the time they started back to the van, Garrett reverted to “coherent” twice, but, by the time they reached the bottom of the path, it appeared that she did not recognize the van. Defendant recalled that when she unlocked the door and held it open, Garrett “didn’t know who [Defendant was].” After Garrett got into the van, Defendant had to fasten her seat belt for her. It appeared to Defendant that Garrett did not know what she was doing.

{4} Defendant then got back on the highway heading toward Alamogordo. She set the cruise control for 60 miles per hour and left it there until Garrett fell out of the van. Garrett was initially quiet and unresponsive to conversation. At some unspecified time after getting underway, Garrett made a loud “growling” sound and at the same time made a wide sweeping motion with her right hand. The sound and motion startled Defendant. Defendant asked “What’s the matter?” but Garrett did not respond. Within a short time after the sound and motion, Garrett unfastened her seat belt and started toward the back of the van and then sat back down. After sitting back down, Garrett opened the door and leaned out while sitting in the seat. Defendant started yelling, but Garrett did not respond. The van was too wide to allow Defendant to reach Garrett.

{5} It is unclear from the record what Defendant said or how long this first door-opening lasted. Defendant testified that the door did not shut after Garrett sat back down. After sitting back down, Garrett turned to the door again and this time stood on the step in the van and started “wiggling back and forth trying to get to the back of the door where she would fall out.” Garrett kept bumping against the door until she fell out. Defendant thought throughout that Garrett was getting sick and was trying to vomit outside. Defendant never applied the brakes or otherwise tried to slow the van. When asked why she did not slow down, Defendant stated that she was using the force of the wind to hold the door shut and was concerned that if she hit the brake, the door would open. The road at this point was straight and there was no other traffic.

{6} Defendant moved for summary judgment, arguing that Garrett had committed suicide and that she had no duty to prevent a suicide. Defendant presented Garrett’s death certificate and the report of the Office of the Medical Investigator as evidence of the suicide. The trial court granted summary judgment finding:

1. There is no genuine issue as to whether Nelda Sue Garrett committed suicide when she stepped out of the van being driven by Defendant.
2. There is no duty in law to prevent a suicide outside of a limited number of exceptions that do not apply to this case.

STANDARD OF REVIEW

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. We consider the facts in the light most favorable to support a trial on the issues because the purpose of summary judgment is not to preclude a trial on the merits if a triable issue of fact exists. Madsen v. Scott, 1999-NMSC-042, ¶ 7, 128 N.M. 255, 992 P.2d 268 (internal quotation marks and citation omitted). “Summary judgment is not appropriate when the facts before the court are insufficiently developed or where further factual resolution is essential for determination of the central legal issues involved.” Brown v. Taylor, 120 N.M. 302, 307, 901 P.2d 720, 725 (1995) (internal quotation marks and citation omitted). We review a grant of summary judgment de novo. Self, 1998-NMSC-046, ¶ 6.

DISCUSSION

This case raises several issues: (1) What is the legal standard for determining when a death is a suicide in New Mexico? (2) Is there a question of material fact as to whether Garrett committed suicide? (3) Did Defendant owe a duty of reasonable care to her passenger, under these circumstances? (4) And, if so, are there genuine issues of fact as to whether she breached that duty?

I. Suicide

The district court determined there was no question of fact that Garrett committed suicide. It is not possible to tell from the record what definition or standard the court applied. Defendant’s briefing in this Court and below does not attempt to devise a definition for suicide. Rather, Defendant simply assumes that Garrett’s death constituted suicide. If the district court adopted Defendant’s approach, it erred as we shall explain. In any event, we hold that there are questions of fact precluding summary judgment on the issue.

New Mexico has not had occasion in the civil personal injury arena to articulate a standard for determining when a death may be labeled a suicide. We have no statutory definition, and the cases that do mention suicide come from different legal settings. For example, in the workers’ compensation setting, there is a presumption against suicide. Suicide is an affirmative defense which defendants must prove. Neel v. State Distribus., Inc., 105 N.M. 359, 361, 732 P.2d 1382, 1384 (Ct. App. 1986). “This presumption, though not conclusive, is sufficient unless rebutted by substantial evidence, to support an award for compensation.” Medina v. N.M. Consol. Mining Co., 51 N.M. 493, 496, 188 P.2d 343, 345 (1947) (suggesting the kind of evidence necessary to rebut the presumption, including “domestic trouble” and “signs of worry”). In the life insurance contract setting, the language of the policy controls the definition of suicide. Typically, life insurance policies include clauses which specify that if a death is the result of a suicide, the insurer is not liable for the face amount of the policy. Estate of Galloway v. Guar. Income Life Ins. Co., 104 N.M. 627, 627, 725 P.2d 827, 827 (1986). At issue in Estate of Galloway was a life insurance policy that excluded liability “[i]f the insured commits suicide, while sane or insane.” Id. Affirming summary judgment in favor of the insurer, the Court noted the history behind this verbiage.

Many early cases have held that self-destruction while insane was not suicide within a suicide exclusion clause since it was deemed that there could be no suicide unless the person committing the self-destructive act could form a conscious intention to kill himself and carry out that act, realizing its moral and physical consequences. As a reaction to these holdings, insurers began to add to suicide exclusion clauses the phrase “sane or insane.” Id. at 628, 725 P.2d at 828. The workers’ compensation cases demonstrate that intent is taken into account in distinguishing between accident and suicide, while the insurance policy cases reveal that insurers have sought to remove knowing intent from the concept of suicide.

The case before us, of course, is not a workers’ compensation case, and does not involve an insurance policy definition. These opinions do, however, indicate that absent contractual provisions to the contrary, the deceased person’s state of mind is relevant in deciding whether a death is properly classified as a suicide. Other authorities confirm this view. For example, dictionary definitions require intention on the part of the actor, and awareness of the likely consequences of one’s voluntary acts. Black’s Law Dictionary defines suicide as “[s]elf-destruction; the deliberate termination of one’s own life.” Black’s Law Dictionary 1434 (6th ed. 1990). Webster’s Dictionary elaborates on the definition of suicide: “the deliberate and intentional destruction of his own life by a person of years of discretion and of sound mind.” Webster’s Unabridged International Dictionary 2286 (3rd ed. 1993).


The definitions in these secondary authorities comport with cases which have dealt with the issue. Wallin v. Ins. Co. of N. Am., 596 S.W.2d 716, 718 (Ark. Ct. App. 1980) (reversing a jury verdict in favor of an insurer because of the admission of improper evidence and noting that “[s]uicide is the intentional taking of one’s own life”); Ray v. Federated Guar. Life Ins. Co., 381 So. 2d 847, 848 (L.a. Ct. App. 1980) (holding that death caused by drowning in a bathtub was “accidental” within the meaning of a policy because the deceased was insane at the time of his death and did not “foresee the consequences of his actions”). In turn, these cases reflect the common law rule that to constitute suicide, “a person who takes his own life ‘must be of years of discretion, and in his senses.’” Wackwitz v. Roy, 418 S.E.2d 861, 864-65 (Va. 1992) (quoting 5 William Blackstone, Commentaries *189); see also State v. Willis, 121 S.E.2d 854, 857 (N.C. 1961) (holding that an “insane person” cannot commit the common law crime of attempted suicide); Bisenuis v. Karns, 165 N.W.2d 377, 382 (Wis. 1969) (defining suicide as the “voluntary and intentional taking of one’s own life by a sane person”).

Distilling these strands, we define suicide as a voluntary, deliberate, and intentional self-destruction by someone of sound mind. While we do not believe it is necessary to recognize a presumption against suicide, we do believe that it is best treated as an affirmative defense in cases such as this, placing the burden of proof on the defendant to prove the fact of suicide. Contrary to Plaintiff’s argument, Defendant adequately pled and briefed suicide as an affirmative defense.

On motion for summary judgment,
Defendant carried the burden of making a prima facie showing as to each element of the definition. That is, Defendant was required to show there was no question of material fact that Garrett acted voluntarily, deliberately, and intentionally while of sound mind. This she did not do. There was simply no evidence presented which can be deemed to conclusively show that Garrett acted voluntarily, deliberately, and intentionally or that she was even in her right mind. Defendant testified she never heard her daughter threaten or contemplate suicide. Defendant’s description of the events of the day cannot be seen to resolve the factual questions inherent in the definition of suicide. Quite the opposite, the record raises questions of fact concerning the state of Garrett’s mind after the tooth extractions and the extent of her ability to act voluntarily, deliberately, and intentionally, appreciating the potential consequences of her actions.

To make a prima facie case on these questions, Defendant had the burden of at least presenting evidence explaining what caused Garrett’s behavior and the likely extent of confusion. Defendant did not do so. Defendant essentially asks that we determine Garrett’s actions constituted suicide because she fell from the vehicle without any intervention from anyone else. Just as we will not impose a presumption against suicide, we will not indulge one in favor of suicide as an explanation for Garrett’s behavior. Garrett’s state of mind, motivation, and intent are still subject to proof.

We, of course, acknowledge that the death certificate listed the manner of death as “suicide.” Plaintiff argues that the death certificate was not properly admissible to prove the “manner” of death (suicide) as opposed to the “cause” of death (multiple injuries). Corlett v. Smith, 107 N.M. 707, 712, 763 P.2d 1172, 1177 (Ct. App. 1988), does express skepticism as to the use of a death certificate as evidence of the manner of a death. We do not need to resolve the issue, however. Even if the certificate was properly considered by the district court, it cannot be deemed conclusive of the issue given the other evidence in the record about Garrett’s behavior. Further, the record does not reveal whether the medical investigator had the correct definition of suicide in mind when she filled in the certificate. As the person with the burden of production and proof on summary judgment, Defendant was required to demonstrate that the finding in the death certificate was based on the correct legal standard.

Without conclusive evidence of Garrett’s intention or state of mind, Defendant failed to make a prima facie case of suicide, and the ultimate fact of whether Garrett’s death was an accident or suicide is clearly in dispute. The district court erred in granting summary judgment on the ground that Garrett committed suicide.

II. Duty of Ordinary Care

On appeal, Defendant primarily argues that summary judgment was proper even if Garrett did commit suicide because Defendant owed no legal duty to her passenger to protect her from harming herself. At the district court level, however, Defendant focused on the legal effect of suicide and made no reference to the duty of ordinary care. Because the argument on appeal is different from that argued to the district court, we hesitate to respond. We choose to do so for the sake of completeness.

Defendant’s argument is twofold. First, emphasizing the singular nature of the facts, Defendant rhetorically asks “What was I to do?” Defendant’s rhetorical response is that there was nothing she could do or be expected to do; therefore, she did not have any duty to do anything. Second, Defendant asks that we adopt a rule absolving drivers of responsibility for a passenger’s actions in a vehicle. Defendant cites Stephenson v. Ledbetter, 596 N.E.2d 1369 (Ind. 1992) as her preferred approach.

In Stephenson, a drunk passenger sitting on the side rail of the bed of a pickup traveling about 40 miles per hour fell to his death. Id. at 1370. Over a dissent, the court held as a matter of law that the driver’s failure to “stop or slow the truck and compel [the deceased], a competent (if drunk) adult passenger, to sit in a safer position” did not breach the duty of reasonable care to the passenger. Id. at 1372-73.

We do not believe that Stephenson accurately represents the law in New Mexico. In this state, a negligence claim requires the existence of a duty from a plaintiff to a defendant, as well as breach of that duty which is the proximate cause and cause in fact of the plaintiff’s damages. Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d 181. Whether a duty exists is a question of law for the courts to decide. Schear v. Bd. of County Comm’rs, 101 N.M. 671, 672, 687 P.2d 728, 729 (1984). Foreseeability is a critical and essential component of New Mexico’s duty analysis because “no one is bound to guard against or take measures to avert that which he [or she] would not reasonably anticipate as likely to happen.” and because “[i]there can be no duty in relation to another person absent foreseeability.” Herrera, 2003-NMSC-018, ¶ 20 (internal quotation marks and citations omitted). In this case, we must decide as a matter of law whether the possibility of harm was foreseeable, so as to impose a duty. Clearly, Defendant knew that Garrett was impaired. When Garrett got up out of her seat and moved around in the van, Defendant was on alert that some harm could come to her passenger. Then, when Garrett opened the door, there was the possibility that she would fall out. This possibility increased as Garrett wiggled back and forth trying to get to the back of the door where she ultimately fell out. Based on these facts, we hold that harm to Garrett was foreseeable and that the general law of reasonable care thus applies.

Every person has a duty to exercise ordinary care for the safety of the person and the property of others.” UJI 13-1604 NMRA. In turn, the measure of this duty is ordinary care “in the light of all the surrounding circumstances.” UJI 13-1603 NMRA; see Hughes v. Walker, 78 N.M. 63, 65, 428 P.2d 37, 39 (1967) (applying duty of ordinary care in favor of car passenger). Whether a defendant breached her duty of care is a question of the reasonableness of her conduct. Knapp v. Fraternal Order of Eagles, 106 N.M. 11, 13, 738 P.2d 129, 131 (Ct. App. 1987). As such, it is normally a fact question. Id.

Rhetorical flourishes aside, we agree with Defendant that this presents a very strange fact pattern. We do not agree, however, that the strangeness of the situation allows us to decide the case as a matter of law. It might well be that a jury will absolve Defendant of any responsibility. But, we believe that the jury should make the decision.

Defendant relies on out-of-state cases containing statements indicating that it is unforeseeable as a matter of law that a person would jump out of a moving vehicle, see Turner v. D’Amico, 701 So. 2d 236, 238 (La. Ct. App. 1997), or that seatbelts are not intended to keep people from jumping out of a car, see DeMarco v. DeMarco, 643 A.2d 1053, 1056 (N.J. Super. Ct. Law Div. 1992), but we do not believe that these cases are consistent with New Mexico law or appropriate authority under the unique facts of this case. The fact that out-of-state cases exist in which people have unexpectedly jumped from moving vehicles suggests that such events are not unforeseeable as a matter of law. Importantly, in this case, the facts indicate a person in an apparent drug-induced, impaired...
mental state, who was acting unpredictably, including opening the door of a fast-moving car. As we indicated above, we believe that responsibility on the basis of these strange facts is for the jury to decide.

{24} The parties have raised arguments concerning the admissibility and relevance of the fact that Garrett removed her seat belt before she fell out of the vehicle. In addition, the parties argue whether Restatement (Second) of Torts §§ 323 and 324 (1965) applies as a source of Defendant’s duty. We have not addressed these issues because they are premature and not necessary to our decision. The trial court issued its summary judgment on quite narrow grounds. We have dealt with those grounds and a closely related issue. The seat belt and Restatement issues are best dealt with in the first instance by the trial court as the evidence in the case is further developed, in particular with regard to the nature and source of Garrett’s described confused mental state.

CONCLUSION

{25} Because there are genuine factual questions regarding Garrett’s death and the performance of Defendant’s duty to exercise reasonable care, we reverse summary judgment and remand to the trial court.

{26} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Judge

WE CONCUR:
LYNN PICKARD, Judge
CELIA FOY CASTILLO, Judge
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Eric Sirokin’s Legal Counseling Services is looking for a creative lawyer with 2 + years trial experience, great people skills, a love of justice and interest in the rights of workers. Send letter of interest and resume to LCS 529 Montclair SE Albuquerque, NM 87108 or sirokin@ijc.org.

Associate Attorney
Small AV rated Albuquerque law firm needs an associate attorney with a minimum of two years experience to do civil litigation. Salary depends upon experience. Please direct all resumes and inquiries to Peter Pierotti, Dines & Gross PC, 6301 Indian School Road NE, Suite 900, Albuquerque, NM 87110. Phone: 889-4050; Fax: 889-4049; E-mail: ppierotti@dineslaw.com.

Traffic Safety Resource Prosecutor
The Administrative Office of the District Attorneys is hiring a Traffic Safety Resource Prosecutor. The TSRP will be responsible for providing training throughout the State of New Mexico on prosecution of DWI cases and will assist District Attorneys offices in the prosecution of difficult DWI cases. Travel throughout the state is required. Applicants must have a minimum of 5 years of prosecutorial and training experience (Equivalent to a Senior Trial Attorney pursuant to the DA Personnel and Compensation Plan). If interested, please submit a resume and a letter of interest to Victoria Bransford by January 8, 2005 at 1313 St. Francis Drive, Santa Fe New Mexico 87505 or by fax to (505) 827-7578.

Request For Proposal
The Pueblo of Santa Ana is soliciting proposals from New Mexico-licensed attorneys and law firms interested in applying to serve as the Pueblo’s general counsel. The Pueblo, situated just north of the Town of Bernalillo, New Mexico, has a wide variety of commercial activities, governmental programs and other initiatives, as to which it frequently requires advice and representation. The Pueblo’s general counsel serves as attorney for the Pueblo and all of its governmental offices and agencies, and may also provide legal services to some or all of the Pueblo’s enterprise boards. The attorney or firm acting as general counsel must be accessible to Pueblo officials at all times, and be available to attend frequent meetings at the Pueblo and elsewhere on a variety of issues. Experience and expertise in the following areas, at a minimum, is required: all areas of federal Indian law (including Indian gaming and issues unique to New Mexico Pueblos); civil litigation in state and federal courts; commercial transactions, including leases and contracting, mortgage financing, public and private bond issues and the like; real estate transactions and law; drafting of statutes and regulations; corporate organization and governance; federal and state administrative law; federal and state taxation; natural resources, including water law, mineral leasing, environmental issues and the like; and governmental relations, including familiarity and experience in working with state and federal governmental agencies, the state legislature and its members and committees, Congress and its members and committees, and various federal agencies. The general counsel may also be required to work with various special counsel employed by the Pueblo and its agencies and enterprises on specific matters. The proposal for services must identify, and include a detailed resume for, each attorney (and other professional) who would provide services under the contract, specifying the types of services to be provided by each, and identifying the particular expertise or experience of each attorney in the areas listed above. It must also specify the rates to be charged for each person who will provide services, and the period of time during which such rates would be guaranteed, as well as specifying the types of out-of-pocket expenses for which the Pueblo would be liable under the contract. Each proposal must also describe the attorney’s or firm’s existing practice and clients sufficient to enable the Pueblo to evaluate the possibility of conflicts. Proposals must be submitted, in triplicate, to the Office of the Governor, ATTN: Nathan W. Tsosie, Business Specialist, Pueblo of Santa Ana, 02 Dove Road, Santa Ana Pueblo, New Mexico 87004, by no later than 4:30 p.m. on Friday the 28th of January, 2005. Selected applicants will be invited to meet with the Pueblo’s officers and its Tribal Council to present and discuss their proposals, and a final selection is expected to be made by the Tribal Council by the end of February 2005 or thereafter. Anyone with questions concerning the foregoing solicitation should contact Nathan W. Tsosie, Business Specialist, at 505/771-6713.

Associate/Transactions
We are looking for an associate to join our very busy and growing business transactions practice. 2+ years of transactional experience required. Securities, M&A or tax background a plus. Please apply only if you are qualified and want to work hard on the most challenging transactions around. Competitive salary and benefit package. Please submit resume in confidence by mail to Recruiting, Brownstein Hyatt & Farber, P.C., 201 Third Street, N.W., Suite 1500, Albuquerque, NM 87103, by email to abqjobs@bhf-law.com or fax to 505.244.9266. No telephone inquiries.

Legal Assistant/Secretary/Paralegal
Full-time position available for legal assistant/secretary/paralegal for small but extremely busy firm. Candidate should have a minimum of 5 years experience in public finance or transactional work, excellent typing skills and work well in a team setting. Competitive salary and benefit package. Please submit resume in confidence by mail to Recruiting, Brownstein Hyatt & Farber, P.C., 201 Third Street, N.W., Suite 1500, Albuquerque, NM 87103, by email to abqjobs@bhf-law.com or fax to 505.244.9266. No telephone inquiries.

Legal Secretary/Assistant
Legal Secretary/Assistant for Santa Fe attorney practicing business/utility/water law. Requires exceptional secretarial and organizational skills with a commitment to consistent excellent quality of work. Must have ability to work under pressure and maintain flexibility. Position requires superior computer skills, including WordPerfect 9.0, MS Word 2000, MS Office. Knowledge of litigation procedures are also desirable. Minimum of five yrs experience in law firm setting. Firm offers excellent benefit package, competitive salary and great work environment. For consideration, please send resume to HR Manager, Rodey Law Firm, P.O. Box 1888, Albuquerque, NM 87103 or email to hr@rodey.com. EOE.

Word Processing Operator
Part Time Evenings
The Rodey Law Firm is accepting resumes for the position of evening word processing operator for Sunday–Thursday shift (5:00 p.m. – 11:00 p.m.). Applicants must have extensive knowledge of WordPerfect and MS Word with exceptional transcription skills (75 wpm). Prefer experience in legal setting with experience in data base work intended primarily for complex litigation. Prior employment history should include a demonstrated ability to work independently and exercise good judgment. Parking provided. Forward resume to Support Services Manager, PO Box 1888, Albuquerque, NM 87103 or e-mail to hr@rodey.com.
Paralegal

Legal Assistant
The Gaddy Law Firm, an ABQ Plaintiffs firm, is looking for someone to join its team and fill an immediate opening for a legal assistant position. Experience with Word and Outlook is required. Please fax resumes to 254-9366 or email to Legalassistant@gaddylawfirm.com. No calls please.

Divorce Paralegal
Experienced Divorce Paralegal (min. 5 years) for full-time position with small downtown law firm, in a fast paced, fun atmosphere. Must be well organized, self motivated, and have the ability to work independently. Excellent typing/word processing skills, ability to draft and finalize pleadings. Salary DOE. Send cover letter and references to: Office Administrator, P.O. Box 27068, Albuquerque, NM 87125-7068.

Legal Assistant
Legal assistant with exp needed for growing Law Firm. Great Sal & Ben (hol, vac, sick, health, dental, retire plan and more). If you would like to be part of a growing team that is in the process of building a new office in the Journal Center, please submit in confidence cover letter, resume, sal hist & req to 3803 Atrisco Blvd Ste A Albuquerque, NM 87120, fax 833-3040, or email admin@littledranttel.com.

Positions Wanted
Manager/Lawyer
New Mexico licensed attorney with LLM in Natural Resources & Environmental Law, and 20 years as law firm administrator seeks opportunity to work as either a manager or lawyer, or a combination of both skills either full or part-time. Short or longterm projects considered. Please contact Bill Sutherland at 505-463-1228.

Consulting
Forensic Psychiatrist
Trained at Yale University in Forensic psychiatry. Board certified and licensed in New Mexico. Available for expert witness testimony. Experienced in criminal and civil matters. Call Dr. Kelly at 505-463-1228.

Cardio-Legal Consultants
Clinical cardiologists. Experienced in reviewing adult or pediatric heart cases for plaintiff or defense. New Mexico licensed. Widely published. Academic credentials. New Mexico references. Reasonable rates. Contact: mdheartnlegal@yahoo.com

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Large offices with separate secretarial area, free client parking, receptionist, library/conference room, kitchen, telephone, high-speed Internet connection, copier, fax, security. Call Lynda at 842-5924.

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Law Offices for Rent
Two law offices for rent, $325 and $475, lower level, office sharing negotiable at 8010 Menaul NE, Albuquerque. Offices Contact: Hal Simmons, 299-8999.
Ethics Advisory Opinions

Visit the State Bar advisor opinion archive and topical index on the State Bar Web site,* .nmbar.org, for assistance in interpreting the New Mexico Rules of Professional Conduct.

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• Original questions, involving one’s own conduct, should be sent to the committee chair, Peter Pierotti, c/o State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860.

* The published advisor opinions are also available at the UNM School of law yibrar and the Supreme Court yibrar.