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Also Available:
• New Mexico Rules Annotated 2005
• New Mexico One Source of Law CD-ROM
• New Mexico One Source of Law DVD (Includes Historical Laws)

Coming Soon:
• New Mexico Rules Annotated 2005 Supplement
• New Mexico Advanced Legislative Service 2005

Advanced Annotation & Rules will not be published in 2005
SEMINAR REGISTRATION FORM
CLE PROGRAMS - State Bar Center

MARCH

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How to Win Your Next Jury Trial Using the Power Trial Method
Friday, March 18, 2005 • 9 a.m. • State Bar Center, Albuquerque • 7.2 General CLE Credits

Co-Sponsor: Trial Practice Section
Presenter: David J. F. Gross of Faegre & Benson, LLP - Minneapolis, Minnesota
David J. F. Gross, one of the nation's most highly regarded and experienced trial lawyers and co-author of the NITA publication The Power Trial Method, has taught trial practice seminars to attorneys across the country. He is a magna cum laude graduate of Harvard Law School, a former clerk to the Honorable Levin H. Campbell of the U.S. Court of Appeals for the First Circuit in Boston, and a former Trial Attorney for the Civil Division of the U.S. Dept of Justice in Washington, D.C. Gross recently received an "Attorney of the Year" award by the newspaper Minnesota Lawyer for his role as lead trial counsel in a successful drug case involving a billion-dollar trade secret trial. In this full day seminar, Gross will explore the various elements that go into successful preparation and presentation at trial to include how to avoid making mistakes and how to handle serious challenges at trial. All seminar attendees will receive a complimentary copy of The Power Trial Method.

☐ Standard and Non-Attorney $199 ☐ Government & Paralegal $189
☐ Trial Practice Section Member $179

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DUI in New Mexico: Practical Problems and Possible Solutions
Tuesday, March 22, 2005 • 9 a.m.
State Bar Center, Albuquerque • 6.7 General CLE Credits
This full day seminar will consist of a legal update on evidence issues and a panel discussion on DUI problems and ideas for solutions in New Mexico. The panel will be composed of a police officer, a judge, a prosecutor, a defense attorney and a victim's representative. Audience participation will be sought and problems from Albuquerque and around the state will be aired. The day will conclude with a planning session for future actions.

☐ Standard and Non-Attorney $159 ☐ Government & Paralegal $149

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Cashing Out: Six Ways Business Owner Clients Can Sell Their Businesses
Thursday, March 24, 2005 • Luncheon (provided): 11:30 a.m. to Noon, CLE Workshop: Noon to 1:30 p.m.
State Bar Center, Albuquerque • 1.8 General CLE Credits

Co-Sponsor: Business Law Section
Presenter: Darrell Arne, CPA
This 90-minute workshop will be presented by a CPA, business appraiser and business intermediary who specializes in business owner transfers to privately held business owners. In this presentation, business lawyers will be provided a framework which they can use in advising their business owner clients about selling their businesses. Discussion will include a business owner's wealth accumulation life cycle, the four key elements to growing a business to maximize its value, the right and wrong timing for selling a business, the levels of value for different buyers, and some of the advantages, disadvantages and specific exit strategies for various sale or transfer options. The workshop will be preceded by a luncheon co-sponsored by the Business Law Section.

☐ Standard and Non-Attorney $59 ☐ Government & Paralegal $49
☐ Business Law Section Member $49

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.
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Email ____________________________ ☐ Program Cost ___________________________

☐ Standard and Non-Attorney $59 ☐ Government & Paralegal $49
☐ Business Law Section Member $49

Authorized Signature ____________________
Exp. Date ___________________________
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Professionalism Tip

With respect to parties and their counsel:

I will not use litigation, delay tactics or other courses of conduct to harass the opposing party or their counsel.

Meetings

March
14 Lawyers Professional Liability Committee, 11:45 a.m., State Bar Center
15 Solo and Small Firm Practitioners Section Board of Directors, 11:30 a.m., State Bar Center
15 Solo and Small Firm Practitioners Section, noon, State Bar Center
17 Health Law Section Board of Directors, 7:30 a.m., State Bar Center
17 Senior Lawyers Division Board of Directors, 4:30 p.m., State Bar Center
18 Family Law Section Board of Directors, 9 a.m., via teleconference
18 Indian Law Section Board of Directors, 9 a.m., State Bar Center

State Bar Workshops

March
15 Lawyer Referral for the Elderly Workshop, 10 a.m., Sacramento Mountain Senior Services, Cloudcroft
16 Lawyer Referral for the Elderly Workshop, 10 a.m., Ruidoso Downs Zia Senior Center, Ruidoso Downs
22 Lawyer Referral for the Elderly Workshop, 10 a.m., Jemez Valley Community Center, Jemez Pueblo
23 Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center
23 Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces
24 Consumer Debt/Bankruptcy 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 Judicial Performance Evaluation Commission Surveys**

The Judicial Performance Evaluation Commission (JPEC) was created by the New Mexico Supreme Court to evaluate the performance of appellate, district and metropolitan court judges standing for retention in New Mexico. The commission’s work in 2005 focuses on the interim evaluations of district court judges. The results of the interim will not be shared with the public since the primary objective of the interim evaluation is self-improvement. A final evaluation is planned for 2008. These results will be released to the public at least 45 days before the November 2008 general election. Because of the large number of District Court Judges, the interim evaluations will be done in two phases. Phase I includes the judges in the Third, Fifth, Sixth, Ninth, Tenth, Eleventh and Twelfth Judicial Districts. Phase II includes the judges in the First, Second, Fourth, Seventh, Eighth and Thirteenth Judicial Districts.

Lawyers who appeared before the PHASE II judges between January 1, 2004 and December 31, 2004 will receive a questionnaire to complete starting the week of April 1. The JPEC would like to see the response rates increase from attorneys with direct experience with the judges. Attorneys are asked to take the time to complete and return the questionnaire. The questionnaire are returned to Research & Polling, Inc., consultant to the JPEC. Research & Polling aggregates the results for the JPEC by population group (lawyers, jurors, court staff, and resource staff). The JPEC does not see individual results. The comments are retyped and submitted to the JPEC for review and not provided to the judges. Research & Polling destroys the individual responses. Thus, the JPEC does not know who completed the survey.

Questions should be directed to Felix Briones, Jr., Chair of the Judicial Performance Evaluation Commission, (505) 325-0258.

**Notice of Vacancy on the Rules of Criminal Procedure Committee for District Courts**

One attorney vacancy exists on the Rules of Criminal Procedure Committee for District Courts due to the recent resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest and/or resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for letters/resumes is March 14.

**Proposed Revisions to the Rules of Criminal Procedure for the District Courts**

The Supreme Court is considering proposed revisions to the District Court Criminal rules. If you would like to comment on the proposed amendments, send your written comments by March 18 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed revisions were printed in the Feb. 28 (Vol. 44, No. 8) Bar Bulletin.

**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
  - murielmcc@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

**NM Board of Legal Specialization Comments Solicited**

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

- Workers’ Compensation
  - David L. Skinner

**Legal Specialists Announced**

The New Mexico Supreme Court Board of Legal Specialization has announced the following attorneys as Board Certified Specialists:

- Bankruptcy Law - Consumer
  - Steve H. Mazer

- Employment and Labor Law
  - Carlos M. Quinones
  - Ryan M. Randall

- Estate Planning, Trusts and Probate Law
  - James F. Beckley
  - Joyce M. Gentry
  - Michael T. Murphy
  - Harlley B. Hess

- Local Government Law
  - Randall D. Van Vleck

To receive information on any of the certified specialty areas, call the Legal Specialization Administrative Office, (505) 797-6057.

**First Judicial District Court Almost Free MCLE Credit**

The First Judicial District Court invites any attorney who practices in the district to earn almost-free MCLE credit by attending a one-day seminar, “Turn Your Stumbling Blocks into Building Blocks: Conflict Management in Settlement Facilitation,” on March 18. The seminar will be from 8:30...
more information, call Celia Ludi, ADR at the school’s cafeteria. To register, or for questions or concerns, the court requests that only those attorneys who reasonably expect to be able to participate in the ADR program this year attend. Refreshments will not be provided but are available at the school’s cafeteria. To register, or for more information, call Celia Ludi, ADR Program Director, (505) 827-5072.

Destruction of Exhibits
Pursuant to the Supreme Court Retention and Disposition Schedule, the First Judicial District Court will destroy exhibits filed with the court, in criminal, civil, children’s court, domestic, incompetency/mental health and probate cases for years 1970 to 1987. Counsel for parties are advised that exhibits can be retrieved through April 9. The exhibits can be retrieved by verifying exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by order of the court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by order of the court.

Second Judicial District Court
Destruction of Exhibits
Pursuant to the Supreme Court ordered Judicial Retention and Disposition Schedule, the Second Judicial District Court will destroy tapes and logs filed with the court in Domestic Relations cases for years 1976 to 1987, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Should attorneys have cases with tapes and logs, and wish to have duplicates made, verify tape and log information with the Special Services Division, (505) 841-6711, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after March 24, 2005.

Mailing Procedures
The Second Judicial District Court receives a large volume of mail every day simply addressed to Clerk of the Court, Juanita M. Duran, or Second Judicial District Court. This mail has to be opened and sorted before it can be routed to the proper clerk's division. In order to expedite processing of paperwork and insure it is delivered to the correct division, follow one of these sample addresses when mailing in paperwork or requests:
- ATTN: Civil (or whatever case category) Second Judicial District Court PO Box 488 Albuquerque, NM 87103
- ATTN: Civil (or whatever case category) Second Judicial District Court 400 Lomas Blvd. NW Albuquerque, NM 87102
- Children's Court cases should be mailed to: Children's Court 5100 2nd St. NW Albuquerque, NM 87107

Case Categories:
- Civil (CV, PB, PQ, SL, MS)
- Foreclosure, student loans, name changes, license restoration, probate, personal injury, property damage, malpractice, civil restraining orders
- Criminal (CR, ER, LR, CS, SW)
- Criminal, extraditions, lower court appeals, search warrants
- Domestic Relations (DR, DV)
- Divorce, custody, paternity, child support, domestic violence restraining orders
- Children's Court (JR, YR, JV, QJ, SA, SQ, SI, JS)
- Juvenile delinquent, youthful offender, emancipation, kinship, guardianship, abuse and neglect, termination of parental rights, adoptions (minors and adults), mental health

Notice to Attorneys
Effective March 21, Judge Clay Campbell will be assigned to Division XII of the Civil Court and will assume all civil cases formerly assigned to Judge Wendy York. Parties who have not previously exercised their right to challenge or excuse will have 10 days from March 21 to challenge or excuse the new judge pursuant to Supreme Court Rule 1-088.1.

State Bar News
Paralegal Division Meet and Greet with a Board Meeting
The Paralegal Division will host a meet and greet reception with State Bar staff at 4:30 p.m., March 15 in the Boardroom at the State Bar Center. hors d’oeuvres and beverages will be provided. A board meeting will follow at 5:30 p.m. All members are welcome and encouraged to attend.

Pro Hac Vice
The New Mexico Supreme Court has established a new rule for practice by non-admitted lawyers before state courts (Pro Hac Vice). The new Rule 24-106 NMRA, is effective for cases filed on or after Jan. 20, 2005. Attorneys authorized to practice law before the highest court of record in any state or territory wishing to enter an appearance, either in person or on court papers, in a New Mexico civil case should consult the new rule. This rule requires non-admitted lawyers to file a registration certificate with the State Bar of New Mexico, file an affidavit with the court and pay a nonrefundable fee of $250. Fees collected under this rule will be used to support legal services for the poor. For more information on the rule, a copy of the registration certificate and sample affidavit, please go to www.nmbar.org. For questions about compliance with the rule, please contact Richard Spinello, Esq., Director of Public and Legal Services, State Bar of New Mexico, (505) 797-6050, (800) 876-6227, or rspinello@nmbar.org.

Prosecutors’ Section
Annual Awards
The State Bar Prosecutors’ Section is soliciting nominations for awards that the Section will present to five prosecutors at the Association of District Attorneys’ 2005 Spring Conference on May 12. The five award categories are: Prosecutor of the Year, Law Enforcement Prosecutor, Community Service Prosecutor, Legal Impact Prosecutor and Rookie Prosecutor. For a complete list of the award categories, see the Feb. 21 issue of the Bar Bulletin (Vol. 44, No. 7).

Nominations should be submitted for receipt by March 18 to Michael P. Sanchez, section chair, c/o Fifth Judicial District Attorney’s Office, 110 East 4th St., Roswell, NM 88201-6273; or msanchez@da.state.nm.us. The nominees will be presented to a committee for selection.

Solo and Small Firm Practitioners Section
Monthly Meeting
The Solo and Small Firm Practitioners Practice Section will hold a monthly meeting at noon, March 15 at the State Bar Center. A roundtable discussion on current practice issues will be conducted. The
section board will meet prior to the meeting at 11:30 a.m. Members and nonmembers are welcome to this brownbag lunch meeting.

**Young Lawyers Division 2005 Summer Fellowship**

The Young Lawyers Division (YLD) of the State Bar is currently accepting applications from law students interested in working in public interest law or the government sector during the summer of 2005. The purpose of the fellowship is to enable one law student to work in public interest law or the government sector in an unpaid legal position. The fellowship award is intended to provide the opportunity for a law student to work in a position that might not otherwise be possible because the position is unpaid. The fellowship award, depending on the circumstances of the position, could be up to $3,000 for the summer.

To be eligible for the fellowship, the applicant must be a current law student in good standing. Applications for the fellowship must include the following: a letter of interest from the applicant that details the student’s interest in public interest law or the government sector; a resume of the applicant; and a written offer of employment to the applicant for an unpaid legal position in public interest law or the government sector for the summer of 2005. Applications must be submitted to the following address: J. Brent Moore, YLD Summer Fellowship Coordinator, Office of General Counsel, New Mexico Environment Department, 1190 St. Francis Dr., Suite N-4050, Santa Fe, New Mexico 87505. Applications must be postmarked by March 31. Any questions regarding the fellowship should be directed to J. Brent Moore at (505) 476-3783.

**Brownbag Lunch**

The Young Lawyers Division will sponsor a Brownbag Lunch at noon, March 24, in the third floor conference room of the Second Judicial District Courthouse. The topic of the event will be “The Do’s and Don’ts of Practicing in the Second Judicial District Court.” Food will be provided and space is limited so attorneys are asked to R.S.V.P. by March 18 to Briana Zamora, (505) 884-0777, or bhzamora@btblaw.com.

**Other Bars**

**National Lawyers Guild Southwest Regional Conference**

Join the members of the National Lawyers Guild for their Southwest Regional Conference April 1 to 3 in Albuquerque. The conference begins with an April Fool’s Day party beginning at 7 p.m., April 1. Panel presentations on April 2 will include: Current Developments in Immigration/Criminal Law; The Lawyer’s Role in Peace Building – How Lawyers Can Effectively Support the Peace Movement in Their Communities; The International Criminal Court and How to do International Human Rights Legal Work in Your Practice; and The Politics of Tort Litigation, including tips on handling expert medical witnesses. For registration or for more information, contact cmarrs@flash.net.

**Sandoval County Bar Association March Monthly Meeting**

The Sandoval County Bar Association will hold its next monthly meeting from noon to 1 p.m., March 24 at the Pasta Café Italian Grill, 3201 Southern Blvd. SE, Rio Rancho. The program will feature Teresa Berry, director of Mediation Programs for the 13th Judicial District. Anyone interested in attending should R.S.V.P. by close of business on March 22 to (505) 892-1050.

**Other News**

**UNM Law Library Spring Semester Hours**

Hours through May 15:

| Mon. – Thurs. | 8 a.m. to 11 p.m. |
| Fri. | 8 a.m. to 6 p.m. |
| Sat. | 9 a.m. to 6 p.m. |
| Sun. | noon to 11 p.m. |

Reference:

| Mon. – Thurs. | 9 a.m. to 9 p.m. |
| Fri. | 9 a.m. to 5 p.m. |
| Sat. | noon to 4 p.m. |
| Sun. | noon to 4 p.m. |

Extended Exam Hours:

| Apr. 30 | 8 a.m. to 10 p.m. |
| May 1 | 9 a.m. to 10 p.m. |
| May 7 | 8 a.m. to 10 p.m. |
| May 8 | 9 a.m. to 10 p.m. |
| May 14 | 8 a.m. to 10 p.m. |

Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by 5 p.m., Monday the week prior to publication.
Dear Pat:

There has been a lot of discussion lately, by you and others, that in spite of great progress, women are still hitting (and sometimes cracking) their heads on the glass ceiling. Although women have made great strides in the legal profession and elsewhere, they are not making partner or other otherwise advancing in their law firms at the rate that would be expected given the number of women who have graduated from law school.

Although I understand the reasons why are a matter of debate, it seems to me this situation would change if law firms were persuaded that it was in their economic interest to remove the glass ceiling. Do you agree and if so, do you have any ideas on how to accomplish this?

Sincerely,

Hard Hat Hannah

Dear Hannah:

I agree wholeheartedly with your suggestion and I understand that some corporations are doing just that in an effort to encourage diversity in law firms. In the December 2004 edition of the ABA Journal, I read with interest an article about the efforts by corporations to increase diversity in the outside law firms they use.

Legal officers from hundreds of major corporations have signed pledges, most recently in 2004, calling for companies to base their decisions to use outside law firms “in significant part” on diversity and to end or limit their relationship with firms that fall short.

Even more impressive are the actions of companies like Shell Oil Co. and its general counsel, Catherine Lamboley. Ms. Lamboley tracks the demographics of outside law firms by requiring them to report the number of women and minority lawyers and the amount of Shell’s work that was done by those lawyers. As a result, Shell cut the number of outside firms it uses from the hundreds to about 27 it calls strategic partners — those firms and a few others get the bulk of Shell’s work.

Significantly, Ms. Lamboley says that the next logical step is to track the advancement of women and minorities into partnership and management positions at those firms.

While it is disturbing to me that law firms require this kind of not-so-gentle nudging to become more diverse, I am encouraged by the actions of these major corporations. If this continues, and it looks like it will, it may be that economic necessity will break the glass ceiling for many women lawyers.

Sincerely,

Pat

P.S. Pat would like to remind readers to join the Committee on Women and the Legal Profession and the Northern New Mexico Women’s Bar Association for full-day seminar, Workplace Dynamics and the Practice of Law, starting at 9 a.m., April 8 at the State Bar Center. The seminar will be worth 3.2 general, 2.0 professional and 1.2 ethics MCLE credits.
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<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>24</td>
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<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
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G = General  E = Ethics  P = Professionalism  VR = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.
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EFFECTIVE MARCH 9, 2005

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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CERTIORARI GRANTED BUT NOT SUBMITTED:

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

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AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT
Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860
EFFECTIVE MARCH 9, 2005

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### Clerk Certificates

**From the New Mexico Supreme Court**

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<th>Telephone</th>
<th>Email</th>
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<tr>
<td>Richard E. Anderson</td>
<td>Anderson, Burns &amp; Vela, LLP</td>
<td>(214) 397-0032</td>
<td><a href="mailto:randerson@ABVLaw.com">randerson@ABVLaw.com</a></td>
</tr>
<tr>
<td></td>
<td>2121 San Jacinto, Ste. 840</td>
<td>(214) 397-0051 (fax)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Dallas, TX 75201</td>
<td></td>
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Expired Court Reporter Certifications
In this employment dispute involving a claim of constructive discharge, the Court of Appeals affirmed summary judgment in favor of the employer, Coca-Cola Enterprises (Defendant). On certiorari, we conclude, as a question of first impression in New Mexico, that Don Gormley (Plaintiff) has not shown that his working conditions rose to the level necessary to support a claim of constructive discharge. Accordingly, we affirm the grant of summary judgment regarding Plaintiff’s constructive discharge claim.

**BACKGROUND**

(1) In 1983, Plaintiff was employed by Southwest Coca-Cola (Southwest) as a driver and deliveryman. The job involved heavy manual labor, including the requirement that he lift substantial weight. In 1994, when Plaintiff was 58, management at Southwest moved Plaintiff to a warehouse position with lighter duties and less hourly pay. Plaintiff’s warehouse duties included stacking containers, janitorial work, running errands, filling out paperwork, and cleaning truck trailers. The record indicates that Plaintiff’s supervisors, Robert Bolin and Ronnie Hill, initiated the move from the route to the warehouse out of concern for Plaintiff’s health and safety. They feared that the workload may have rendered Plaintiff more vulnerable to an accident or injury. Upon Plaintiff’s reassignment to the warehouse, he was told that he would now work a fifty-five-hour work week to maintain the same income he had received as a route driver.

(2) In 1998, Defendant acquired Southwest by merger. Soon after the acquisition, Plaintiff’s new supervisor, Ruben Cardona, cut Plaintiff’s fifty-five-hour work week, first by five hours and then by another five hours, and his warehouse duties were changed to include heavy lifting. At the time of the cuts, management was implementing a policy to reduce overtime hours for all employees. Plaintiff was assigned some route duties involving heavy lifting. Former supervisor Bolin advised Cardona that Plaintiff had been promised a fifty-five-hour work week and lighter duties, and that Plaintiff was risking injury by performing the more physically demanding duties assigned by Cardona. Despite Bolin’s protest, Cardona expressed indifference, and Plaintiff’s working conditions did not improve.

(3) Plaintiff never personally protested the changes in his schedule and duties, nor did he file a complaint with his employer. Plaintiff acknowledges that two younger workers did the heavy lifting in the warehouse for him. Plaintiff alleges Cardona would complain to Plaintiff’s immediate supervisor about the quality of his work. However, Plaintiff was never reprimanded or otherwise disciplined for his job performance. In 1999, roughly fifteen months after Defendant’s acquisition of Southwest, Plaintiff tendered his resignation giving a month’s notice.

(4) In May 2000, Plaintiff initiated the present litigation, claiming breach of implied employment contract based on the promise of wages and hours, wrongful termination, age discrimination, constructive discharge, and in an amended complaint, disability discrimination. Defendant responded with a motion for summary judgment on all claims, which the district court ultimately granted.

(5) The Court of Appeals reversed the award of summary judgment on the breach of implied contract, from which Defendant has not appealed, and in a divided opinion, the court affirmed the district court on all other counts. *Gormley v. Coca-Cola Enters.*, 2004-NMCA-021, 135 N.M. 128, 85 P.3d 252. We granted certiorari to review solely the summary judgment against Plaintiff’s claim of constructive discharge which was the focal point of disagreement among the members of the Court of Appeals panel.

(6) Regardless of what we decide today, Plaintiff’s breach of implied contract claim, based on the alleged promise of a certain level of hours and wages, will proceed to trial. The question on certiorari is whether that trial will include Plaintiff’s claim for consequential damages for breach of implied contract beyond the time of his resignation.

**DISCUSSION**

**Summary Judgment**

(1) Summary judgment is proper when “there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 (citation omitted). We look at whether, as
a matter of law, the defendant is entitled to summary judgment. *Id.* These legal questions are reviewed de novo. *Id.* “When reviewing a trial court’s grant of summary judgment, we view the facts in the light most favorable to the party opposing summary judgment, drawing all inferences in favor of that party.” *Stieber v. Journal Publ’g Co.*, 120 N.M. 270, 271-72, 901 P.2d 201, 202-03 (Ct. App. 1995).

**Constructive Discharge**

[9] Constructive discharge is not an independent cause of action, such as a tort or a breach of contract. Instead, constructive discharge is a doctrine that permits an employee to recast a resignation as a de facto firing, depending on the circumstances surrounding the employment relationship and the employee’s departure. See *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1030 (Cal. 1994) (“Even after establishing constructive discharge, an employee must independently prove a breach of contract or tort in connection with employment termination in order to obtain damages for wrongful discharge.”). An employee who resigns from employment must prove constructive discharge as part of establishing a wrongful termination. *Pollard v. High’s of Baltimore, Inc.*, 281 F.3d 462, 472 (4th Cir. 2002). Plaintiff, in the case before us, must establish a constructive discharge if he wants to pursue compensatory damages for breach of contract beyond the time of his resignation.

[10] Although no New Mexico opinion sets forth the elements necessary to prove constructive discharge, numerous federal opinions from the Tenth Circuit discuss from that standard. An employee must allege facts sufficient to find that the employer made working conditions so intolerable, when viewed objectively, that a reasonable person would be compelled to resign. See *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986). “Essentially, a plaintiff must show that she had no other choice but to quit.” *Yearous v. Niobrara County Mem’l Hosp.*, 128 F.3d 1351, 1356 (10th Cir. 1997) (quoting authority omitted). “The bar is quite high” for proving constructive discharge. *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1211 (10th Cir. 2002).

[11] Examples of adverse employment actions that rise to the level of constructive discharge include “a humiliating demotion, extreme cut in pay, or transfer to a position in which [the employee] would face unbearable working conditions.” *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342, 2347 (2004). Other examples include: an employer’s threat of being fired; overt pressure to resign and accept early retirement; dramatic cut in pay; and retaliatory measures (e.g., discrimination, unreasonable criticism, involuntary transfer). See *Douglas v. Orkin Exterminating Co.*, No. 98-8076, 2000 WL 667982, at *4, 215 F.3d 1336 (10th Cir. May 23, 2000) (unpublished opinion) (holding that evidence of a demotion and lower pay supported reversal of summary judgment); *Keller v. Bd. of Educ.*, 182 F. Supp. 2d 1148, 1157 (D.N.M. 2001) (holding that constructive discharge claim was supported by the record and justified denial of summary judgment when employee was reassigned to a job without a job title and description, her office was in a supply closet, and her salary was cut by more than one-half, amounting to less than her retirement benefit); *Gower v. IKON Office Solutions, Inc.*, 177 F. Supp. 2d 1224, 1233 (D. Kan. 2001) (holding claim of constructive discharge was supported by evidence that the worker was given twenty-four hours to sign a new contract limiting the number of accounts he could service, reducing his commission in one account from $8,000 to $3,000 per month, and changing his reporting requirements); *Goodwin-Haulmark v. Menninger Clinic, Inc.*, 76 F. Supp. 2d 1235, 1239 (D. Kan. 1999) (concluding that overt pressure to resign raised genuine issues of material fact to justify denial of summary judgment regarding constructive discharge); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 993 (10th Cir. 1994) (finding that systematic threats and pressure to retire constituted constructive discharge).

[12] The specific facts of the employment condition, and the severity of its impact upon the employee, are pivotal in determining whether the claim rises to the level of constructive discharge. In many cases, the circumstances surrounding resignation are not egregious enough to support a claim. See *Gioia v. Pinkerton’s, Inc.*, 194 F. Supp. 2d 1207, 1228 (D. N.M. 2002) (stating that plaintiff’s change in duties and pay reduction of approximately 9.1% did not constitute constructive discharge); *Garrett*, 305 F.3d at 1221 (intimidating behavior by supervisors resulting in lower performance evaluations and repeated denial of requests to transfer did not amount to constructive discharge); *Baker v. Perfection Hy-Test*, No. 94-6031, 1996 WL 1162, *9*-11, 74 F.3d 1248 (10th Cir. Jan. 16, 1996) (unpublished opinion) (holding a demotion, a ten percent reduction in pay and jokes by co-workers directed at plaintiff did not amount to constructive discharge); *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 858 (10th Cir. 2000) (holding that change in location of desk, monitoring of telephone calls, ostracism by fellow employees, and suggestion by supervisor to transfer did not amount to constructive discharge); *Williams v. Giant Food Inc.*, 370 F.3d 423, 434 (4th Cir. 2004) (stating that “dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign”) (quoted authority omitted).

[13] Plaintiff bases his claim for constructive discharge on four factors: criticism of Plaintiff’s job performance, the loss of his guaranteed fifty-five-hour work week, a reduction in pay, and the loss of assignment to lighter duties. In each case, the record on summary judgment does not demonstrate employment conditions so severe that a reasonable person in Plaintiff’s situation would have felt compelled to resign.

[14] Clearly, the reduction in Plaintiff’s fifty-five-hour work week to a forty-five-hour work week is not sufficient to amount to constructive discharge. The loss of overtime hours did not reduce Plaintiff’s base pay. Though he was earning less than he had been before, the change in pay was not such a material change that, when viewed objectively, would force him to leave. See *Gioia*, 194 F. Supp. 2d at 1228; *see also King v. AC & R Adver.*, 65 F.3d 764, 767-68 (9th Cir. 1995) (holding that compensation reduction from $235,000 to $175,000 was insufficient as a matter of law to cause constructive discharge); *McCann v. Litton Sys., Inc.*, 986 F.2d 946, 952 (5th Cir. 1993) (ruling that 12% decrease in pay plus loss of some supervisory responsibilities was not a constructive discharge).

[15] Plaintiff also lost some overtime hours but did not suffer a substantial cut in pay. A cut in pay must be an extreme change in pay

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1 It is the practice of this Court not to cite unpublished opinions. However, since this is a case of first impression in New Mexico, we are including two federal unpublished opinions to provide additional factual examples of what courts have determined to constitute or not to constitute constructive discharge. These opinions are cited for the limited purpose of illustration. It continues to be the practice of this Court to only rely on published cases as precedent.
to support a constructive discharge claim. Pennsylvania State Police, 124 S.Ct. at 2347. Plaintiff still retained some of his overtime hours and was not paid less for the hours he worked. Management at the facility was instructed to reduce the number of overtime hours for all employees and was not focused just on Plaintiff. Employers are not required to continue to provide overtime hours.

{16} Plaintiff argues he was subjected to a “barrage of criticism.” He alleges that he was exposed to continuous criticism such that he felt constant pressure and discomfort. However, during Plaintiff’s deposition when asked about criticism from his new manager, he stated, “whenever he talked to me, to my face he was real nice and everything.” Plaintiff testified Cardona would then complain to Plaintiff’s immediate supervisor, criticizing the quality of Plaintiff’s work. Even assuming the truth of the allegations, they hardly rise to the level of conditions that would leave Plaintiff no choice but to quit. “An objectively reasonable person would expect one’s supervisor to criticize what he perceived as his employee’s poor performance . . . .” Smith v. Aaron’s Inc., 325 F. Supp. 2d 716, 727 (E.D. La. 2004). Additionally, Plaintiff never received any written warnings or reprimands. Such generalized claims of criticism are not enough to amount to constructive discharge. See Aikens v. Banana Republic, Inc., 877 F. Supp. 1031, 1039 (S.D. Tex. 1995) (“[T]he mere fact that [plaintiff] experienced ‘pressure’ or was ‘nitpicked’ does not establish such intolerable working conditions as to give rise to a constructive discharge.”).

{17} Analytically, Plaintiff’s claim that the loss of lighter duties jeopardized his safety is sound, but unfortunately the claim is not sufficiently supported in the record. Although Plaintiff was removed from the easier cashier and warehouse duties and assigned jobs involving some heavy lifting, two of the younger workers in the warehouse were available to help him. There was no evidence presented on summary judgment that Plaintiff actually had to perform heavy lifting, or that he was placed in a situation where that was likely to happen. Plaintiff did not suffer any injuries resulting from the change in duties, and he made no showing that his health was endangered. Mere speculation about what could possibly happen is not sufficient.

{18} Plaintiff’s change in duties, though perhaps improvident or even insensitive on the part of his employer, do not rise to the level of constructive discharge. Yearous, 128 F.3d at 1356-57 (“[A] series of questionable judgments leading to difficult working conditions does not alone support a claim of constructive discharge . . . .”). We acknowledge that there are circumstances in which a change of duties endangering an employee’s safety might well rise to the level of constructive discharge. Plaintiff simply never presented such a case on summary judgment. Additionally, Plaintiff never directly claimed that safety concerns caused him to leave. Plaintiff never established a sufficient nexus between those concerns and his resignation.

{19} Other factors may be considered to determine whether the worker’s resignation was voluntary or de facto compulsory. For example, some courts require that the employee notify the employer of the problem, and afford the employer a sufficient opportunity to resolve it before leaving. As an example, in Woodward v. City of Worland, 977 F.2d 1392, 1402 (10th Cir. 1992), the Tenth Circuit suggested that a reasonable person would have filed a formal complaint in response to sexual harassment prior to resigning and barred the worker’s claim as a matter of law.

Here, [the employee] apparently was able to work under these circumstances for several years, and there was no showing either that the situation got substantially worse just before she quit or that requesting disciplinary action against [the employer] would have been ineffective. Hence, on this record, [the employee] failed to establish a genuine dispute as to whether a reasonable person would have believed that there was no reasonable alternative to resignation.

Id.

{20} Defendant also points to the fact that, even after these changes occurred, Plaintiff remained on the job for over a year. Plaintiff investigated his social security benefits for early retirement. When Plaintiff submitted his letter of resignation he did so by giving a full month’s notice. Plaintiff was asked by Cardona to reconsider and stay on the job, but refused and resigned.

{21} Defendant asks that we issue a bright-line rule requiring prior notice in all instances, and stipulating a time within which an employee must leave to complain of constructive discharge. We decline to do so. Notice is one factor out of many for the fact-finder to consider when looking at the specific circumstances of each case. The same is true with respect to the circumstances surrounding how long the employee remains on the job and continues to suffer from onerous conditions. In the case before us, we affirm summary judgment not because of any one factor, but because Plaintiff did not create a genuine issue of material fact to support his constructive discharge claim.

CONCLUSION

{22} As a matter of law, Plaintiff did not create a genuine issue of material fact to support his constructive discharge claim. Therefore, we affirm the opinion of the Court of Appeals affirming summary judgment for Defendant.

{23} IT IS SO ORDERED.

RICHARD C. BOSSON,
Chief Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHAVEZ, Justice
OPINION

JAMES T. WECHSLER, CHIEF JUDGE

{1} Defendant Ellen Mercer appeals her convictions for two counts of fraud and four counts of embezzlement. She argues that: (1) the district court erred in refusing to allow her to introduce the testimony of a satisfied business customer; (2) the district court improperly limited the scope of Defendant’s cross-examination of the State’s witness, Danny Gamboa, and improperly excluded extrinsic evidence relevant to Gamboa’s motive and bias; (3) the district court erred in allowing an amendment to the grand jury indictment to add new charges; (4) the evidence was insufficient to support her convictions; (5) she was erroneously subjected to double jeopardy when convicted and sentenced for both fraud and embezzlement; and (6) cumulative error warrants reversal.

{2} We reverse and remand for a new trial to allow Defendant to introduce the testimony of at least one satisfied customer. We address Defendant’s remaining issues only to the extent they either have the potential of affording Defendant greater relief on appeal or they are likely to recur on retrial.

Background

{3} Defendant was the owner and operator of Kitchen ‘N Bath Design in Las Cruces, New Mexico. As the owner and operator, Defendant primarily engaged in the design and construction of kitchen and bathroom countertops and cabinets. After receiving advance payments and failing to perform on her contractual obligations, Defendant was indicted on four counts of fraud, or, in the alternative, four counts of embezzlement, for activities arising out of the operation of her business. She was indicted on two counts of fraud over $20,000, or, in the alternative, embezzlement, with respect to transactions involving Danny and Paula Gamboa (the Gamboas) and Scott and Terry Adams (the Adamses). She was also charged with two counts of fraud over $2500, or, in the alternative, embezzlement, with respect to transactions involving the Gamboas and David Loyd and Kimela Miller-Loyd (the Miller-Loyds). After a jury trial, Defendant was convicted on all four counts of embezzlement and two counts of fraud.

Testimony Regarding a Contemporaneous Legitimate Business Transaction

{4} At trial, the State introduced testimony from Kimela Miller-Loyd, the Gamboas, and the Adamses that Defendant had defrauded them by collecting fees from them for goods and services that were never delivered. Defendant sought to introduce testimony from a satisfied customer as evidence of lawful business dealings. The State objected claiming that this testimony was irrelevant. Defendant responded that the testimony was directly relevant to her claim that she never intended to defraud anyone in her business dealings. To refute the State’s evidence of Defendant’s fraudulent intent, she sought to prove that she ran a legitimate, ongoing business, which regularly and successfully performed on projects similar to those at issue in the criminal proceedings. The State then argued that, if Defendant was allowed to introduce testimony of satisfied customers, the State would seek to bring in other dissatisfied customers. The State also argued that Defendant was improperly trying to introduce extrinsic evidence of Defendant’s character.

{5} The district court excluded the evidence on the grounds that it was improper extrinsic evidence of character. See Rule 11-404 NMRA. The court observed that, under State v. McCallum, 87 N.M. 459, 461, 535 P.2d 1085, 1087 (Ct. App. 1975), the State would be entitled to bring in dissatisfied customers to show that Defendant continued to undertake projects which she could not complete. However, the court found that McCallum did not authorize Defendant to introduce the testimony of satisfied customers because that testimony would be improper extrinsic evidence of character or reputation.

{6} We analyze this decision of the district court concerning the admission or exclusion of evidence for abuse of discretion and will not disturb the exercise of that discretion absent a clear abuse. State v. Stanley, 2001-NMSC-037, ¶ 5, 131 N.M. 368, 37 P.3d 85. “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the [district] court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason.” State v. Woodward, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995) (internal quotation marks and citation omitted).

{7} Under Rule 11-404, evidence of other acts may be admissible to prove motive, intent, and absence of mistake. In McCallum, 87 N.M. at 461, 535 P.2d at 1087, this Court held that, in a prosecution for fraud against a building contractor, the state could introduce evidence of other instances of unchecked misconduct involving similar failures to complete construction projects. We held that such
evidence is admissible on the issue of the defendant’s motive or intent to defraud and noted that, in the absence of such evidence, the jury could conclude that “defendant is simply a poor businessman” or mistakenly believed he could complete the contract. Id.; see State v. Schifani, 92 N.M. 127, 129, 584 P.2d 174, 176 (Ct. App. 1978) (holding that, in a prosecution for fraud and embezzlement, the testimony of witnesses who had dealings with the defendant similar in nature to the victims’ dealings with the defendant was admissible as relevant to the issue of the defendant’s fraudulent intent).

[8] We are unaware of any New Mexico cases addressing whether Rule 11-404 bars a defendant from offering evidence of prior lawful business dealings to attempt to rebut the state’s evidence of fraudulent intent. However, we are persuaded by out-of-state authority addressing this issue that Defendant may introduce such evidence of lawful business dealings to rebut the prosecution’s evidence of fraudulent intent under Rule 11-401 NMRA (defining “relevant evidence” as “evidence having any tendency to make the existence of” any consequential fact more or less probable) and Rule 11-402 NMRA (providing that relevant evidence is generally admissible). See, e.g., United States v. Thomas, 32 F.3d 418, 421 (9th Cir. 1994) (observing that defendants are entitled “to present, within reason, the strongest case they are able to marshal in their defense” which includes testimony of previous lawful behavior to negate fraudulent intent); United States v. Shavin, 287 F.2d 647, 654 (7th Cir. 1961) (same); Bogren v. State, 611 So. 2d 547, 550-51 (Fla. Dist. Ct. App. 1992) (holding that testimony of satisfied travel agency customers was relevant to the issue of the defendant’s intent in accepting advance payments for travel when the travel agency was on the brink of collapse); State v. Marinarios, 345 N.E.2d 76, 79 (Ohio Ct. App. 1975) (holding that it was prejudicial error to exclude the testimony of satisfied customers during the three-month period when the defendant allegedly engaged in fraud because the excluded testimony would rebut evidence introduced by the state on the question of fraudulent intent).

[9] The State argues that, even if the district court erred in excluding the testimony under Rule 11-404, the testimony was also properly excluded under the balancing requirements of Rule 11-403 NMRA, as cumulative and a waste of time. See Rule 11-403 (providing that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence”); State v. Nguyen, 1997-NMCA-037, ¶ 7, 123 N.M. 290, 939 P.2d 1098 (observing that, even if evidence is admissible under Rule 11-404(B), the court must weigh the probative value of the evidence against its prejudicial effect pursuant to Rule 11-403 before deciding to admit the evidence). We do not agree.

[10] First, we disagree that the testimony of a satisfied customer is cumulative to Defendant’s other evidence consisting of her own testimony and that of her accountant. See State v. Balderama, 2004-NMSC-008, ¶ 36, 135 N.M. 329, 88 P.3d 845 (holding that the court erred in excluding testimony as a “waste of time” when the testimony was relevant to the essential element of deliberate intent, and it was not cumulative); Chacon v. State, 88 N.M. 198, 200, 539 P.2d 218, 220 (Ct. App. 1975) (holding that evidence which came from two witnesses who were not connected to the defendant or his family was not cumulative even if the testimony appeared to be identical to that offered by the defendant); Thomas, 32 F.3d at 421 (holding that the customers benefitted by the defendant’s actions were entitled to testify and that such testimony was not cumulative “of the abstract expert testimony proffered by the defendant’s accountant”).

[11] Second, we disagree that the district court, in the exercise of its discretion, could exclude the testimony in order to prevent a “parade of witnesses who had bad and good experiences with defendant.” Indeed, the district court may exercise its discretion by limiting the number of satisfied and dissatisfied customers and excluding the testimony of any remaining customers as cumulative. However, the district court’s authority to limit the number of witnesses does not alter our holding that the court abused its discretion in this case by refusing to allow Defendant to present the testimony of at least one satisfied customer. We recognize that in some cases fraudulent intent may be implied by the act itself, such as embezzlement by a bookkeeper with access to an employer’s funds. See Bogren, 611 So. 2d at 548. However, in cases such as this one, in which the alleged fraudulent activity involves the acceptance of advance payments from customers while the business is experiencing financial difficulties, the trier of fact must determine whether the defendant’s actions were motivated by poor business judgment or by an intent to wrongfully and criminally obtain funds from vulnerable customers. See Shavin, 287 F.2d at 654 (observing that, in a close question of whether the defendant acted with fraudulent intent or in good faith, it was error for the district court to refuse to allow the defendant to introduce evidence of other legitimate business transactions); Bogren, 611 So. 2d at 550.

[12] We therefore hold that the court abused its discretion in excluding the testimony of a satisfied customer as extrinsic evidence of character under Rule 11-404 because its exclusion precluded Defendant from an opportunity to fully develop a major element of her defense. See Stanley, 2001-NMSC-037, ¶ 24 (holding that the “denial of an opportunity for [d]efendant to develop a major part of his defense was an abuse of discretion”); see also State v. Saavedra, 103 N.M. 282, 284, 705 P.2d 1133, 1135 (1985) (holding that the district court abused its discretion in refusing to admit evidence that was highly probative on the issue of defendant’s improper identity defense and crucial to the defendant’s principal theory of defense). In light of our disposition, we do not reach Defendant’s arguments under the United States and New Mexico Constitutions. See State v. Self, 88 N.M. 37, 40, 536 P.2d 1093, 1096 (Ct. App. 1975). We reverse and remand for a new trial to allow Defendant to introduce the testimony of at least one satisfied customer.

**Sufficiency of the Evidence**

[13] Because Defendant would be entitled to dismissal of the charges against her if we were to find in her favor regarding the sufficiency of the evidence, we address this issue. See State v. Santillanes, 109 N.M. 781, 782, 790 P.2d 1062, 1063 (Ct. App. 1990). When reviewing a claim of insufficiency of the evidence, we must determine whether substantial evidence, either direct or circumstantial, exists to support a guilty verdict beyond a reasonable doubt for every essential element of the crimes at issue. See State v. Rojo, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. We review the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences to uphold the conviction and disregarding all evidence and inferences to the contrary, to ensure that a rational jury could have found each element of the crime established beyond a reasonable doubt. Id.; see State v. Orgain, 115 N.M. 123, 126, 847 P.2d 1377, 1380 (Ct. App. 1993).
We consider whether the evidence is sufficient to support Defendant’s convictions for fraud and embezzlement. “Fraud consists of the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations.” NMSA 1978, § 30-16-6 (1987). “Embezzlement consists of the embezzling or converting to his own use of anything of value, with which he has been entrusted, with fraudulent intent to deprive the owner thereof.” NMSA 1978, § 30-16-8 (1995).

To convict Defendant of embezzlement, the State had to prove beyond a reasonable doubt that Defendant was entrusted with money that she converted to her own use and, at the time Defendant converted the money, she fraudulently intended to deprive the owner of it. See UJI 14-1641 NMRA. “‘Converting to one’s own use’ means keeping another’s property rather than returning it, or using another’s property for one’s own purpose [rather than] . . . for the purpose authorized by the owner.” Id. “‘Fraudulently intended’ means intended to deceive or cheat.” Id.

To convict Defendant of fraud, the State had to prove beyond a reasonable doubt that (1) Defendant, by any words or conduct, made a promise she had no intention of keeping or misrepresented a fact to the victims, intending to deceive or cheat them and, (2) because of the promise or misrepresentation and the victims’ reliance on it, Defendant obtained money belonging to someone other than Defendant. See UJI 14-1640 NMRA.

Count 1 is directed at the $40,000 paid by the Gamboas for their cabinet package. Count 2 is directed at the money paid by the Gamboas for the granite countertops and kitchen hood. Count 3 is directed at the $6500 paid by the Miller-Loyds, and Count 4 is directed at the $29,726.49 paid by the Adamses.

The State presented evidence at trial that Danny Gamboa paid Defendant an initial deposit of $2000 on October 12, 1998, and another payment of $40,000 on February 19, 1999 to design and build cabinets for the Gamboas’ house. Gamboa testified that, on September 24, 1999, he made an advance payment of $10,525.50 to pay one-half of the cost of the granite countertops. He paid an additional $3442 in September 1999 for a hood for the top of his stove. While extending the deadline into October and November 1999, Defendant continued to assure the Gamboas that the cabinets would be forthcoming, but the cabinets failed to arrive. Negotiations continued into December. The Gamboas never received the cabinets, the granite countertops, or the hood, and Defendant never refunded their money. The Gamboas’ attorney testified that he attempted to work with Defendant to have the cabinets delivered, but the cabinets were never produced.

Kimela Miller-Loyd testified that she visited Defendant’s showroom in October 1999, and Defendant prepared an estimate for the work that Miller-Loyd requested. Miller-Loyd believed that the price was too high. In early December, Defendant sent a flyer offering discounts. Miller-Loyd again met with Defendant who offered additional cost-saving ideas. Defendant offered Miller-Loyd a price of $6500. Defendant informed her that this price, which represented a 10% discount, required Miller-Loyd to pay in advance, in full. Miller-Loyd made full payment. Miller-Loyd testified that Defendant’s actions in coming to her house, making drawings, and representing that she was capable of doing the cabinets induced Miller-Loyd to pay the $6500.

In late February 2000, Defendant told Miller-Loyd that she was going out of business but assured her the cabinets would be completed. Over the next month, Miller-Loyd attempted to contact Defendant without success. In September 2000, Miller-Loyd discovered that Defendant had declared bankruptcy and did not list Miller-Loyd as a creditor. Defendant later contacted Miller-Loyd offering to refund her money, but, after Miller-Loyd indicated she would accept the offer, Defendant did not contact her again. Miller-Loyd never received any cabinets in exchange for her $6500 payment.

To the extent Defendant challenges her convictions in Count 4, we review the evidence supporting those convictions as well. There is evidence that Terry Adams met with Defendant on January 19, 2000 about possible cabinetry work. Adams paid Defendant $1500 for plan drawings with the understanding that money would be refunded if Adams decided to purchase the cabinets. The next day, January 21, 2000, Adams agreed to have Defendant build the cabinets and paid Defendant $29,726.49 in advance.

The following Monday, Adams was informed that Defendant’s business was having trouble and she called her bank to stop payment on the check. Defendant and Adams spoke, and Defendant tried to assure Adams of her credibility. Adams informed Defendant that she no longer wanted the cabinets but would pay the $1500 for drawings already completed. Adams gave Defendant’s daughter a second check for $1500 on Thursday. Defendant admitted that she also deposited the second $1500 check written by Terry Adams.

Defendant never told Adams that she had deposited, and cashed, the $29,726.49 check. Defendant’s bank sought reimbursement from the Adames because Defendant had already withdrawn the funds. After Defendant’s bank instituted litigation, the Adameses had to pay the bank $24,000 in settlement. Defendant never provided the Adameses with any cabinets or additional goods and services beyond the initial drawings. Defendant never reimbursed the Adameses.

Defendant claims that her convictions must be reversed because the State failed to introduce direct evidence showing that she had the criminal intent to defraud. We disagree because intent is usually established by circumstantial evidence. See State v. James, 109 N.M. 278, 280, 784 P.2d 1021, 1023 (Ct. App. 1989) (affirming the defendant’s conviction for embezzlement and observing that “[t]he fact that the evidence is circumstantial makes no difference”); State v. Gallegos, 109 N.M. 55, 66, 781 P.2d 783, 794 (Ct. App. 1989) (stating that intent is usually inferred from the facts of the case, not direct evidence); State v. Gregg, 83 N.M. 397, 399, 492 P.2d 1260, 1262 (Ct. App. 1972) (holding that there was substantial evidence of the defendant’s fraudulent intent even though the evidence was circumstantial). In this case, Defendant’s failure to complete the work for the Gamboas, the Miller-Loyds, and the Adameses is circumstantial evidence of fraudulent intent, especially in light of the evidence that Defendant’s business was in a precarious financial position as early as March 1997. See McCallum, 87 N.M. at 461, 535 P.2d at 1087 (stating that “[t]he fact that defendant entered into many contracts which he failed to complete shows that either he was aware of the risks, that he was aware of his capabilities, or that he could not have believed that he would complete the contracts. The defendant’s proceeding to contract in spite of his awareness is evidence of his fraudulent intent”); cf. McCary v. Commonwealth, 590 S.E.2d 110, 114-15 (Va. Ct. App. 2003) (holding that sufficient evidence supported a finding of the defendant’s fraudulent intent based upon a showing of the defendant’s unfulfilled promises to complete two construction contracts, the lack of communication between the defendant and the homeowners, and the defendant’s failure
Moreover, additional evidence introduced at trial supports a finding of fraudulent intent by rebutting Defendant’s contention that she was a legitimate businesswoman who was, at most, guilty of poor business judgment. The State introduced evidence that Defendant purchased a car for her daughter using business funds in June 1999. Defendant purchased the car from Danny Gamboa for $13,429 by writing a check on a Kitchen N' Bath Design account. Defendant told Gamboa that he could cash the check when the project was complete or destroy the check and take the amount off of the final payment due for the cabinetry work.

Evidence was also introduced that Defendant withdrew large amounts of cash from her business, although she claimed that the money was used for business purposes. Defendant admitted that she occasionally paid herself commission before completing the work even though her business was failing. She also admitted that she purchased a ticket for a trip to Hawaii out of the proceeds of the Adames’ check although she claimed the trip was to interview for a possible job. Finally, Defendant’s accountant testified that Defendant did not file a corporate tax return in 1998 or 1999, and there were several tax liens against Defendant’s business because Defendant had failed to pay requisite payroll taxes. This evidence, when viewed in the light most favorable to conviction, is sufficient to support the jury’s finding that Defendant acted with fraudulent intent.

Defendant also argues that her convictions must be reversed because “uncontroverted evidence” shows that she repeatedly performed on her contracts and that she tried to negotiate a fair settlement with the injured parties. We are unpersuaded because Defendant’s alleged efforts to reach a settlement, if believed by the factfinder, do not warrant reversal as a matter of law. See Schifani, 92 N.M. at 131-32, 584 P.2d at 178-79 (holding that whether the defendant ultimately repaid the victim is irrelevant to the defendant’s conviction for fraud and embezzlement because the crimes are complete when the defendant fraudulently obtains the money or wrongfully converts it to his own use). Furthermore, the issue of whether Defendant made good-faith efforts to fulfill her contractual obligations is one of credibility that must be resolved by the jury as finders of fact and they are free to reject Defendant’s version of the events. James, 109 N.M. at 280-81, 784 P.2d at 1023-24.

Other Issues for Retrial

Having reviewed the evidence in the light most favorable to the verdict and concluding that there was sufficient evidence to support Defendant’s convictions beyond a reasonable doubt, we address the remainder of Defendant’s contentions that may arise again on retrial.

Double Jeopardy

Defendant was charged with four counts of fraud and, in the alternative, four counts of embezzlement. On Counts 2 and 4, she was convicted of both the fraud and embezzlement alternatives. The State is authorized to charge in the alternative. See State v. Pierce, 110 N.M. 76, 86, 792 P.2d 408, 418 (1990). However, Defendant’s convictions for both alternatives violate her right to be free from double jeopardy. See State v. Cooper, 1997-NMSC-058, ¶¶ 55, 57, 124 N.M. 277, 949 P.2d 660; cf. State v. Kenny, 112 N.M. 642, 651, 818 P.2d 420, 429 (Ct. App. 1991) (affirming the defendant’s conviction for one count of aggravated battery because even though the jury found him guilty under two alternatives, the district court corrected any confusion by indicating that the defendant was convicted of only one count of aggravated battery). If, upon retrial, the jury again convicts Defendant of alternatives on any count, one alternative conviction must be vacated. See Pierce, 110 N.M. at 86-87, 792 P.2d at 418-19. The double jeopardy violation cannot be cured merely by imposing one sentence for both alternatives because “the second conviction, even if it results in no greater sentence, is an impermissible punishment.” Id. (quoting Ball v. United States, 470 U.S. 856, 864-65 (1985)). As both the fraud and embezzlement offenses are the same degree felonies, we express no opinion as to which alternative conviction would need to be vacated. Cf. State v. Santillanes, 2001-NMSC-018, ¶¶ 9, 15, 130 N.M. 464, 27 P.3d 456 (stating that the general rule is to vacate the conviction and any sentence imposed for the lesser offense).

Limitation of Cross-Examination of Danny Gamboa and Exclusion of Extrinsic Evidence on the Issue of Gamboa’s Bias

Defendant claims that the district court erred in limiting her cross-examination of Danny Gamboa and in excluding extrinsic evidence as to Gamboa’s motive and bias. The admission or exclusion of evidence is within the sound discretion of the district court and we will not overturn its determination absent an abuse of that discretion. Stanley, 2001-NMSC-037, ¶ 5. We will affirm the ruling unless it is “clearly untenable or not justified by reason.” Woodward, 121 N.M. at 4, 908 P.2d at 234 (internal quotation marks and citation omitted).

Defendant claims that her cross-examination of Danny Gamboa was unduly restricted because she was not allowed to ask him about a pending criminal investigation or a contract dispute between Gamboa and Urena, who ultimately supplied the cabinets for Gamboa’s home. Our review of the record indicates that Defendant never invoked a ruling from the district court on these matters and thus failed to preserve any objection to the court’s decision to exclude these lines of questioning. See State v. Trujillo, 2002-NMSC-005, ¶ 13, 131 N.M. 709, 42 P.3d 814 (refusing to address the defendant’s confrontation clause concerns because he failed to object to the admission of evidence on confrontation grounds); State v. Varela, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (holding that a timely and specific objection is necessary to preserve error). To the contrary, the transcript indicates that defense counsel specifically agreed not to ask about the criminal investigation unless it became relevant at some later point. Defendant does not contend that either party raised the issue later during the trial. Defense counsel also initially agreed that the contract dispute between Gamboa and Urena was irrelevant. Later, during cross-examination of Urena, Defendant stated that she might seek to bring in evidence of the contract dispute. However, Defendant made this statement in response to the State’s attempt to ask Urena about the amount Gamboa agreed to pay him for the cabinets. The State was attempting to establish the amount Gamboa lost in his dealings with Defendant. Once the court determined that the amount Gamboa paid to Urena was not relevant to the issue of any criminal behavior by Defendant, Defendant no longer sought to introduce any evidence of the contract dispute between Urena and Gamboa. As these issues were not preserved, we do not express an opinion as to whether, on retrial, Defendant should be allowed to introduce evidence of the contract dispute between Urena and Gamboa or any alleged criminal investigation concerning Gamboa. See State v. Mireles, 119 N.M. 595, 597, 893 P.2d 491,
Defendant also claims that she should have been allowed to question Danny Gamboa about a victim’s restitution request form completed by the district attorney’s office. Defendant claims that she sought to introduce the restitution form to show Gamboa’s direct interest and bias by showing that Gamboa initiated prosecution to obtain reimbursement. The State argued that the form was inadmissible because Gamboa never signed it and it was only for internal use by the district attorney’s office.

We hold that the court did not abuse its discretion in excluding the question based upon its finding that any inconsistency between the $80,000 claimed on the restitution request and the $55,000 loss Gamboa asserted at trial was irrelevant to the issue of Gamboa’s bias. We also note that the court informed Defendant that she could ask about bias by asking Gamboa, “You’re out at least $55,000; you want your money back?” Even though invited to do so, defense counsel did not question Gamboa further about any money he wanted to recover from Defendant. Therefore, Defendant waived any objection based upon exclusion of the restitution request sheet. Cf. State v. Mora, 1997-NMSC-060, ¶¶ 45-46, 124 N.M. 346, 950 P.2d 789 (holding that the defendant waived his claim that the State’s late disclosures prevented him from effectively cross-examining certain witnesses because the defense failed to recall any witness when he was given the opportunity to do so).

Finally, Defendant contends that she was improperly prevented from questioning two other witnesses about Gamboa’s intense dislike of Defendant. We disagree as to the first witness -- Munoz, because the transcript indicates that Defendant failed to preserve any such objection. The transcript indicates that the court did allow Defendant to ask this witness about excessive demands and changes made by Gamboa which would be evidence of Gamboa’s dislike. However, Defendant never asked any further questions about demands or changes once the court permitted this line of questioning.

As to Urena, Defendant claims she should have been able to ask him about a statement made to him by Gamboa that Gamboa was pleased Defendant was arrested. This question might be admissible to establish bias or motive on the part of Gamboa. See State v. Lovato, 91 N.M. 712, 714, 580 P.2d 138, 140 (Ct. App. 1978). However, the court did not abuse its discretion in disallowing the question because the inquiry appears cumulative of other evidence that Gamboa did not like Defendant and, in light of Gamboa’s claim that Defendant defrauded him, it was relatively lacking in probative value. See Rule 11-403; Lovato, 91 N.M. at 715, 580 P.2d at 141 (observing that extrinsic evidence showing a witness’s bias or motive to testify falsely is admissible but affirming the court’s decision to exclude the tendered testimony as cumulative); cf. State v. Marquez, 1998-NMCA-010, ¶ 24, 124 N.M. 409, 951 P.2d 1070 (stating that the district court may exclude cumulative evidence).

Amendment of the Indictment

Defendant contends that the court erred in amending the indictment to add new charges and to expand the scope of the charges without notice. We decline to address this issue in light of our decision to reverse Defendant’s convictions and remand for a new trial. See State v. Roman, 1998-NMCA-132, ¶ 16, 125 N.M. 688, 964 P.2d 852 (stating that this Court will not usually reach out to decide issues unnecessarily).

Conclusion

We hold that Defendant should have been allowed to introduce testimony from at least one satisfied customer. We further hold that Defendant’s alternative convictions for fraud and embezzlement violate her right to be free from double jeopardy. Accordingly, we vacate the judgment of the district court. Because the evidence was sufficient to support Defendant’s convictions, we remand this case for a new trial to be conducted in a manner consistent with this opinion.

IT IS SO ORDERED.

JAMES J. WECHSLER,
Chief Judge

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

MICHAEL D. BUSTAMANTE, JUDGE

{1} This is a dispute over a commission on the sale of real property. Defendants, Summit Investment Company, L.L.C. (Summit), and Jeffery W. Potter, appeal a judgment, entered after a bench trial, in favor of Plaintiff French & French, Inc. (French). The judgment awarded compensatory and punitive damages and held Summit and Potter jointly and severally liable. Leaving implications of the numerous issues sought to be raised by Defendants to the body of the Opinion, we: (1) affirm the award of compensatory damages against Summit, (2) reverse the judgment against Potter in his individual capacity, and (3) affirm the award of punitive damages against Summit.

BACKGROUND

{2} The district court found the following facts. In early December 1998, Santa Fe Economic Development, Inc. (SFEDI) listed certain property it owned with a real estate broker called Santa Fe Properties (the listing broker). SFEDI agreed to pay the listing broker a 10% real estate commission, plus gross receipts tax, half of which would be paid to any licensed real estate broker who found a buyer for the property. In the fall of 1998, Potter, general manager and sole shareholder of Summit, had enlisted Plaintiff Glen Bogle’s services to find property Summit could buy for commercial development. Summit engaged Bogle to represent it in the purchase of the SFEDI property. Bogle never entered into an agency agreement with Summit, Potter, or SFEDI. Thus there was no written agreement obligating anyone to pay Bogle a commission on the transaction. In any event, Bogle was not able to negotiate the purchase, and in mid-December 1998 Summit terminated its business relationship with Bogle.¹

{3} At the end of December 1998, Summit contacted French to act as a buyer’s agent in the purchase of the same property. On behalf of Summit, Potter executed a form “Buyer’s Agency” agreement with French. French prepared the form to run from December 1, 1998, until June 1, 1999. Summit attempted by interlineation to limit the term of the agreement to January 31, 1999. The district court found that French did not agree to this limitation, and that the term of the agreement “was not affected by Potter’s interlineation.” Summit and French also entered into a “Buyer’s Agency Disclosure and Compensation Agreement” (Compensation Agreement). The Compensation Agreement required SFEDI, as seller, to authorize the listing broker to pay French a 5% commission, plus gross receipts tax, in the event of a sale. The Compensation Agreement recited that it was to be attached to any purchase agreement covering property that was not listed by French where French was acting as the buyer’s broker.

{4} Following signature of the two agreements, French proceeded to facilitate negotiations with SFEDI to produce a purchase agreement. During the last week of negotiations, SFEDI informed Potter and Summit that it would require them to indemnify SFEDI from any claims for compensation that Bogle might make. With the exception of Potter agreeing to personally indemnify SFEDI, all essential terms and conditions of the purchase agreement were agreed to by January 29, 1999. The district court found that French did not agree to this limitation, and that the term of the agreement “was not affected by Potter’s interlineation.” Summit and French also entered into a “Buyer’s Agency Disclosure and Compensation Agreement” (Compensation Agreement). The Compensation Agreement required SFEDI, as seller, to authorize the listing broker to pay French a 5% commission, plus gross receipts tax, in the event of a sale. The Compensation Agreement recited that it was to be attached to any purchase agreement covering property that was not listed by French where French was acting as the buyer’s broker.

{5} After French refused to indemnify SFEDI, Summit’s counsel authorized French to arrange a meeting with Bogle to negotiate a resolution of Bogle’s claim to commission. French arranged a meeting with Bogle, but before the meeting occurred, Summit’s counsel

¹ Bogle was a Plaintiff at the trial in district court. The district court ruled he was not entitled to any recovery. He did not appeal the ruling and he is not a party here.
told French not to meet with Bogle because Potter had agreed to indemnify SFEDI and Summit and SFEDI had signed the purchase agreement. Summit informed French it would not be paid a commission on the sale. Rather, Summit replaced French, was named the buyer’s broker in the final purchase agreement, and the commission was paid to Summit.

[6] The district court found that Summit and Potter “interfered with and prevented” French from acting as agent and performing its obligations under the Buyer’s Agency agreement “thereby breaching Summit’s obligations un [sic] the contract.” The district court decided that the Buyer’s Agency agreement and the Compensation Agreement constituted a statutorily enforceable agency agreement, and that French was a procuring cause of the sale of the SFEDI property. The district court ruled that Summit was liable to French “for deliberately executing a purchase contract with SFEDI that did not require payment” of a commission to French. The district court also entered the following findings of fact:

3. Santa Fe Economic Development, Inc. (SFEDI) is a nonprofit New Mexico corporation.
4. Summit Investment Company, LLC (Summit) is a limited liability company.
5. Jeffery W. Potter (Potter) is a resident of Santa Fe County, New Mexico and is a licensed real estate broker under the laws of the State of New Mexico. He is the manager of Summit.
6. Santa Fe Properties, Inc. (Santa Fe Properties) [the listing broker] is engaged in the sale and purchase of real estate under the laws of the state of New Mexico.
7. SFEDI was the owner of approximately 21.44 acres of land located in Santa Fe County, which land is part of the Valdez Center.
8. Under the listing agreement, SFEDI agreed to pay Santa Fe Properties [the listing broker] a 10% real estate commission, plus gross receipts tax thereon, of which half (5%) would be paid to any licensed real estate broker who brought a purchaser who purchased the lots at Valdez Center from SFEDI.
9. In the fall of 1998, Potter, in his capacity as General Manager of Summit, enlisted Bogle’s services to find Summit real estate could purchase for commercial development.
10. Bogle showed and introduced Potter to various commercial properties, including SFEDI’s lots.
11. After being introduced to SFEDI’s properties, Potter informed Bogle that Summit wanted to purchase SFEDI’s lots.
12. Summit engaged Bogle to represent it in the sale of the Valdez Center lots.
13. On December 3, 1998, Summit, through Potter, asked and authorized Bogle to submit a letter of intent to purchase the SFEDI property, expressly acknowledging that Bogle was making the offer as Buyer’s Agent for Summit.
14. Bogle never entered into a Broker’s Agency Agreement with Summit or Potter.

DISCUSSION

[7] Defendants raise thirteen issues on appeal, which we have classified into three categories for the purposes of our discussion: contract issues, tort issues, and punitive damages. We address each one in turn.

BREACH OF CONTRACT

[8] Defendants first argue that no contract existed between Summit and French because there was no mutual assent as to the termination date of the contract, and without mutual assent, no contract was ever formed. We deal with this argument summarily because Summit did not raise these issues at trial, and they have not been preserved for appeal. See Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) (noting preservation requirements). Defendants actually made the opposite argument below. Defendants requested the following findings of fact:

18. At the end of December 1998, Summit executed a Buyer’s Agency Disclosure Statement and Compensation Agreement and Buyer’s Agency Right to Represent Buyer Agreement . . . with French, . . .


Defendants’ argument during trial mirrored their requested findings of fact. Defendants may not change their “theory on appeal” and now claim that no contract existed. See Azar v. Prudential Ins. Co., 2003-NMCA-062, ¶ 24, 133 N.M. 669, 68 P.3d 909 (internal quotation marks and citation omitted).

[9] Defendants next argue that if there was a contract between French and Summit, no breach occurred because the contract expired on January 31, 1999, four days before they entered into a purchase agreement with SFEDI. In the same vein, Defendants argue that the district court erred in allowing parol evidence to be admitted regarding the end date of the contract, and “rewriting” the terms of the contract to make the end date June 1, 1999.

[10] The question whether a contract contains an ambiguity is a matter of law to be determined by the district court. Mark V, Inc. v. Mellekas, 114 N.M. 778, 781-82, 845 P.2d 1232, 1235-36 (1993). The meaning of an ambiguous term is a question of fact which we review under a substantial evidence standard. Id. Appellate courts are not bound by the district court’s conclusions of law, but its findings of fact are reviewed under a substantial evidence standard. C.R. Anthony Co. v. Loretto Mall Partners, 112 N.M. 504, 510, 817 P.2d 238, 244 (1991) “[I]n determining whether a term or expression to which the parties have agreed is unclear, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance.” C.R. Anthony Co., 112 N.M. at 508-09, 817 P.2d at 242-43 (footnote omitted). In adopting this rule, New Mexico courts have abandoned the “plain-meaning” or “four-corners” standard that required courts to resolve the ambiguity without

Based on our holdings in *C.R. Anthony* and *Mark V, Inc.*, the district court correctly heard evidence surrounding the making of the Buyer’s Agency agreement to resolve the ambiguity concerning its term. The district court relied on the testimony of French’s agent, who testified it was customary practice for the length of a Buyer’s Agency agreement to extend six months to a year, that he did not agree to Potter’s handwritten expiration date, and that to do so in a complicated transaction such as this would be unreasonable. The district court also relied on the fact that Summit authorized French to continue to perform under the Buyer’s Agency agreement as late as February 4, 1999, after the claimed expiration date. All of these facts support the district court’s decision that the term of the agreement ran through June 1, 1999.

In a rather odd argument, Defendants assert that even if there was a contract in force, Summit as the buyer had no personal obligation according to the terms of the contract to pay French any commission. Rather, Defendants claim, SFEDI as seller had the obligation to pay the broker’s commission. We characterize this argument as odd given the basic nature of the arrangement between Summit and French.

French concedes (and says it never argued otherwise) that Summit did not have a direct obligation to pay the commission. French points out that the agreement between it and Summit contained both implied and express promises that the purchase agreement between Summit and SFEDI would assure payment of the commission to French by the listing broker. French argues, and the district court ruled, that Summit breached these promises. As noted above, French and Summit executed two documents. The Buyer’s Agency agreement gave French the right and authority to represent Summit in locating and acquiring real property. The Compensation Agreement—executed simultaneously with the Buyer’s Agency agreement—was designed to protect, if not insure, payment of the buyer’s (Summit) broker’s commission. The Compensation Agreement obligated Summit to make the Compensation Agreement an exhibit to any purchase agreement Summit entered into as a buyer. Paragraph 4(b) of the Compensation Agreement required sellers (such as SFEDI) to agree to have the following terms in any purchase agreement:

b. Seller authorizes and directs Listing Broker to share its commission with Broker, acting as a Licensee, in accordance with the division shown in the listing information offered through MLS or Broker shall be compensated on the following terms: Five percent of sales price plus applicable New Mexico gross receipts tax. Broker shall not receive any undisclosed real estate brokerage commission in this transaction. Payment of said commission to Broker shall not create any agency or subagency relationship between Broker and either Seller or Listing Broker.

Together, the two documents described how French would earn its commission and how it would be paid from the sales proceeds. Thus, Summit’s argument that it had no direct obligation to pay the commission is literally beside the point, and we reject it.

Summit’s only factual defense of its action was that French in effect bowed out of the transaction when it refused to indemnify SFEDI. Once that defense was rejected as a factual matter, the district court’s decision could—and did—rest on a number of legal theories. For example, Summit breached an express term of the agreement when it failed to have the Compensation Agreement attached to the purchase agreement with SFEDI.

In addition, in real estate transactions, the law implies certain promises between a buyer and a broker even if the commission is to be paid by the seller, as in this case. French cites to a number of out-of-state cases for the proposition that a real estate broker has a cause of action against a purchaser who refuses to carry out his contract with the seller, even though the broker has agreed to look to the seller for his commission. *See generally Pobst v. Di Giovanni*, 95 So. 2d 321 (La. 1957); *Blache v. Goodier*, 22 So. 2d 82 (La. Ct. App. 1945); *Tanner Assocs., Inc. v. Ciralt*, 161 A.2d 725 (N.J. 1960); *Duross Co. v. Evans*, 257 N.Y.S.2d 674 (N.Y. App. Div. 1965); *Danciger Oil & Ref. Co. v. Wayman*, 37 P.2d 976 (Okla. 1934); and *Livermore v. Crane*, 67 P. 221 (Wash. 1901). The general rule derived from these cases is that a purchaser is liable to a broker for breach of an implied promise when the purchaser fails to complete the transaction. Here, the district court found that Summit failed to complete the transaction with French as its broker for no good reason.

Perhaps more familiarly, the district court found a breach of the duty of good faith and fair dealing. “[E]very contract imposes upon the parties a duty of good faith and fair dealing in its performance and enforcement.” *Watson Truck & Supply Co. v. Males*, 111 N.M. 57, 60, 801 P.2d 639, 642 (1990); *Gilmore v. Duderstadt*, 1998-NMCA-086, ¶ 24, 125 N.M. 330, 961 P.2d 175. This implied covenant requires that neither party do anything that will injure the rights of the other party to receive the benefit of the agreement. *Bourgeois v. Horizon Healthcare Corp.*, 117 N.M. 434, 438, 872 P.2d 852, 856 (1994). Having found that SFEDI never demanded indemnification from French, the district court clearly decided there was no excuse for Summit’s behavior in excluding French from the transaction. The district court implicitly decided that Summit simply tried to force French to accept a risk which was not part of the original arrangement between them. The district court was clearly struck—as are we—by the fact that Summit itself took the commission. All of these circumstances support the district court’s ruling.

Finally, Defendants argue that the district court erred by finding Potter individually liable for breach of contract. The short answer is that it did not. The district court’s basis for Potter’s individual liability was in tort.

**TORT CLAIMS**

We read the district court’s rulings to hold only Potter, and not Summit liable for intentional interference with French’s contract and for prima facie tort. Therefore, we do not address any tort liability of Summit under either of these theories. Relying on California and Texas case law, Defendants argue that Potter, as manager for Summit, cannot interfere with Summit’s contracts. This Court addressed the issue of a corporate officer interfering with the contracts of his own corporation in *Ettenson v. Burke*, 2001-NMCA-003, 130 N.M. 67, 17 P.3d 440. In *Ettenson*, we rejected the view that “corporate officers are simply surrogates of the corporation, entitled to absolute immunity from suits for tortious interference with contract.” *Id.* ¶ 20. We held instead that the privileged immunity of
corporate officers is qualified. *Id.* Corporate agents “are privileged to interfere with or induce breach of the corporation’s contracts with others as long as their actions are in good faith and for the best interests of the corporation.” *Id.* ¶ 18. We recognized in *Ettenson* that the inquiry of whether or not a privilege exists is fact specific, to be determined by the trier of fact. *Id.* ¶¶ 18, 19, 21. In determining whether or not a privilege exists, the district court must look to the motivating forces behind the agent’s decision to induce the corporation to breach its contractual obligations. *Id.* ¶ 18. A court cannot say as a matter of law that a corporate agent was not acting in the best interest of the corporation by interfering with its contractual duties simply because, as in this case, the agent may have stood to profit along with the corporation. *Id.* ¶ 21. In addition, under New Mexico’s Limited Liability Company Act, NMSA 1978, §§ 53-19-1 to -13 (1993, as amended through 2004) and supporting case law, an agent of a corporation may be held liable for the consequences of his own acts or omissions, including tortious acts. *Kreischer v. Armijo*, 118 N.M. 671, 673, 884 P.2d 827, 829 (Ct. App. 1994) (recognizing that an agent may be held individually liable for his own tortious acts, whether or not he was acting for a disclosed principal).

{19} As a matter of law, therefore, it is possible in New Mexico for a corporate agent to wrongfully interfere with his corporation’s contracts and to be held personally responsible for his acts. The question then becomes whether or not Potter could be held liable under the facts of this case.

{20} To establish liability, French had the burden of showing that (1) Potter had “knowledge of the contract” between French and Summit, (2) “performance of the contract was refused,” (3) Potter “played an active and substantial part in causing [French] to lose the benefits of [the] contract,” (4) “damages flowed from the breached contract,” and (5) Potter “induced the breach ‘without justification or privilege to do so.’” *Ettenson*, 2001-NMCA-003, ¶ 14 (quoting *Wolf v. Perry*, 65 N.M. 457, 461-62, 339 P.2d 679, 681-82 (1959)).

{21} To find Potter individually liable, the facts must show that Potter acted with either an improper motive or by use of improper means. *See Diversey Corp. v. Chem Source Corp.*, 1998-NMCA-112, ¶ 20, 125 N.M. 748, 965 P.2d 332. Improper means includes not only tortious behavior, but any “predatory” behavior, including behavior that is wrongful based on an established standard of a trade or profession. *Id.* ¶ 21. The district court found Potter’s motive in interfering with the contract was for the improper purpose of diverting a commission away from French to himself and Summit. What is lacking, though, is any evidence establishing how Potter’s motives were separate from those of Summit. The district court did not find that Potter’s improper purpose in diverting the commission was for his own benefit, rather than that of Summit. In this case, Summit profited from the diverted commission. The findings do not support a legal conclusion that Potter acted with an improper personal or individual motive. We hold that the evidence was not sufficient to support a claim for intentional interference with the contract against Potter individually. We therefore reverse the decision of the district court on this issue.

{22} Having determined that the record does not support a claim for intentional interference with contract, we now address the district court’s ruling that Potter was “individually liable . . . because his acts and omission satis[fied] the elements of a prima facie tort.” To state a claim for prima facie tort, French had to show (1) “[a]n intentional, lawful act by defendant;” (2) “[a]n intent to injure the plaintiff;” (3) “[i]njury to plaintiff, and” (4) “insufficient justification for the defendant’s acts.” *Schmitz v. Smentowski*, 109 N.M. 386, 393-94, 785 P.2d 726, 733-34 (1990) (citation omitted). Prima facie tort is intended to provide a remedy for persons harmed by acts that are intentional and malicious, but otherwise lawful, which “fall outside of the rigid traditional intentional tort categories.” *Martinez v. N. Rio Arriba Elec. Coop., Inc.*, 2002-NMCA-083, ¶ 24, 132 N.M. 510, 51 P.3d 1164 (internal quotation marks and citation omitted). Prima facie tort should be used to address wrongs that otherwise “escaped categorization,” but “should not be used to evade stringent requirements of other established doctrines of law.” *Schmitz*, 109 N.M. at 396, 398, 785 P.2d at 736, 738.

{23} New Mexico courts have accepted the view that prima facie tort may be pleaded in the alternative. *See id.* “However, if at the close of the evidence, plaintiff’s proof is susceptible to submission under one of the accepted categories of tort, the action should be submitted . . . on that cause and not under prima facie tort.” *Id.* at 396, 785 P.2d at 736. Using this procedure, the theory underlying prima facie tort, (which is to provide a remedy for intentionally committed acts that do not fit within the contours of accepted torts), may be furthered, while remaining consistent with modern pleading practice. *Hagebak v. Stone*, 2003-NMCA-007, ¶ 26, 133 N.M. 75, 61 P.3d 201 (internal quotation marks and citation omitted).

{24} Although French was unable to establish a claim under intentional interference with contract, that was the appropriate tort action in this case. In addition, Plaintiff had a (successful) cause of action under breach of contract. Thus, existing causes of action provided reasonable avenues to a remedy for the asserted wrongful conduct. As such, there was simply no need to resort to prima facie tort. This is a classic case of a plaintiff trying to avoid “stringent requirements of other established doctrines of law” to impose liability in tort. *Schmitz*, 109 N.M. at 398, 785 P.2d at 738. Prima facie tort has no application here.

**PUNITIVE DAMAGES**

{25} Defendants argue that the district court violated the United States Constitution by holding both Potter and Summit liable for punitive damages. Defendants contend that the district court failed to make several determinations that are required to uphold a finding of punitive damages, including Defendants’ reprehensibility, whether the harm was physical or economic, whether the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others, and whether the conduct involved repeated actions or was an isolated incident. We first address the district court’s decision to award punitive damages, then the reasonableness of the award.

{26} Plaintiff contends the district court had substantial evidence to conclude that Potter’s acts were willful and in reckless disregard of French’s right to a commission. Plaintiff further alleges that Potter’s stated pretext for taking French out of the sales transaction and stepping in as the buyer’s broker predicated on the false claim that SFEDI demanded indemnity from French is evidence of dis-

{27} Since we have reversed the district court on the issue of Potter’s individual tort liability, we also reverse as to any punitive damages awarded against Potter. We only review the punitive damages based on the breach of contract action against Summit.

{28} New Mexico law allows a plaintiff who establishes a cause of action in law to recover punitive damages as long as the wrongdoer’s conduct is willful, wanton, malicious, reckless, oppressive, or fraudulent and in bad faith. Sanchez v. Clayton, 117 N.M. 761, 767, 877 P.2d 567, 573 (Ct. App. 1994); Gonzales v. Sansoy, 103 N.M. 127, 129, 703 P.2d 904, 906 (Ct. App. 1984). Contrary to Defendants’ contention that punitive damages cannot be awarded in breach of contract cases, our case law clearly establishes that punitive damages may be recovered for breach of contract when the defendant’s conduct has been sufficiently malicious, oppressive, fraudulent, or committed recklessly with a wanton disregard for the plaintiff’s rights. Paiz v. State Farm Fire & Cas. Co., 118 N.M. 203, 210, 880 P.2d 300, 307 (1994). An award of punitive damages for breach of contract may be sustained on appeal only if the evidence shows a culpable state of mind. Alsup’s Convenience Stores, Inc. v. N. River Ins. Co., 1999-NMSC-006, ¶ 45, 127 N.M. 1, 976 P.2d 1. “Our rule on punitive damages never was intended to make punitive damages available for every intentional breach of a contract.” Romero v. Mervyn’s, 109 N.M. 249, 256, 784 P.2d 992, 999 (1989). An intentional breach by itself ordinarily cannot form the predicate for punitive damages, not even when the breach is flagrant, that is, when there is no question that the conduct breaches the contract, even if the other party will clearly be injured by the breach. Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs., L.P., 1998-NMCA-005, ¶ 43, 124 N.M. 440, 952 P.2d 435 (Hartz, C.J., concurring in part and dissenting in part). Circumstances which could make punitive damages appropriate in a breach of contract case include, for example, an intentional breach accompanied by fraud. See, e.g., Whitehead v. Allen, 63 N.M. 63, 65-66, 313 P.2d 335, 336 (1957) (affirming a punitive damages award for the falsification of weight records by purchaser of alfalfa).

{29} Also, when the breaching party intends to inflict harm on the non-breaching party or engages in conduct which violates community standards of decency, punitive damages are appropriate. McConnell, 112 N.M. at 375, 815 P.2d at 1165. See Romero v. Mervyn’s, 109 N.M. 249, 258, 784 P.2d 992, 1001 (1989) (“Overreaching, malicious, or wanton conduct” justifying punitive damages “is inconsistent with legitimate business interests, violates community standards of decency, and tends to undermine the stability of expectations essential to contractual relationships.”). Malicious conduct is the intentional doing of a wrongful act with knowledge that the act was wrongful.” UJI 13-861, NMRA. See Romero at 255-56, 784 P.2d at 998-99 (“[M]alice . . . means the intentional doing of a wrongful act without just cause or excuse. This means that the defendant not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrong when he did it.”) (quoting Loucks v. Albuquerque Nat’l Bank, 76 N.M. 735, 747, 418 P.2d 191, 199 (1966)); UJI 13-1827, NMRA (giving same definition for malicious conduct in tort cases to justify punitive damages).

{30} Using this analysis, the question is whether Summit’s breach of contract with French was sufficiently egregious to merit punitive damages. The district court found Summit had full knowledge that French was entitled to its commission and that it entered into the purchase agreement with SFEDI with the intention of depriving French of its due. The district court also found that Summit’s conduct was not justifiable under all the circumstances and that it was motivated by an improper purpose to divert the commission to itself. The district court did not enter any specific finding that Potter or Summit acted dishonestly or deceitfully.

{31} As discussed above, every intentional breach can be seen as a wrongful act that the breaching party knows will cause financial harm to the other party. Thus, the fact that Summit knew French was entitled to the commission is not enough to support an award of punitive damages.

{32} Do the lack of justification and improper purpose or motive to divert the commission provide the added level of egregiousness sufficient to support punitive damages? We hold that they do. While not strictly dishonest, Summit’s actions were, as the district court found, without justification. Summit found itself faced with a potential claim from Bogle. SFEDI demanded protection from Bogle’s claim. Summit’s potential difficulties with Bogle were none of French’s doing or business. Yet Summit purposely took French’s commission for itself to cover its own risk. Summit tried to make French pay for business risks which were Summit’s alone. This cannot be viewed as a legitimate business reason for an intentional breach. Rather Summit’s acts and motive fits the standard for malicious conduct. The basis for punitive damages was established.

{33} The amount of the damages also seems reasonable. The Eighth and Fourteenth Amendments to the federal Constitution prohibit punitive damage awards that are “grossly excessive.” Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-34 (2001). We review an award of punitive damages for excessiveness de novo. Aken v. Plains Elec. Generation & Transmission Coop., Inc., 2002-NMSC-021, ¶ 17, 132 N.M. 401, 49 P.3d 662. Our review must consider three guideposts: “1) the degree of reprehensibility of the defendant’s misconduct; 2) the disparity between the harm . . . suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” Id. ¶ 20 (citing BMW, 517 U.S. at 574-75).

{34} An award of punitive damages “should reflect the enormity of [the] offense.” BMW, 517 U.S. at 575 (internal quotation marks and citation omitted). To determine the reprehensibility of the defendant’s misconduct, we must consider whether the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. State Farm Mut. Auto. Ins. Co., 538 U.S. at 419. Although the presence of any of these factors alone may not be sufficient to support an award of punitive damages, the “absence of all of them renders any award suspect.” Id. The only factor weighing in favor of an award of punitive damages in this case is the fact that the harm inflicted by Summit was the result of intentional malice. However,
we find that this factor is sufficient to support an award of punitive damages. Punitive damages are “intended to punish the defendant and to deter future wrongdoing.” Cooper Indus., 532 U.S. at 432. Absent an award of punitive damages in this case, Summit would have no incentive to refrain from cheating those with whom it does business in the future. Therefore, we find that Summit’s conduct was sufficiently reprehensible to support the relatively modest punitive damages award imposed by the district court.

{35} The second BMW guidepost requires us to consider whether the “amount of [the] award [is] so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice.” Aken, 2002-NMSC-021, ¶ 23. This is a somewhat imprecise inquiry; the United States Supreme Court has refused to establish a “bright-line ratio which a punitive damages award cannot exceed.” State Farm Mut. Auto. Ins. Co., 538 U.S. at 425. However, the Court has recognized that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” Id. In this case, the district court imposed a relatively modest punitive damage award equal to one and one-half times the compensatory damages award. Based on the general lack of guidance on what constitutes an appropriate ratio between compensatory and punitive damages and the relatively small ratio in this case, we find that the amount of punitive damages awarded by the district court did not violate due process.

{36} The third guidepost requires us to “[compare] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.” Aken, 2002-NMSC-021, ¶ 25 (quoting BMW, 517 U.S. at 583). Under the Unfair Practices Act, NMSA 1978, § 57-12-1 to -24 (1967, as amended through 2004), it is unlawful for any person to make a “false or misleading oral or written statement, . . . or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services . . . which may, tends to or does deceive or mislead any person.” §§ 57-12-2(D), -3. Because of the similarity of the conduct prohibited by the Unfair Practices Act and the conduct engaged in by Summit, the remedies afforded under the Unfair Practices Act serve as a meaningful comparison in our determination of the reasonableness of the punitive damages awarded by the district court. Under the Unfair Practices Act, any person who suffers a financial loss as the result of another willfully engaging in an unfair trade practice may recover treble damages. § 57-12-10(B). Because the ratio of punitive damages to compensatory damages awarded by the district court was smaller than the statutory ratio for similar conduct, we find that the award of punitive damages was not excessive under this guidepost.

{37} Because we find that each of the three BMW guideposts supports the district court’s award of punitive damages, we conclude that the amount of the award did not violate due process. Therefore, we affirm the district court’s award of punitive damages.

CONCLUSION

{38} We affirm the award of compensatory and punitive damages against Summit. We hold that the district court erred in finding Potter individually liable, and we reverse the judgment against him.

{39} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
MICHAEL E. VIGIL, Judge
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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.

Offices for Lease Downtown  
Spacious remodeled offices with furnished secretarial space. ($425.00 - $650.00) Two conference rooms; kitchen, telephone, free DSL, Cat. 5 networking, fax, free client parking, security & janitorial. Walking distance to all courts -Congenial atmosphere. Call Deborah at (505) 843-9171.

For Lease  
For Lease, 2142 sq. ft. on Central at 12th, very clean space with plenty of on-site parking. 5 offices plus conference room $1200/month call Dan Hernandez M: 480-5700, O: 247-0444 at Berger Briggs Real Estate & Insurance Inc.

Downtown  
Beautiful adobe building near MLK on north I-25 on-ramp, Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $240 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

Office Space Available  
400 Gold SW  
Executive suite available, includes reception, conference rooms, breakroom, copy/fax services, and phone system. Offices starting at $400/mo. Suites also available 1000 to 5000 sf, negotiable lease terms and improvements. Covered onsite parking. Call Daniel at 241-3801 or e-mail daniel@armstrongbros.com.

Santa Fe Studio Office  
Overnight office in Santa Fe at The Lofts on Cerrillos Road w/high speed Internet access, Murphy bed, and kitchenette. Rent negotiable. Unit #1101. 505-690-6565.

Granada Square Office Park in Albuquerque  

Uptown Square Office Building  
Prestigious Uptown location, high visibility, convenient access to I-40, Bank of America, companion restaurants, shopping, two-story atrium, extensive landscaping, ample parking, full-service lease. 3747SF. Buildings include reception counter/desk and separate kitchen area. Competitive Rates. Available Soon! Call Ron Nelson or John Whisenant 883-9662.

Office For Lease – Historic Sunshine Bldg.  

Louisiana/Candelaria Corner!  
Office suite w/ staff station. Shared conference room, reception area, copy room/kitchen. Phone system, janitorial. 889-3899.
CASHING OUT:
Six Ways Business Owner Clients Can Sell Their Businesses

State Bar Center, Albuquerque
Thursday, March 24, 2005
1.8 General CLE Credits
Luncheon (provided at the State Bar Center)
- 11:30 a.m. to Noon
CLE Workshop - Noon to 1:30 p.m.

Co-Sponsor: Business Law Section
Presenter: Darrell Arne, CPA

This 90-minute workshop will be presented by a CPA, business appraiser, and business intermediary who specializes in business owner transfers to privately held business owners. In this presentation, business lawyers will be provided a framework which they can use in advising their business owner clients about selling their businesses. Discussion will include a business owner’s wealth accumulation life cycle, the four key elements to growing a business to maximize its value, the right and wrong timing for selling a business, the levels of value for different buyers, and some of the advantages, disadvantages and specific exit strategies for various sale or transfer options. The workshop will be preceded by a luncheon co-sponsored by the Business Law Section.

REGISTRATION - CASHING OUT:
SIX WAYS BUSINESS OWNER CLIENTS CAN SELL THEIR BUSINESSES
Thursday, March 24, 2005 • State Bar Center, Albuquerque
1.8 General CLE Credits

☐ Standard and Non-Attorney $59  ☐ Government and Paralegal $49  ☐ Business Law Section Member $49

Name: ___________________________________________________________________________ NM Bar#: _________________________
Firm: ______________________________________________________________________________________________________________
Address: ______________________________________________________________________________________________________________
City/State/Zip: _______________________________________________________________________________________________________
Phone: __________________________ Fax: ________________________________
E-mail address: _______________________________________________________________________________________________________

Payment Options: ☐ Enclosed is my check in the amount of $ ______________ (Make Checks Payable to: CLE State Bar of NM)
☐ VISA  ☐ Master Card  ☐ American Express  ☐ Discover  ☐ Purchase Order (Must be attached to be registered)
Credit Card Acct. No. ________________ Exp. Date ______________

Signature __________________________________________________________________________

Mail this form to: Center for Legal Education of the NM State Bar Foundation, P.O. Box 92860 Albuquerque, NM 87199 or Fax to (505) 797-6071.

Register Online at www.nmbar.org
DUI in New Mexico: Practical Problems and Possible Solutions
Tuesday, March 22, 2005 • 9 a.m.
State Bar Center, Albuquerque
6.7 General CLE Credits

Presenters: Lee Boothby, Esq.,
Thomas DeMartino, Esq.,
Hon. Cristina S. Jaramillo, Jack Mastenbrook,
Melissa Stephenson and Lt. Murray Conrad

This full day seminar will consist of a legal update on evidence issues and a panel discussion on DUI problems and ideas for solutions in New Mexico. The panel will be composed of a police officer, a judge, a prosecutor, a defense attorney and a victim’s representative. Audience participation will be sought and problems from Albuquerque and around the state will be aired. The day will conclude with a planning session for future actions.

Schedule of Events

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:00 a.m.</td>
<td>Introduce the Problem</td>
</tr>
<tr>
<td>9:50 a.m.</td>
<td>Break</td>
</tr>
<tr>
<td>10:00 a.m.</td>
<td>The Progeny of Chouinard, State vs. _______</td>
</tr>
<tr>
<td>10:50 a.m.</td>
<td>Panel Discussion</td>
</tr>
<tr>
<td>Noon</td>
<td>Lunch</td>
</tr>
<tr>
<td>1:00 p.m.</td>
<td>Potential Solutions</td>
</tr>
<tr>
<td>2:15 p.m.</td>
<td>Break</td>
</tr>
<tr>
<td>2:30 p.m.</td>
<td>Q &amp; A</td>
</tr>
<tr>
<td>3:30 p.m.</td>
<td>Plan for Action</td>
</tr>
<tr>
<td>4:00 p.m.</td>
<td>Adjourn</td>
</tr>
</tbody>
</table>

REGISTRATION - DUI IN NEW MEXICO:
PRACTICAL PROBLEMS AND POSSIBLE SOLUTIONS
Tuesday, March 22, 2005 • State Bar Center, Albuquerque
6.7 General CLE Credits

☐ Standard and Non-Attorney $159  ☐ Government and Paralegal $149

Name: ____________________________  NM Bar#: ____________________________
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Fax:
E-mail address: ____________________________

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Credit Card Acct. No. ____________________________  Exp. Date ____________
Signature ____________________________________________

Mail this form to: Center for Legal Education of the NM State Bar Foundation, PO Box 92860 Albuquerque, NM 87199 or Fax to (505) 797-6071.
Register Online at www.nmbar.org
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