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2005-NMCA-097: Healthsource, Inc. v. X-Ray Associates of New Mexico, P.C., and Jerome Burstein, M.D.

Special Insert:

Bill Kitts Mentor Program
Dear Fellow Members of the Bar:

After a two and half year involvement in an attorney discipline matter before the New Mexico Disciplinary Board prosecuted by Disciplinary Counsel, it is time for a report to the entire membership on what is clearly a broken system in need of radical repair.

FACTS OF THE CASE:

The Stein Law Firm practices estate planning on a state-wide basis. The firm avoids courts and probate for our clients with Living Trusts. We have established thousands of New Mexico trusts for flat fees. For married couples, the firm accomplishes an A/B Split at the first death for significant federal estate tax savings. The firm also prepares, files and defends 706 Estate Tax returns with the IRS and New Mexico Taxation and Revenue for flat fees based on the size of the estate.

The firm also advertises. Seeing that the legal advertising rules were being applied in an unconstitutional fashion, this office filed suit in Federal District Court attacking the rules. During the pendency of the litigation, our Supreme Court eliminated the Legal Advertising Committee and most of the legal advertising rules. I believe that the disciplinary action described below was in retaliation for the advertising rule challenge.

In 2002, after completing an A/B Split and 706 Estate Tax Return for a surviving husband, having the fee paid and acceptance of the returns by the government, the husband fell into dementia. The unbalanced daughter of this couple then went to a competitor estate planning attorney and a few months later this daughter made a complaint to Disciplinary Counsel. Almost a year later, Disciplinary Counsel filed a formal Specification of Charges citing over 20 claimed violations of the Rules of Professional Conduct, including a complaint on the way the firm billed for its services.

The appointed Chair of the Hearing Committee denied adequate discovery. There were six listed adverse witnesses identified. The Chair refused to allow any interrogatories, requests to produce or requests for admissions. Only four depositions of no more than 90 minutes each were allowed just two weeks before trial. Needless to say, without the ability to conduct adequate discovery - after Disciplinary Counsel got everything they wanted prior to the filing of the Specification of Charges - the Hearing Committee found violations of the Rules of Professional Conduct, including a complaint on the way the firm billed for its services.

Although not yet reviewed by the Supreme Court, I now face a 90 day suspension for charging a standard, nationwide benchmark fee for tax work agreed to by the client and his family amongst other technical and unsupported findings. The Firm did nothing wrong and would repeat the same conduct to protect the rights of our clients in the future. The real problem is the disciplinary system.

The Stein Law Firm
A Professional Law Corporation
City Place Suite 2200  2155 Louisiana Blvd. NE
(505) 889-0100 or 800-889-4433

This ad is paid for by the Stein Law Firm to inform the Bar.
...And We Have To Fix It!

WHAT NEEDS TO BE DONE:

FIRST: A CHANGE OF DISCIPLINARY LEADERSHIP

If you ever had a client complain to the Disciplinary Board, you have experienced the unnecessary adversarial posturing of Disciplinary Counsel. This is the ultimate responsibility of Chief Disciplinary Counsel. She should be replaced. As a matter of good public policy, no one should lead any investigative government organization for more than eight years. After the first few years new ideas end and all efforts are geared to keeping the status quo. We don't let Governors serve for more than 8 years. We all remember the disrespect that befell our legislature when it had the same leadership in both houses for too long.

New leadership will bring much needed change to an atrophied office.

SECOND: THE RULES GOVERNING DISCIPLINE HAVE TO BE CHANGED. HERE ARE SOME SUGGESTIONS.

1. Rules of Civil Procedure concerning discovery must be a right in all discipline matters. If an attorney attempts to abuse discovery, protective orders can be requested.

2. Since disbarment is always a potential result, all lawyers should be entitled to a District Judge to hear these cases. A Judge from out of the District in which the lawyer practices can be assigned by the Supreme Court as is done now when all of the judges in a District are disqualified. The entire Hearing Committee and Review Panel system should be tossed.

3. All disciplinary matters should be sent to a retired judge mediator to explore settlement prior to a final hearing. This works well in the civil division of our District Courts. There is no reason why alternative dispute resolution would not be effective in discipline matters.

4. Final Hearings should not be required to be held within four months of the filing of an Answer to the Specification of Charges. Accused felons have six months from the date of arraignment.

I have other ideas on how the system could be changed for the better. Your suggestions may be more productive. Let's begin the dialog with the Board of Bar Commissioners. If you know some of the members and can relate your personal experiences with them, please do so. Unless we speak up, we will continue to suffer in silence in fear of the Discipline Board and Discipline Counsel.

With Best Regards, [Signature]

This ad is paid for by the Stein Law Firm to inform the Bar.
16th Annual Appellate Practice Institute: A Sophisticated Approach
Friday, August 19, 2005
8:20 a.m. - 4:30 p.m.
State Bar Center, Albuquerque
6.4 General and 1.0 Ethics CLE Credits

Cosponsor: Appellate Practice Section
Presenters: Steven L. Tucker, Esq., Edward Ricco, Esq.,
Jane B. Yohalem, Esq., Hon. Gene E. Franchini,
Kerry Kiernan, Esq., Bruce R. Rogoff, Esq.,
Andrew S. Montgomery, Esq., Thomas C. Bird, Esq.,
Hon. Edward L. Chavez, Hon. Pamela B. Minzner,
Hon. Cynthia A. Fry, Hon. Lynn Pickard

This seminar goes beyond the basics of appellate practice. It is designed to develop appellate skills in various post-trial proceedings, interlocutory appeals and writ practice. It is for those practitioners who wish to broaden their appellate practice and learn more about various sub-topics within the general field of appeals.

☐ Standard & Non-Attorney $179
☐ Government & Paralegal $169
☐ Appellate Practice Section Member $159

Annual Probate Institute
Friday, September 9, 2005 • 8 a.m. - 5 p.m.
State Bar Center, Albuquerque
7.2 General CLE Credits

Cosponsor: Real Property and Probate Section
Presenters: Fletcher R. Catron, David M. English,
Richard B. Gregory, Scotty A. Holloman,
William C. Weinsheimer

The primary focus of this year’s annual seminar will be on the Uniform Trust Code as presented by David M. English, professor of law at the University of Missouri-Columbia School of Law, and fiduciary liability as presented by William C. Weinsheimer, partner in the Chicago office of Foley & Lardner, LLP and a fellow and active member of the American Trust and Estate Counsel (ACTEC). Other topics will also include Circular 230, HIPAA, and acts relating to Uniform Estate Tax Apportionment and Uniform Disclaimer of Property Interests in New Mexico.

☐ Standard & Non-Attorney $179
☐ Government & Paralegal $169
☐ Real Property and Probate Section Member $159
Contributions and announcements to the Bar Bulletin are welcome, but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy available upon request.

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Virginia R. Dugan, President-Elect
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Stacey E. Scherer, Esq.

**Executive Director** – Joe Conte
**Editor** – Keith Thompson
**Layout** – Julie Schwartz

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**• Professionalism Tip •**

With respect to the public and to other persons involved in the legal system:

I will respect and protect the image of the legal profession, and will be respectful of the content of my advertisements or other public communications.

**Meetings**

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*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. *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**

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**Supreme Court**

**Judicial Performance Evaluation Commission**

**Upcoming Meeting**

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next meeting will be from 8 a.m. to 5 p.m., Aug. 26 at the Seventh Judicial District Court, 200 Church St., Socorro. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

**First Judicial District Court**

**Criminal Bench and Bar Brownbag**

The First Judicial District Court Criminal Bench and Bar will have a brownbag meeting at noon, Sept. 20 in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to any of the First Judicial District Court’s Criminal Divisions.

**Second Judicial District Court**

**Children’s Court Monthly Judges’ and Managers’ Meeting**

The Second Judicial District Children’s Court will hold its monthly judges’ and managers’ meeting at noon, Sept. 6 in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, Albuquerque. Children’s Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

**Destruction of Tapes**

Pursuant to the Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy tapes filed with the court, in the criminal cases for years 1980 to 1984 included but not limited to cases that have been consolidated. Cases on appeal are excluded. Should attorneys have cases with tapes, and wish to have duplicates made, they should verify tape information with the Special Services Division, (505) 841-6717, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Aug. 26.

**Family Court Open Meetings**

Second Judicial District Family Court judges will hold open meetings to discuss ongoing concerns and projects at noon, Sept. 12 in the Conference Center located on the third floor of the Bernalillo County Courthouse. Contact Sandra Partida, (505) 841-7531, for more information or to have an item placed on the agenda.

**Notice to Attorneys**

Judge Kenneth H. Martinez will fill the criminal court position at the Second Judicial District Court effective Sept. 1. Martinez will assume criminal court cases assigned to Division XXIV. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Sept. 1 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

**Rio Arriba County Magistrate Court**

**Judicial Vacancy**

Gov. Bill Richardson has announced that he is seeking candidates from Rio Arriba County who are interested in serving as magistrate judge in Division I. Interested candidates must send their application, a signed background check form, résumé and letters of recommendation to Governor Bill Richardson, Attention Legal Division, State Capitol Building, Suite 400, Santa Fe, New Mexico 87501. The package must be received in the Governor’s Office by Aug. 22 at 5 p.m. Materials may be sent via e-mail to marcia.maestas@state.nm.us, U.S. Mail or by hand delivery. The application and background check form may be obtained from the Legal Division, (505) 476-2200 or on the governor’s Web site at www.governor.state.nm.us under the link “Governors Appointments.”

**U.S. District Court for the District of New Mexico Service on Court Committees and Panels**

U.S. District Court for the District of New Mexico Chief Judge Martha Vázquez would like to solicit interest of Federal Bar members in future service on the following court committees: Bench and Bar Fund Committee, Pro Se Civil Litigants Committee, Magistrate Judge Merit Selection Panel, CJA Panel Committee, and the Tenth Circuit Advisory Committee. All interested Federal Bar members in good standing should respond indicating their preference to Matthew Dykman, Clerk of the Court, U.S. District Court, Pete V. Domenici Courthouse, 333 Lomas Blvd. NW, Albuquerque, NM 87102, or by e-mail to jbullington@nmcourt.fed.us.

**STATE BAR NEWS**

**Annual Meeting**

**Resolutions and Motions**

The 2005 Annual Meeting of the State Bar of New Mexico will be held at noon, Sept. 23, at the Ruidoso Convention Center in Ruidoso. Resolutions and motions to be considered must be submitted in writing and received in the office of Joe Conte, executive director, PO Box 92860, Albuquerque, NM 87199; fax, (505) 828-3765; or e-mail, jconte@nmbar.org, by 5 p.m., Aug. 23.

**Appellate Practice Section**

**Annual Meeting**

The annual meeting of the Appellate Practice Section will take place at 1 p.m., Aug. 19 at the State Bar Center. It will be held in conjunction with the 16th Annual Appellate Practice Institute, which will be held that day at the State Bar Center from 8:20 a.m. to 4:30 p.m. All members of the section and other interested persons are invited to attend and to participate.

**Children’s Law Section**

**Annual Poster and Writing Contest**

The Children’s Law Section will sponsor its third annual poster and writing contest. This event is a great way for attorneys, their firms, or organization to assist in changing the lives of New Mexico’s troubled youths by supporting children’s artistic talent, and to promote mentorship for positive behavior to children in the delinquency system. The contest is for children who are either currently detained, or involved in such programs as the Youth Reporting Center, Drug Court and anti-domestic violence programs. Contestants in Bernalillo, Sandoval, Valencia and Santa Fe Counties will be asked to create a work based on the theme “My Hero, My Heroine.” Sponsorship opportunities include cash donations or prizes to award contest participants.
Commission on Professionalism
Public Member Vacancies
The State Bar of New Mexico is seeking candidates to fill two public member vacancies on the Commission on Professionalism. Both of the public members positions are for two-year terms. Members who know a nonattorney who would be interested in serving on the commission should contact Executive Director Joe Conte, (505) 797-6099 or jconte@nmbar.org. Letters of interest should be sent to PO Box 92860, Albuquerque, NM 87199-2860.

Elder Law Section
NAELA Conference Scholarship
The Elder Law Section has set aside funds to provide a scholarship to one or two members to help offset the registration fees for the 2005 National Association of Elder Law Attorneys (NAELA) Conference. Section members interested in attending should e-mail Chair Kevin D. Hammar, kevinhammar@qwest.net, for an application and a letter providing further details. The NAELA Conference is scheduled for Sept. 28 to Oct. 2 in New Orleans. The quid pro quo for this financial support is that any sponsored attendees would be expected to present a CLE of two to three hours in 2006 to brief the membership on topics of interest from the conference. Attorneys who have already registered can still apply for the scholarship.

Employment and Labor Law Section
Board Meetings Open to Section Members
The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Sept. 7. (Lunch is not provided.)

Public Law Section
Board Meeting
The next Public Law Section board meeting will be held at noon, Sept. 8 in the Risk Management Division Legal Bureau Conference Room on the first floor of the Montoya Building, 1100 St. Frances Dr., Santa Fe. Contact Deborah Moll, (505) 827-2000, for more information.

International and Immigration Law Section
Annual Section Meeting
The International and Immigration Law Section will conduct its annual section meeting at 3 p.m., Aug. 26 at the State Bar Center. Section members are also invited to attend a happy hour and receive a free drink at the Pyramid immediately after the meeting. Attendees are asked to R.S.V.P. to Tony Horvat, (505) 797-6033 or thorvat@nmbar.org.

Paralegal Division
Brownbag CLE
Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., Sept. 14 at the State Bar Center. Registration begins at 11:30 a.m. and the cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. The topic for this month’s CLE is “Get the Facts: Witness Interview Techniques,” presented by Jeanne Adams, paralegal and private investigator. For more information, contact Cheryl Passalaqua, (505) 890-6089, or Amy Paul, (505) 883-8181.

NM Paralegal Day
Gov. Bill Richardson has declared Aug. 26 as Paralegal Day in New Mexico. That date marks the 10th anniversary of the organizational meeting of the Paralegal Division of the State Bar of New Mexico. The Paralegal Division, formerly known as the Legal Assistants Division, was created by the New Mexico Supreme Court to serve the needs of paralegals throughout the state with the following specific goals: to encourage a high order of ethical and professional attainment; to provide a forum for paralegals to discuss their problems and share ideas. The Division will honor its founders, current members and the legal community with a reception at the Albuquerque Museum from 2 to 5 p.m., Aug. 27. For more information about the Paralegal Division or the paralegal profession in New Mexico, visit its Web site at www.nmbar.org.

Technology Utilization Committee
Using Excel in the Legal Environment
The Technology Utilization Committee will be holding a free workshop from 5 to 6 p.m., Aug. 18 at the State Bar Center, Albuquerque. In this one-hour session, participants will learn how easy it is to use Excel for sorting lists and quickly finding information amongst large amounts of data using the Filter and SubTotal tools. Paralegals, attorneys and support staff are all invited to attend. Class is limited to 11 attendees. Reservations should be made by Aug. 16 with Mary Patrick, CLE program coordinator, mpatrick@nmbar.org or (505) 797-6059. CLE credit will not be provided.

Other Bars
Albuquerque Bar Association
Monthly Luncheon and Professionalism CLE
The Albuquerque Bar Association’s monthly luncheon will be held at 11:45 a.m., Sept. 6 at the Albuquerque Petroleum Club. Attorneys who serve and have served in the U.S. military will be acknowledged. These veterans need not be members of the Albuquerque Bar Association to participate. The luncheon address, “Military Law and Lawyers in the New Paradigm,” will be presented by John Hutson, dean and president of the Franklin Pierce Law Center in Concord, N.H. Hutson served as a judge advocate in the U.S. Navy from 1972 to
Bar Bulletin—August 15, 2005

2000 and was judge advocate general of the Navy from 1997 to 2000.
The CLE, “How to Effectively Represent Your Client in Mediation,” will be presented by Wendy York, mediator and former district court judge, with a portion of the program to include a panel of mediators presenting techniques or approaches that lawyers have used in mediation that help ... or hurt ... the chances of settlement. The CLE from is from 1:30 to 4 p.m. for 2.5 professionalism CLE credits. The luncheon is $20 for members and $25 for non-members; the luncheon and CLE is $70 for members and $100 for non-members; the CLE only is $50 for members and $75 for non-members. Register online at www.abqbar.com; by e-mail at abqbar@abqbar.com; or phone the Albuquerque Bar office, (505) 243-2615.

Hispanic National Bar Association

30th Annual Convention

Alan M. Varela, president of the Hispanic National Bar Association has announced the 30th Annual HNBA Convention in Washington D.C. at the Mandarin Oriental Hotel Oct. 16 to 20. The convention provides an opportunity to network with hundreds of the most influential Hispanics in the nation and will include world-class legal education seminars focusing on crucial issues facing the legal profession and the nation. On Oct. 19 a professional job fair will be held for law students and experienced attorneys seeking employment with Fortune 500 corporations and the nation’s most prestigious law firms. “Unidos in Washington” will feature social events at various venues, such as the Mexican Cultural Institute for a “Taste of Latin America and the Caribbean.”

Registration for the convention can be found at the HNBA Web site, www.hnba.com, and completed entirely online. The convention is open to all interested legal professionals. There are special discounted rates for HNBA members as well as those who sign up for the early bird rate now until Aug. 31. Job fair employers may also register online at the HNBA Web site for the job fair. The registration fee for job employers includes day passes for two interviewers, prominent listing in the convention program book and the full day of interviews with the highest caliber talent pools in the United States. The HNBA is a nonprofit, national association that represents the interests of over 27,000 Hispanic American attorneys, judges, law professors, law students and legal professionals throughout the United States and Puerto Rico. For more information go to www.hnba.com or contact the HNBA Washington office, (202) 223-4777.

National Association of Counsel for Children
28th National Children’s Law Conference

This summer, the National Association of Counsel for Children will hold its annual national child advocacy training Aug. 25 to 28 at the Hollywood Renaissance Hotel in Los Angeles. Each year in America, over one million children suffer abuse and neglect. These are serious incidents of beatings, sexual assault, and the kind of neglect that results in serious health problems. NACC members serve as child advocates for these children and guide them through the difficult legal process that determines their fate. The NACC is a nonprofit agency that provides the professional training and technical assistance the child advocates need to do their work. For more information, contact NACC at (888) 828-6222, or visit its Web site at www.NACCchildlaw.org.

NM Defense Lawyers Association

Advanced Trial Techniques

The NM Defense Lawyers Association will present a CLE program Aug. 25 at the State Bar Center entitled “Advanced Trial Techniques.” Registration information will be available soon. Visit the NMLA Web site at www.nmmla.org or contact Rhonda Dahl, (505) 797-6021, for more information.

NM Women’s Bar Association

Annual Gala

The New Mexico Women’s Bar Association will hold its annual gala from 5:30 to 10 p.m., Sept. 9 at the Albuquerque Marriott Hotel, located at Louisiana and I-40. The event will feature the innovative music of the Kumusha Women’s Marimba Ensemble. There will be a live and silent auction hosted by Bob Schwartz, Esq. and, of course, delicious food and libations. The Women’s Bar will also be awarding its annual Henrietta Pettijohn Award to Lt. Gov. Diane Denish and its annual scholarship to a deserving University of New Mexico law student.

Mid-State Chapter Monthly Networking Luncheon

The New Mexico Women’s Bar Association’s next networking lunch will be from noon to 1:30 p.m., Sept. 14 at Conrad’s in the La Posada Hotel, Albuquerque. Members and visitors are welcome. Advance reservations are required. Lunch prices range from $6 to $11, and payment is made directly to the restaurant. Anyone interested in attending this meeting should R.S.V.P. to Rendie R. Moore, womensbarnm_adminass@msn.com.

Other News

NM Lawyers’ Chapter of The Federalist Society

Free Speech Debate

The New Mexico Lawyers’ Chapter of The Federalist Society for Law and Public Policy Studies and the American Civil Liberties Union of New Mexico Amicus Club will present a “Forum for Academic and Institutional Rights v. Donald Rumsfeld,” a debate on free speech and military recruiting on law school campuses with William Perry Pendley, president and chief legal officer for Mountain States Legal Foundation and George Bach, staff attorney for the American Civil Liberties Union of New Mexico. The debate will begin at 5:30 p.m. Sept. 1 at the Hyatt Regency, 330 Tijeras Avenue, Albuquerque. A cash bar will be available and anyone interested in attending should respond to Wade Jackson, Wade_Jackson@nmcourt.fed.us or (505) 348-2243.

UNM Clinical Law Program

Native American Access to Justice Program

The UNM Clinical Law Program invites volunteer attorneys and tribal court advocates to join the Native American Access to Justice Practitioner Network, a network of attorneys committed to providing pro bono and low cost representation to individuals in areas of unmet need. Network members will provide pro bono or reduced fee representation to Native American clients whose cases the Southwest Indian Law Clinic is not able to accept, but who require assistance with Native American issues in various state, federal, and tribal courts and with governmental agencies.
As a network participant, attorneys will receive client referrals from the program, but decide whether to accept a specific case. Attorneys are responsible for client fee and costs arrangements. In return, network participants will receive free access to Loislaw, four Aspen online practice libraries with forms (family law, elder law, personal injury and general litigation), and the Navajo Code CD-ROM. UNM law librarians will provide network attorneys with telephone reference service and online legal research training in the use of the program databases. Free online legal research training sessions for participants will also be offered at the UNM Law Library, Crownpoint Institute, San Juan College, UNM Gallup, and others.

The UNM Clinical Law Program is also interested in identifying individuals who are willing to serve as mentors for the Southwest Indian Law Clinic attorneys.

Finally, the Law School Access to Justice courses are open to network members for $5 per credit hour. Upcoming courses include Spanish for Lawyers I, Spanish for Lawyers II, Navajo Law and Practice, and Tribal Courts. For more information contact Associate Dean Antoinette Sedillo Lopez, (505) 277-5265 or lopez@law.unm.edu.

UNM Law Library
Summer Hours
Law Library hours through Aug. 21:
Mon. – Thurs. 8 a.m. to 9 p.m.
Fri. 8 a.m. to 6 p.m.
Sat. 9 a.m. to 6 p.m.
Sun. noon to 9 p.m.
Reference:
Mon. – Fri. 9 a.m. to 6 p.m.
Sat. noon to 4 p.m.
Sun. noon to 4 p.m.

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

MCLE Rule Changes

Effective January 1, 2006 every active licensed New Mexico attorney shall complete twelve (12) hours of continuing legal education during each compliance year. One (1) hour (credit) of continuing legal education will be equivalent to sixty (60) minutes of instruction.

Of the (12) credits of approved continuing legal education, at least one (1) credit must be ethics and only one (1) credit must be professionalism.

Self-Study: No more than four (4) credits may be given during one (1) compliance year for self-study activities. Self-study credits may be applied only to the continuing legal education requirements for the year in which they are earned, and may not be carried over to subsequent year requirements or backward to prior year requirements.

Carry-over: Attorneys may carry up to twelve (12) credits earned in one (1) compliance year over to the next compliance year only. One (1) ethics credit may be carried-over as part of the twelve (12) credits. One (1) professionalism credit may be carried over as part of the twelve (12) credits. While excess ethics credits can be converted to be used toward the substantive (general) requirement, excess professionalism credits cannot be converted. Self-study credits cannot be carried over.

Throughout 2005 information regarding the rule changes will be featured on www.nmmcle.org, and in the weekly Bar Bulletin.

LEGAL SPECIALIZATION – ls@nmbar.org

• If you want to advertise your status as a specialist, the proper wording pursuant to 19-202(G) of the Rules is “New Mexico Board of Legal Specialization Certified Specialist in ____” and state your area of specialization. This can be abbreviated to “Board Certification Specialist in ____.”

• Visit the Court Regulated Programs exhibit table at the State Bar Annual Meeting in Ruidoso, September 22-24, 2005.

• For more information about the Legal Specialization program, including a list of board certified specialists, go to www.nmbar.org, Other Bars/Legal Groups, or call 797-6057.

August 26 is Paralegal Day in NM

Visit the State Bar of New Mexico’s web site
www.nmbar.org

The MCLE Board, the Board of Legal Specialization and Staff thank Paralegals in the State of New Mexico for their service to the community and the legal profession.
2005 State Bar Annual Award Recipients

The awards will be presented during the State Bar’s Annual Meeting Sept. 23-24 at the Ruidoso Convention Center in Ruidoso. To register for the luncheons or to review a complete schedule of events and programs for the Annual Meeting, see the insert in the July 25 issue of the Bar Bulletin or visit the State Bar’s Web site at www.nmbar.org.

Friday, September 23

Distinguished Bar Service Award
Briggs F. Cheney

Distinguished Bar Service – Non Lawyer Award
Kay L. Homan

Outstanding Section Award
Bankruptcy Law Section

Outstanding Contribution to People with Disabilities Award
Tara C. Ford

Outstanding Young Lawyer of the Year Award
Morris J. “Mo” Chavez

Saturday, September 24

Outstanding Judicial Service Award
Judge John W. Pope

Outstanding Local Bar Award
Sandoval County Bar

Outstanding Program Award
New Mexico Hispanic Bar Association Scholarship Program

Professionalism Award
John G. Baugh (posthumously)
Lawrence M. Pickett
Lowell Stout (posthumously)

Quality of Life – Lawyer Award
Susan E. Page

Quality of Life – Legal Employer Award
Aguilar Law Offices, P.C.

Robert H. LaFollette Pro Bono Award
Steve H. Mazer

Fifty-Year Practitioners
William F. Brainerd
John P. Eastham
Douglass K. Fischer
Leland B. Franks
Glen L. Houston
Daniel A. Sisk
Justice Harry E. Stowers, Jr.
J. Penrod Toles
Matias A. Zamora

Paralegal Day

By proclamation of Governor Bill Richardson, August 26 is hereby proclaimed to be Paralegal Day in celebration of the 10th anniversary of the Paralegal Division, formerly known as the Legal Assistants Division.

The Division was created by the Supreme Court to:

- encourage a high order of ethical and professional attainment
- further education among its members
- carry out programs within the State Bar

...and establish good fellowship among Division members, the State Bar of New Mexico and the members of the legal community.
Bryan J. Davis and David H. Johnson, both attorneys from Rodey, Dickason, Sloan, Akin & Robb, PA, have been selected to serve the American Bar Association.

Johnson has been appointed by the chair of the ABA’s Health Law Section to serve a three-year term on the Health Law Section Council. Consisting of six members and of section officers, the Section Council is responsible for governing the Health Law Section, which has a membership of nearly 8,000 healthcare attorneys around the nation. Johnson also currently serves as co-chair of the section’s annual conference on Emerging Issues in Healthcare Law, which will be held in Tucson, Arizona on Feb. 22 to 24, 2006.

Davis has been appointed to the ABA’s Health Law Section’s Programs Planning Committee. He will also serve as liaison to the Publications Committee. In these roles, Davis is involved in the selection of section-sponsored CLE and teleconference topics and speakers, as well as involved with the selection of articles for publication in The Health Lawyer and the eHealth Source.

Virginia R. Dugan, an attorney and shareholder with Atkinson & Kelsey, PA practicing divorce and family law, has been named 2005-06 chair of the Marital Property Committee/Family Law Section of the American Bar Association. Dugan is also president-elect of the New Mexico State Bar and immediate past president of the Mid-State Chapter of the New Mexico Women’s Bar. She is recognized as a specialist in family law by the New Mexico Board of Legal Specialization and practices before the U.S. District Court of New Mexico.

James G. Durham has been hired as the Head of Public Services at the Touro College Law Library in Huntington, N.Y. Durham will oversee reference services, coordinate faculty services and teach legal research courses at the college. He will occasionally serve as program administrator for Touro’s summer study abroad program for American law students in Shimla and Dharamsala, India. Durham was previously employed as publications and reference librarian at the Fred Parks Law Library at South Texas College of Law in Houston. He also served the school as an adjunct law professor, teaching “Sexual Orientation and the Law.” Durham is licensed to practice law in New Mexico, graduated from Ohio State University College of Law in 1997, and has a master’s degree in library and information science from the University of Illinois at Urbana-Champaign.

Chief Justice Cheryl Demmert Fairbanks has been elected to the American Arbitration Association Board of Directors. The association is the world’s leading provider of conflict management services. Fairbanks is Tlingit-Tsimshian from Alaska and has served for 10 years as chief justice for the Yavapai-Apache Tribe, and two years as the family court judge for Santa Clara Pueblo. She is also partner at Cuddy, Kennedy, Albertta & Ives, LLP. Her practice concentrates in the areas of state-tribal relations, Indian law, Indian gaming law, tribal courts, mediation, family law, school and education. She was instrumental in establishing the Indian Child Welfare Desk and the New Mexico Office of Indian Tourism in her previous position as senior policy analyst with the New Mexico Office of Indian Affairs.

The U.S. Soccer Foundation, the major charitable arm of soccer in the United States, has elected Brad Hays as its chair. Hays is a lawyer in Sandoval County and a founding board member and former treasurer of the U.S. Soccer Foundation, with an extensive background in the sport. The U.S. Soccer Foundation was established in 1994 to manage the surplus funds generated by the 1994 FIFA World Cup held in the United States. Under the guidance of its board of directors, the foundation has taken a leading role in supporting the continuous development of the sport at all levels. More than $40 million in grants, financial support and loans have been made to help develop a soccer nation. The Foundation has provided 345 grants focused on developing players, coaches and referees and building or enhancing fields and soccer complexes, with a special emphasis on economically disadvantaged urban areas.

Hispanic magazine selected Attorney General Patricia Madrid to receive the 2005 Latina Excellence Award in Government. Madrid received the award at the 11th Annual Latina Excellence Awards ceremony in New York. According to Hispanic magazine, the Latina Excellence Awards are presented to honor outstanding Hispanic women who have made significant contributions in their fields and have created a positive impact in their own Hispanic communities.

Editor’s Note: The Bar Bulletin periodically publishes “Hearsay” and “In Memoriam.” Send items to: Editor, PO Box 92860, Albuquerque, NM 87199-2860 or notices@nmbar.org.
Patrick L. McDaniel, an attorney and shareholder with Atkinson & Kelsey, PA practicing divorce and family law, has been named domestic relations editor of the New Mexico Trial Lawyer magazine. McDaniel is a graduate of the American Trial Advocacy Institute, member and past chair of the American Bar Association’s Marital Torts Committee/Family Law Section and a member of the ABA’s Elder Law and Trial Practice Techniques Committees. He also serves on the Board of Samaritan Counseling Center. Before receiving a law degree from the UNM School of Law, McDaniel pursued a career as an educator and an educational consultant. He served on national committees to address school dropout issues, including committees under the auspices of the Ford Foundation and the Council of Great City Schools. He also served as the national president of the National Association for Year-Round Education, and during his tenure won an award from the Albuquerque Human Rights Council for work as a consultant on educational equity. In addition, he earned national recognition from the American Educational Research Association for his educational research.

Weldon L. Merritt, of Santa Fe, has been recognized by the National Association of Parliamentarians as a professional registered parliamentarian, the highest level of achievement recognized by that organization. Merritt is a 1975 graduate of the UNM School of Law, and a former hearing officer for the New Mexico Environment Department. Merritt currently serves as president of the New Mexico State Association of Parliamentarians.

Margaret E. Montoya, a professor at the University of New Mexico Law School, and Attorney General Patricia Madrid have been cited by Hispanic Business magazine as being among its “80 Elite Hispanic Women” for 2005.

Allison P. Pieroni, an attorney practicing divorce and family law with Atkinson & Kelsey, PA, has been elected board chair of La Familia Incorporated, a non-profit organization that provides services for families, including adoption, a group home for deaf and hard-of-hearing adolescents, pregnancy counseling and support for families that provide foster-care treatment homes. Pieroni, who is also a certified mediator, has been admitted to try cases before the U.S. District Court for the District of New Mexico. She is a member of the American Bar Association, Women’s Bar Association and the Family Law Section of the State Bar. The Albuquerque native is also a member of the Christian Legal Aid Society, St. Thomas More Society and the Equestrian Order of the Holy Sepulchre of Jerusalem. She received a law degree from the UNM School of Law.

Carlos M. Quiñones has been selected for a second two-year term on the national board of directors for the Mexican American Legal Defense and Educational Fund (MALDEF). He was also recently recognized by the New Mexico Board of Legal Specialization as a certified specialist in the area of employment and labor law. He is a partner at Narvaez Law Firm, PA in Albuquerque.

Ryan M. Randall was recently certified as a specialist in employment and labor law by the New Mexico Board of Legal Specialization. As a shareholder in Tinnin Law Firm, PC, Randall’s practice is devoted to advising and representing employers in labor relations, employment litigation and human resources management. Randall serves as an editor of New Mexico Employment Law Letter, a monthly publication that updates employers on developments in labor and employment law.

Les Sandoval has been named by the American Bar Association as the reporter for all New Mexico family law issues in Family Law Quarterly’s annual law survey. Each year, the American Bar Association Family Law Section publishes a guide of family law for all 50 states. The association chooses one lawyer to report on the annual changes in each state. For the second year in a row, Sandoval has been recognized as the reporter for New Mexico. Sandoval practices family law at Walther Family Law. His experience, which encompasses all aspects of family law, will enable him to accurately encapsulate and report on all changes in New Mexico. He received a law degree from the UNM Law School and a degree in accounting and finance from UNM’s Anderson School of Management. He was a member of the Law Review and a recipient of the WestLaw Proficiency Award for excellence in domestic relations law.

Patricio Tafoya, a Marine Corps judge advocate, recently completed a Master of Laws program specializing in international law from The Judge Advocate General’s Legal Center and School in Charlottesville, Va. He was also recently awarded the Bronze Star Medal for his service with Combined Joint Task Force 7 in central Iraq as a legal advisor for coalition headquarters. Tafoya’s next assignment will be as the staff judge advocate for Marine Forces Europe in Stuttgart, Germany where he will serve as the legal advisor for Marine forces in Europe and Western Africa.

Charles J. Vigil, a partner with Rodey, Dickason, Sloan, Akin & Robb, PA, has been appointed to a three-year term on the ABA Standing Committee on Lawyers’ Professional Liability. Selection for this committee is extremely competitive; there are only a few appointments made every year on a national basis. The Standing Committee on Lawyers’ Professional Liability is the liaison between the ABA and state and local bar associations on issues related to lawyer liability. Vigil also is the current president of the State Bar of New Mexico.
IN MEMORIAM

Robert James Affeldt, 83, died June 7 after battling cancer, ending a long career the attorney had fighting for the rights of workers and against discrimination. A Detroit native, Affeldt earned bachelor’s and master’s degrees in English from the University of Detroit before obtaining law degrees from Notre Dame and Yale. After his 1957 Yale graduation, he spent nearly 20 years teaching labor law and civil rights at the University of Toledo Law School in Ohio. He also served as a conciliator for the federal Equal Employment Opportunity Commission and published articles on the philosophy of civil rights laws.

Affeldt gained national attention in September 1970, when he resigned from his post with the federal Department of Housing and Urban Development. Affeldt had been appointed by Nixon to serve as a special assistant in the Civil Rights Division of HUD. He resigned about a year later, expressing frustration and criticizing the administration for its “lax enforcement” of the housing act.

When he left HUD, Affeldt returned to his post as a professor of law at the University of Toledo. Affeldt left his tenured teaching position in 1975 and in Sylvania, Ohio, opened one of the country’s first full-time class action employment discrimination law firms. On behalf of minorities and women, he successfully litigated several class action discrimination cases against companies, including McDonald’s, Jeep and Owens-Corning Fiberglas.

Affeldt, and his wife, Mary Susan, retired to Albuquerque in 1991. The couple was active in the community, including with the Academy Park Homeowners’ Association. Affeldt’s wife, Mary Susan, died in 2003. He is survived by his daughter, Elizabeth, of Santa Academy Park Homeowners’ Association. Affeldt’s wife, Mary Susan, died in 2003. He is survived by his daughter, Elizabeth, of Santa

Lawrence Lorenzo A. Barela, 55, a resident of Albuquerque, passed away on May 22. Barela is survived by his wife, Tommie Barela; he is also survived by one sister, Lorraine Solano and husband, Bob, one niece, Anna Marie Solano; one nephew, Eric Solano and wife, Adella; a sister-in-law, Cat Gonzales and husband, Robert and their children, Jennifer and Steven Restrepo; grand niece, Madison Solano; and many other extended family members. Barela was a member of the Catholic Church and a UNM Lobo Booster for the past 12 years.

James “Jim” I. Bartholomew passed away May 25. He was born in Raton on Oct. 11, 1938, and raised in Albuquerque. He is preceded in death by his sister, Kay Loftin. He is survived by his wife, Flora Bartholomew, his brother, John Bartholomew, his brother-in-law, Steve Loftin of Ga.; two nieces, Lisa Inagawa of Peach Tree, Ga.; and Sandy Loftin of Denver, Colo.; close friends, Scott and Mary Connors and their family, Carolyn Reinicke and her family, all of whom loved Jim and thought of him as family; as well as many, many other friends who will miss him greatly. He graduated from the University of New Mexico in 1961 and graduated with a law degree from Oklahoma City University in 1967. He has been a member of the New Mexico State Bar since August, 1967 and was a member of the Phi Delta Phi Legal Fraternity.

Evans Albert Garcia, age 55, born and raised in New Mexico and a resident of Denver, CO since 1977, suffered a brain aneurysm at his mother’s home in Albuquerque on July 2 and died later at UNM hospital. He dedicated his life to giving voice to the underdog through his organizing efforts for the UFW, CWA, as a public defender and private attorney. He is survived by his daughter, Dolly; his mother, Frances; his father, Evans; his sisters, Pauline and Margaret; his brother, Tony; three nieces, two nephews, and four great-nephews.

Rebecca “Becky” A. Houston passed away March 19. She graduated from the University of Texas Law School in 1980 and joined the firm of Keleher & McClendon in Albuquerque where she became a partner and practiced civil litigation for many years before striking out on her own. In addition to being a passionate advocate for her clients, she was an avid cook, gardener, photographer and loved animals. She is survived by her husband, Tim Van Valen, of Albuquerque; her parents Bill and Bess Kilman of Dallas; and her sister- and brother-in-law Kathy and David Maquire of Austin, Texas, as well as Henry B. Dog, her devoted Brittany Spaniel.

Dennis D. Meridith, 61, died on May 14 at his home near Silver Creek, Neb., of Lou Gehrig’s disease. Meridith, formerly of Albuquerque, practiced law at Marron & McKinnon in the 1970s, then studied accounting at UNM, became a CPA, and worked for Peat, Marwick, Mitchell. He returned to the practice of law with the Moses Law Firm, concentrating on tax law, estate planning, and business planning. He particularly enjoyed helping families and small business owners accomplish their goals in our sometimes complex legal and regulatory system.

In 1990 he moved to Des Moines, Iowa, where he was the head of tax policy for the Iowa Department of Revenue. He then moved to his grandmother’s farm outside of Silver Creek, working first as a trust officer at the Oak Tree Trust Company and then practicing law in Columbus, Neb., until his “semi-retirement.” Simultaneously, he established, with his son, an alfalfa hay operation on the family farm, homesteaded in 1871.

Dennis was a member of the New Mexico, Nebraska and Iowa Bars and the CPA Society of New Mexico. He was a private pilot and enjoyed carpentry, devoting time and energy to the renovation of the family farmhouse. He will be remembered for his varied interests, especially debating the political and social issues of the day.

Meridith is survived by his son, Benson Meridith of Silver Creek; daughter Heather Meridith Tyndall and husband Robert, grandchildren Emily and John of Cranbury, N.J.; and former wife, Shirley Meridith of Albuquerque.

Ronald M. Valencia, age 57, passed away in Albuquerque on June 22 from complications related to Huntington’s Disease. He was preceded in death by his mother, Della Franz; great-grandmother, Julia Benavidez; aunt, Juliette Mente. He is survived by his wife, Rosa Q. Valencia of Albuquerque; sons Christopher A. Valencia and wife Jamie of Albuquerque, Miguel R. Valencia and fiancée Sarah of Albuquerque; father, Joe Valencia and wife Celia of Albuquerque; brother Frank Valencia and wife Lisa of Albuquerque; sister, Cindy Sain and husband Steve of California, Peggy Megginson and husband Rich of Albuquerque, and Juan Carlos Mascarenas of Cerro. Ron was a father figure and mentor to many young people including: Quatro Gillis, Pete Bolton, George Escamilla, Pietro Berardinell and numerous nephews, nieces, aunts, uncles, cousins, and many friends in Albuquerque, Santa Fe and Pecos. He married his sweetheart in 1989. He attended St. Michael’s High School, received a bachelor’s degree in government from New Mexico State University and a law degree from UNM in 1982. Ron was “champion for the underdog,” and former officer on the board of directors for “La Companía Teatro.”
FEDERAL APPEALS: THE SCOOP ON ELECTRONIC SUBMISSIONS AND FILING

By Douglas E. Cressler

Senior partner: “There was a time when we had to print everything that was to be filed with the court on paper, along with several copies as required by the rules, then physically mail or deliver the whole stack of stuff to the court and send additional paper copies of everything to all the parties in the case.”

New associate: “Wow. And were the deliveries made by dinosaurs?”

-- A near-future law firm conversation.

Since Dec. 1, 2004, the U.S. Court of Appeals for the Tenth Circuit has required that motions, briefs and petitions filed with that court be submitted electronically, in addition to the usual hardcopy filing. At the same time, the court is developing a new docketing system that will permit true electronic filing, eliminating the need for filing paper documents. This article summarizes the federal appellate court’s current electronic submission requirements and previews the changes appellate practitioners can expect when true electronic filing becomes a reality with the circuit court.

THE CURRENT PRACTICE

The Tenth Circuit Court of Appeals is currently operating under an Emergency General Order filed Oct. 20, 2004, and made effective Dec. 1 of that year. The order provides generally that in addition to the paper filings required by the Federal Rules of Appellate Procedure and local Tenth Circuit Rules, certain documents also must be transmitted to the court in electronic form. The order is accessible on the court’s Web site at www.ca10.uscourts.gov online by clicking on “Electronic Submissions.”

The order has been amended twice since its adoption. It currently requires that all motions, petitions, briefs, bills of cost and Fed. R. App. P. 28(j) letters be submitted to the court in ‘digital form.’ That term is expressly defined in the order as follows: “[1]n Portable Document Format (also known as PDF or Acrobat format and sometimes referred to as Native PDF) generated from an original word processing file, so that the text may be searched and copied: PDF images created by scanning documents do not comply.”

The required digital format, as opposed to the scanned form of PDF document, allows the court to search and copy text from submitted documents, thus facilitating appellate review.

The order permits the inclusion of scanned attachments to digital submissions, but only when the attachments are not available in digital format.

A routine example illustrates how the order operates. Tenth Circuit Rule 28.2(A) requires that all pertinent written findings, conclusions, opinions and orders of the lower tribunal be included with the appellant’s initial brief. If those documents are only available in paper form, they can be scanned together into one additional PDF document and transmitted along with the digital brief. Therefore, the e-mail transmission to the court would contain two PDF files: one in searchable digital form containing the brief, cover-to-cover, and a second file containing the attachments to the brief in scanned form.

Submission by mailing a CD-ROM to the clerk is required when the materials submitted are under seal. All unsealed submissions should be sent via e-mail to esubmission@ca10.uscourts.gov. There is no need for special authorization, sign-on codes, or passwords to submit electronically by email.

Within a short time after submission, the electronic documents are linked by court staff to the PACER (Public Access to Court Electronic Records) docket and can be accessed, for a fee, through that system. Information about PACER registration is available at http://pacer.psc.uscourts.gov/register.html online.

Appellate practitioners are advised to read the order carefully and also to comply with its requirements governing identification and signing, certification, service and privacy redactions. The electronic submission does not replace, but is in addition to, the requirement of actual filing in hardcopy with the requisite number of copies, as provided by rule. Practitioners with questions should call the circuit clerk’s office at (303) 844-3157.

THE FUTURE – TRUE ELECTRONIC FILING

The circuit’s electronic submission process is just a warm-up for the advent of electronic filing. As the order states, electronic submission was adopted by the court “to evaluate the usefulness of documents in electronic form.”

The next step in the process will be the implementation of an electronic filing system that completely eliminates the need for the filing and service of paper documents. The acronym used by the federal courts for the new system is CM/ECF, which stands for Case Management/Electronic Case Files.

Whether at the trial court or appellate court level, the general concept is the same. Attorneys register to be part of the system and are then allowed to file and serve pleadings via the Internet with no hardcopies ever trading hands. Rather than sending a paper motion or brief to a court clerk who then makes an entry on the docket system, the attorney actually...
creates the docket entry, attaches the court filing to it and hits the ‘send’ button. The document is filed, the docket is updated, and parties are automatically notified electronically that a filing has occurred. The document can be accessed by anyone immediately.

Among the benefits of CM/ECF to attorneys, clients, and courts are:

• 24 hour, seven-day per week access to file, view, or print documents;
• Automatic e-mail notification of case activity;
• Documents can be filed and accessed from anywhere in the world that Internet access is available;
• Immediate creation of docket entries;
• Immediate access to updated docket sheets and to the documents themselves;
• Potential elimination of paper files that can be misplaced or lost;
• Savings in copying, courier and noticing costs; and,
• The ability to store and search documents electronically.

Many attorneys will already be familiar with electronic filing, either through the state systems or through the federal district court. Although a CM/ECF system is widely available and is growing in popularity with federal district courts, an electronic filing system for the federal circuit courts of appeal and the bankruptcy appellate panels is still in the development process. The various circuit courts are working with the Administrative Office of the United States Courts to develop a system that will be similar to the systems used in the district courts.

In the Tenth Circuit, the project has the full support of the court. The court has appointed Betsy Shumaker, who also serves as Counsel to the Chief Judge, as the CM/ECF project manager. The court hopes that an electronic filing system will be implemented in the Court of Appeals for the Tenth Circuit sometime during 2006, but the project is not far enough along in development for any firm deadlines to be set.

When a clearer picture emerges on an implementation date, the circuit court will begin a large-scale education and training effort. Anticipated plans include online training programs that can be accessed from anywhere and in-person training sessions in each of the six states comprising the Tenth Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. For the moment, however, the focus is on development of a system well-suited to the needs of this diverse circuit.

Lawyers take for granted that we can transact all forms of business, communicate immediately with clients and colleagues, and access an expanding universe of legal and non-legal information through the convenience of an internet infrastructure that essentially did not exist 20 years ago. Electronic filing also is on its way to becoming just another routine part of practicing law.

Douglas E. Cressler serves the U.S. Court of Appeals for the Tenth Circuit as its chief deputy clerk in Denver, Colo. He can be reached at Doug_Cressler@ca10.uscourts.gov or at (303) 844-3157.
**LEGAL EDUCATION**

**AUGUST**

**15** DaVinci Code of Scientific Evidence
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtcle.com

**16** Major Issues in Mediation
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TRT, Inc.
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(800) 672-6253
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**16** Most Recent Developments for Estate Planners
Teleconference
Cannon Financial Institute
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(800) 775-7654
www.cannonfinancial.com

**18** Protecting Business Assets Through Effective Lawyering
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**18-19** Workers’ Compensation Law Update
Albuquerque
Council on Education in Management
13.2 G
(800) 942-4494
www.counciloned.com

**19** 16th Annual Appellate Practice Institute: A Sophisticated Approach
State Bar Center, Albuquerque Appellate Practice Section and Center for Legal Education of NMSBF
6.4 G, 1.0 E
(505) 797-6020
www.nmbar.org

**19** Junk Science or Scientific Evidence?
Teleconference
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**20** 32 Hour Divorce Mediation Training
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Common Ground Mediation Services
36.2 G, 1.2 E
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www.commonground-adr.org

**22** They Took My Stuff! How Do I Get it Back?
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www.trtcle.com

**23** Personal Injury Case Evaluation and Intake - Make Your Accountant and Malpractice Insurer Happy
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www.trtcle.com

**23** What You Need to Know About Public Records and Open Meetings
Albuquerque
Lorman Education Services
7.2 G
(715)833-3940
www.lorman.com

**24** 2005 Professionalism: Lawyers Concerned for Lawyers
VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF
2.0 P
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**24** Burden of Representing Financially-challenged Companies
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2.4 E
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**24** Legal Research
Roswell
Paralegal Division of NM
1.0 G
(505) 622-6510

**25** Advanced Trial Techniques
Albuquerque
New Mexico Defense Lawyers Association
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www.nmdla.org

**25** Document Retention and Destruction
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www.lorman.com

**25** Fundamentals of Arbitration
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www.trtcle.com

**26** Cross-Examination to Negotiation: Defeating the Prosecution’s Case
Las Cruces, Branigan Library
New Mexico Criminal Defense Lawyers Association
5.8 G
(505) 992-0050

**26** The Tangled Webs of Impaired Lawyers
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www.trtcle.com

**30** Common Sense Ethics - Histories and Mysteries
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31 FDCPA Compliance for the New Mexico Practitioner
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National Business Institute
6.7 G, .5 E
(715) 835-8525
www.nbi-sems.com

31 The High Price of Billables
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September

1 Justice in the Jury Room
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6 Burden of Representing Finanancially-challenged Companies
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7 Protecting Business Assets Through Effective Lawyering
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7 Real Estate Contracts In New Mexico
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8 Current Developments in Handling Discrimination Charges at the EEOC and the NM Human Rights Division
VR - Las Cruces
Center for Legal Education of NMSBF
2.7 G
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www.nmbar.org

8 Legislative Process: A 2005 Update
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Center for Legal Education of NMSBF
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9 New Mexico Easements: Rights of Way and Other Encumbrances
Albuquerque
Professional Education Systems, Inc.
8.1 G
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www.pesi.com

9 What Puts Government Lawyers in a Class by Themselves
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2.4 E
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www.trtcle.com

9 Annual Probate Institute
State Bar Center, Albuquerque Real Property and Probate Section and Center for Legal Education of NMSBF
7.2 G
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www.nmbar.org

9 Demonstrative Evidence in Your Personal Injury Trial - When, What, Why and How Much?
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9 Lawyering with Emotional Intelligence
VR - Las Cruces
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www.nmbar.org

9 Public Contracts and Procurement Regulations
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Lorman Education Services
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www.lorman.com

10 Democracy and Lawyers
Las Cruces
Anthony Avallone
2.0 G, 1.0 P
(505) 524-8915

12 Arbitrator Training
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## WRITS OF CERTIORARI

**AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT**

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

**EFFECTIVE AUGUST 12, 2005**

### PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

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### CERTIORARI GRANTED BUT NOT SUBMITTED:

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## WRITS OF CERTIORARI

**AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT**

Kathleen Jo Gibson, Chief Clerk
New Mexico Supreme Court
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**PETITION FOR WRIT OF CERTIORARI DENIED:**

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FORMAL REPRIMAND

PER CURIAM

{1} This matter came before the Court upon recommendation of the Judicial Standards Commission to approve a stipulation agreement and consent to discipline that was entered into between the commission and Honorable Frank W. Gentry.

{2} The commission issued a notice of preliminary investigation to respondent on July 8, 2004. On July 22, 2004, respondent submitted a response letter to the commission, which was treated as a response to the notice of preliminary investigation. On September 23, 2004, the commission issued a notice of formal proceedings to respondent. On November 16, 2004, respondent agreed to enter into a stipulation agreement and consent to discipline with the commission, which the commission accepted and filed on November 23, 2004. The stipulated factual and legal conclusions are set forth below. On January 13, 2005, this Court issued an order granting the commission’s disciplinary petition. Respondent was on unsupervised probation from January 13, 2005 through July 13, 2005.

{3} Respondent is a full-time Bernalillo County Metropolitan Court Judge.

{4} In December 2003, respondent improperly used his judicial position to advance private interests, initiated ex parte communications with a special commissioner and district court judge and, thus, involved himself in, interfered with, and attempted to influence child placement in a case involving respondent’s nephew, a family member within the third degree of relationship. The matter was outside of respondent’s jurisdiction and being handled by a higher court.

{5} Respondent’s admitted conduct violated the following Canons of the Code of Judicial Conduct: 21-100 NMRA 1995 (judge shall uphold integrity and independence of judiciary); 21-200(A) and (B) NMRA 1995 (judge shall avoid impropriety and appearance of impropriety in all activities); 21-300(B)(2) and (B)(7) NMRA 1995 (judge shall perform duties of office impartially and diligently); and 21-500(A)(1)-(4) NMRA 1995 (judge shall so conduct the judge’s extra-judicial activities as to minimize risk of conflict with judicial obligations).

{6} Respondent’s conduct constituted willful misconduct in office.

{7} WE HEREBY FIND that the recommended disciplinary measures for respondent’s violations of the Code of Judicial Conduct are appropriate. Respondent shall comply fully with the requirements of the discipline imposed by this Court and with the Code of Judicial Conduct.

{8} NOW, THEREFORE, IT IS ORDERED that Honorable Frank W. Gentry hereby is disciplined as follows:

1. Respondent shall receive a one-week suspension without pay. Imposition of the suspension without pay shall be deferred on the condition that respondent successfully completes six months of unsupervised probation and that no other formal disciplinary proceedings are initiated against him during the probationary period.

2. During the period of unsupervised probation, respondent agrees that this Court may summarily and temporarily suspend him without pay upon the filing of a notice from the commission that it is conducting formal proceedings against respondent concerning violations of the Code of Judicial Conduct that may constitute willful misconduct in office, failure to perform judicial duties, persistent failure or inability to perform judicial duties, or habitual intemperance. The temporary suspension shall continue until this Court issues an order lifting the suspension after reviewing the results of the commission’s formal investigation and/or formal proceedings concerning these matters. Respondent agrees not to contest the summary temporary suspension.

3. The Commission shall initiate contempt proceedings before this Court concerning any violations of the terms of the unsupervised probation.

4. Respondent shall receive a formal reprimand to be published in the Bar Bulletin after successful completion of the period of unsupervised probation.

5. Respondent shall abide by all terms and conditions of the plea and stipulation agreement and the Code of Judicial Conduct.

6. The parties shall bear their own costs and expenses incurred in this matter.

{9} IT IS SO ORDERED.

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

{1} Petitioners SkyHigh Communications, Estevan Gonzales, and the Santa Fe County Board of County Commissioners (hereinafter “Commission”) appeal from a decision of the district court reversing a decision by the Commission approving SkyHigh’s application for master plan zoning and a height variance. The issue on appeal to this Court only involves the Commission’s approval of the variance. Petitioners sought review of the district court’s decision in the Court of Appeals by filing a petition for a writ of certiorari. See NMSA 1978, § 39-3-1.1(E) (1999) (permitting a party to petition the Court of Appeals for a writ of certiorari to review the district court’s decision in an administrative appeal); Rule 12-505(B) NMRA 2005 (same). The Court of Appeals granted the petition, but after briefing by the parties, the court quashed the writ without any explanation. Petitioners then petitioned this Court for a writ of certiorari, which we granted. See § 39-3-1.1(E) (“A party may seek further review by filing a petition for writ of certiorari with the supreme court.”); Rule 12-505(J) (stating that a party may seek further review from a decision of the Court of Appeals or a denial of certiorari by the Court of Appeals with Supreme Court by petitioning the Supreme Court for a writ of certiorari).

{2} Petitioners assert the following issues in their certiorari petition: (1) the district court’s decision that SkyHigh’s application was not approved based on the Commission’s vote at the public hearing rather than the Commission’s final order is contrary to Section 39-3-1.1 and Rule 1-074 NMRA 2005; (2) the district court impermissibly substituted its judgment for that of the Commission when it concluded that the Commission’s decision to approve SkyHigh’s application was not supported by substantial evidence; and (3) the district court judgment violates the federal Telecommunications Act of 1996.

Facts

{3} SkyHigh filed an application with Santa Fe County officials in which it sought approval for master plan zoning and a height variance so that it could build a 198-foot telecommunications facility in the county. Under the Santa Fe County Land Development Code, a telecommunications facility is a use permitted anywhere within the county. Thus, the land does not have to be re-zoned to allow the construction of such facilities because such facilities are permitted uses under the Code. However, structures are limited to a height of 24 feet under the Code.

{4} A public hearing on SkyHigh’s application was held before the Commission on December 12, 2000. The application was heard by four of the five commissioners. The one commissioner who did not participate recused himself because he was related to the applicant. At the hearing, SkyHigh presented evidence as to why its application should be approved. Afterwards, the Commission heard from several concerned citizens, including Respondents, all of whom opposed the application. The Commission voted on the application immediately following public comment. Two commissioners voted in favor of the application; one commissioner voted against the application; and the chairperson did not cast a vote. The meeting was then adjourned.

{5} On December 28, 2000, the Commission issued a written order in which it approved SkyHigh’s application, subject to conditions. In the order, the Commission made several factual findings as to why it was approving the application. Respondents appealed the Commission’s decision to the district court on January 26, 2001. The district court reversed the
Commission’s decision on two grounds. First, the district court found that the Commission had acted arbitrarily and capriciously in approving the application because the vote was not taken in accordance with the Commission’s procedural rules. Second, the district court found that the Commission’s approval of the height variance was not supported by substantial evidence.

Petitioners then petitioned the Court of Appeals for a writ of certiorari to review the district court’s decision. The Court of Appeals initially granted the petition, but following briefing, the court quashed the writ. Petitioners then petitioned this Court for a writ of certiorari, which we granted.

**DISCUSSION**

The first issue we address is Petitioner Commission’s claim that Respondents’ appeal to the district court was untimely under Section 39-3-1.1 and therefore should have been dismissed by the district court. This issue was not raised in the certiorari petition, see Rule 12-502(C)(2) NMRA 2004 (providing that “only the questions set forth in the petition will be considered by the Court”), but we address the issue because if Respondents’ appeal to the district court had been untimely, we would not have granted the petition.

Section 39-3-1.1 sets forth the time frame for administrative appeals to the district court. See also Rule 1-074. Section 39-3-1.1(C) provides that “a person aggrieved by a final decision may appeal the decision to district court by filing in district court a notice of appeal within thirty days of the date of filing of the final decision.” See Rule 1-074(E) (“Unless a specific time is provided by law or local ordinance, an appeal from an agency shall be filed in the district court within thirty (30) days after the date of the final decision or order of the agency.”). “Final decision” is defined in Section 39-3-1.1(H)(2) as “an agency ruling that as a practical matter resolves all issues arising from a dispute within the jurisdiction of the agency, once all administrative remedies available within the agency have been exhausted.” Subsection (H)(2) further provides that “[t]he determination of whether there is a final decision by an agency shall be governed by the law regarding the finality of decisions by district courts.” The general rule in New Mexico for determining the finality of a judgment is that ‘an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible.” See *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992) (quoting B.L. Goldberg & Assocs. v. Uptown, Inc., 103 N.M. 277, 278, 705 P.2d 683, 684 (1985)).

Petitioner Commission asserts that Respondents’ appeal to the district court was untimely because it was not filed within thirty days of a “final decision” as specified in Section 39-3-1.1. Respondents counter by asserting that the appeal was timely filed because it was filed within thirty days of the Commission’s written order, which Respondents claimed was a final decision. Disagreeing with Respondents’ assertion, Petitioner Commission asserts that Section 39-3-1.1 explicitly distinguishes between “final decision” and “written decision,” and specifically states that the time for filing an appeal to the district court commences upon the issuance of a “final decision,” not a “written decision.” Petitioner Commission asserts that the legislature’s decision to use the term “final decision” rather than “written decision” indicates that the legislature intended that the time for filing the appeal to begin upon the issuance of the final decision and not a written decision. Consequently, Petitioner Commission contends that the December 12 vote was a “final decision” for purposes of Section 39-3-1.1. Thus, Petitioner Commission asserts that Respondents had thirty days to file their appeal from this date and not the date that its written order was filed.

We do not interpret the time limit provision in Section 39-3-1.1 as rigidly as Petitioner Commission. Subsection B details the procedure that an agency must follow when it issues a final decision. A “final decision” for purposes of Section 39-3-1.1 is “an agency ruling that as a practical matter resolves all issues arising from a dispute within the jurisdiction of the agency, once all administrative remedies available within the agency have been exhausted.” Section 39-3-1.1(H)(2). When an agency issues a final decision, subsection B requires it to promptly prepare and file a written decision that includes “an order granting or denying relief and a statement of the factual and legal basis for the order.” The agency must then promptly “serve a document that includes a copy of the written decision and the requirements for filing an appeal of the final decision” on all parties to the administrative proceeding and any person who filed “a written request for notice of the final decision in that particular proceeding.” Section 39-3-1.1(B)(3), -(a), -(b). It appears that this document serves the important purpose of informing the aggrieved parties of the requirements for appealing the administrative decision. See *Village of Angel Fire v. Wheeler*, 2003-NMCA-041, ¶ 33, 133 N.M. 421, 63 P.3d 524, cert. denied, No. 27,882 (Feb. 10, 2003). Subsection C of Section 39-3-1.1 details the appeal process to the district court. Subsection C provides that “a person aggrieved by a final decision may appeal the decision to district court by filing in district court a notice of appeal within thirty days of the date of filing of the final decision.” (Emphasis added.) Rule 1-074(E) similarly provides that “[u]nless a specific time is provided by law or local ordinance, an appeal from an agency shall be filed in the district court within thirty (30) days after the date of the final decision or order of the agency.” (Emphasis added.) As subsection B provides, it is the written decision of the agency’s final decision that is filed. Thus, we conclude that the time for filing an administrative appeal to the district court under Section 39-3-1.1 begins to run on the date the final decision or order is filed. In the present case, the Commission’s final decision was filed on December 28. Therefore, Respondents had thirty days from this date to file their appeal. Respondents’ appeal, which was filed on January 26, was within the thirty-day period, and thus, was timely filed.

Petitioner Commission asserts that its position is supported by *Maples v. State*, 110 N.M. 34, 791 P.2d 788 (1990), which it claims similarly recognized the distinction between a final decision and a written decision for purposes of filing an administrative appeal. We disagree. The issue in *Maples* was whether the plaintiff’s administrative appeal to the judiciary was inequitably barred based on her contention that she was not aware of the administrative decision until after the time for appealing had expired. Id. at 34-35, 791 P.2d at 788-89. This Court concluded that the plaintiff’s appeal was not inequitably barred because her attorney was aware of the hearing officer’s rulings from the bench. Id. at 35, 791 P.2d at 789. Consequently, this Court stated that the plaintiff could have preserved her appeal in several ways, including filing an immediate appeal while the decision was pending filing. Id. Thus, *Maples* involved a determination as to whether a plaintiff’s administrative appeal should be heard after the time for filing an appeal had elapsed where the plaintiff was unaware of the final administrative decision. It did not set forth a rule governing the filing of administrative appeals.
Indeed, Maples recognized that under the relevant procedural rule, plaintiff had thirty days from the final order’s filing date, which occurred after the hearing officer’s oral ruling. See id. at 34, 791 P.2d at 788.

{13} We next address the Court of Appeals’ order quashing the writ of certiorari. Petitioners assert that the Court of Appeals should not have quashed the writ of certiorari because the issues were significant, thereby requiring review by the Court of Appeals. Respondents assert, on the other hand, that the Court of Appeals properly quashed the writ because “the failure to allow a variance in this circumstance did not rise to the level of importance contemplated by Rule 12-502 for the Court of Appeals to grant a Writ of Certiorari.” Additionally, Respondents assert that the untimeliness of the petition to the Court of Appeals supported the quashing of the writ; Respondents submit that the Court of Appeals may have quashed the writ on this ground, which Respondents raised in a motion to dismiss to the Court of Appeals.

{14} A party aggrieved by the district court’s order in an administrative appeal may seek review of the decision by filing a petition for writ of certiorari with the Court of Appeals. Section 39-3-1.1(E); see also Rule 12-505(B) (“A party aggrieved by the final order of the district court in an administrative appeal may seek review of the order by filing a petition for writ of certiorari with the Court of Appeals . . . .”). The decision to grant the writ “rests in the sound discretion of the Court of Appeals.” C.F.T. Dev., LLC v. Bd. of County Comm’rs, 2001-NMCA-069, ¶ 8, 130 N.M. 775, 32 P.3d 784, overruled on other grounds by Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm’n, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806; see also § 39-3-1.1(E); Rule 12-505(B). Therefore, we will not review the Court of Appeals’ decision to quash the writ of certiorari, as the disposition of the writ rests with the discretion of the court. However, following “the disposition of a petition for writ of certiorari by the Court of Appeals, a party may seek further review from a decision of the Court of Appeals or a denial of certiorari by the Court of Appeals by filing a petition for writ of certiorari with the Supreme Court.” Rule 12-505(J) (emphasis added); accord § 39-3-1.1(E) (“A party may seek further review by filing a petition for writ of certiorari with the supreme court.”); see also Rule 12-502(A) (“This rule governs petitions for the issuance of writs of certiorari seeking review of decisions of the Court of Appeals and of actions of the Court of Appeals pursuant to Rule 12-505.”) (Emphasis added).

{15} The four grounds on which this Court may grant a petition for writ of certiorari to review the decision of the Court of Appeals are: (1) a conflict between the Court of Appeals’ decision and a decision of this Court; (2) a conflict between the Court of Appeals’ decision and another Court of Appeals’ decision; (3) the involvement of a significant question of law under the state or federal constitution; and (4) the presence of an issue of substantial public interest that should be determined by the Supreme Court. See Rule 12-502(C)(4). “The critical issue under Rules 12-502 and 12-505 is whether the case presents issues of significant importance to justify the granting of a writ of certiorari . . . .” Rio Grande, 2003-NMSC-005, ¶ 16.

{16} This case presents several issues of significant importance to justify this Court’s review. First, it raises the applicability of the federal Telecommunications Act of 1996, 47 U.S.C. 332, and its compliance mandates on local governments. Second, it implicates the deferential standard of review normally afforded to decisions of New Mexico administrative bodies like the Commission. See Rowley v. Murray, 106 N.M. 676, 679, 748 P.2d 973, 976 (Ct. App. 1987) (noting “[t]his standard reflects a respect for the governing body’s legislative function”); see also Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 782, 907 P.2d 182, 186 (1995) (same). We believe the district court may have given insufficient deference to the procedural process, factual findings and final decision of the Commission as an independent administrative body. Therefore, we find that there are sufficient grounds to justify our review of this matter.

{17} Respondents submit that the Court of Appeals may have accepted the argument presented in their motion to dismiss the petition, that the petition was untimely filed, and thus may have quashed the writ on this basis. Petitioners SkyHigh and Gonzales assert that the timeliness of the appeal is not an issue before this Court because it was not appealed. We address this issue because an untimely appeal to the Court of Appeals would be a basis for affirming the district court’s decision without further review or for affirming the district court if we should reverse on the merits. See Rule 12-201(C) NMRA 2005 (“Review without cross-appeal ”).


{19} Section 39-3-1.1 is a “comprehensive administrative appeals” statute which delineates the method for obtaining judicial review of final decisions of certain administrative agencies.” Hyden v. N.M. Human Servs. Dep’t, 2000-NMCA-002, ¶ 8, 128 N.M. 423, 993 P.2d 740. Rule 1-074 also “governs appeals from administrative agencies to the district courts.” Under Rule 1-074(R), a party may file a motion for reconsideration “within ten (10) days after filing of the district court’s final order.” There is no provision within Rule 1-074 which provides that a motion for reconsideration not acted upon by the district court within a certain amount of time is deemed denied by operation of law.

{20} Section 39-3-1.1(E) provides that “[a] party to the appeal to district court may seek review of the district court decision by filing a petition for writ of certiorari with the court of appeals, which may exercise its discretion whether to grant review. A party may seek further review by filing a petition for writ of certiorari with the supreme court.” Section 39-3-1.1(G) provides that “[t]he procedures governing appeals and petitions for writ of certiorari that may be filed pursuant to the provisions of this section shall be set forth in rules adopted by the supreme court.” Rule 1-074(T) provides that “[a]n aggrieved party may seek review of an order or judgment of the district court in accordance with the Rules of Appellate Procedure.”

{21} Rule 12-505 “governs review by the Court of Appeals of decisions of the district court” in cases where the district court reviews the actions of an administrative agency. See Hyden, 2000-NMCA-002, ¶ 2 (stating that Rule 12-505 specifies the “procedure for obtaining such appellate review”). Rule 12-505(C) provides that the “petition for writ of certiorari shall be filed with the clerk of
the Court of Appeals within twenty (20) days after entry of the final action by the district court.” (Emphasis added). Rule 12-505(C) defines “final action” as “the filing of a final order or judgment in the district court unless timely motion for rehearing is filed, in which event, final action shall be the disposition of the last motion for rehearing which was timely filed.” (Emphasis added). There is no provision within Rule 12-505 which provides that a motion not acted upon by the district court within a certain amount of time is deemed denied by operation of law.

(22) In their motion to dismiss the petition for writ of certiorari to the Court of Appeals, Respondents argued that the motions for rehearing were denied by operation of law under Rule 12-404 NMRA 2005, when they were not acted upon by the district court within thirty days of their filing. See Rule 12-404(C) (“Any motion for rehearing not acted upon within thirty (30) days after it is filed shall be deemed denied unless otherwise ordered by the court.”). Thus, the issue boils down to whether Petitioners’ motions for reconsideration were denied by operation of law when they were not acted upon within thirty days of their filing. If they were deemed denied by operation of law, then the petitions for writ of certiorari to the Court of Appeals were untimely. Conversely, if they were not deemed denied by operation of law, then the petitions were timely.

(23) Respondents’ argument is apparently based on language in Rule 1-074(T), which states that “[a]n aggrieved party may seek review of an order or judgment of the district court in accordance with the Rules of Appellate Procedure.” (Emphasis added). Although we acknowledge the confusion inadvertently created by the promulgation of the various rules governing appellate procedure, we conclude that Rule 12-404 does not apply to this situation. Rule 12-404(A) gives a time limit different from Rule 1-074(R) as to when a motion for rehearing must be filed (fifteen days as opposed to ten days). Rule 1-074, by its very terms, applies specifically to the review of administrative decisions in the district courts, whereas Rule 12-404 seems to apply only to rehearings in general, specifically to those before the Supreme Court and the Court of Appeals. See Rule 12-101 NMRA 2005 (“These rules govern procedure in appeals to the supreme court and the court of appeals . . . .”) (Emphasis added.). Here, the motion for rehearing was filed in the district court. In the motion, the district court was being asked to reconsider its ruling. Finally, the procedure governing certiorari review by the Court of Appeals in administrative agency appeals seems to be wholly addressed by Rule 12-505. See Rule 12-505(A) (“This rule governs review by the Court of Appeals of decisions of the district court.”); cf. Hyden, 2000-NMCA-002, ¶ 2 (stating that Rule 12-505 outlines the procedure for appellate review of administrative agency decisions in the Supreme Court and Court of Appeals).

(24) Under these applicable rules, we find there is no provision which provides that a motion for reconsideration or rehearing is deemed denied by operation of law if it is not acted upon by the district court within a certain time period. Without any such language, the petitions for writ of certiorari to the Court of Appeals may be considered timely filed since they were filed within twenty days of the district court’s March 8 order. We find additional support for this position in Vigil v. Thriftway Mktg. Corp., 117 N.M. 176, 178, 870 P.2d 138, 140 (Ct. App. 1994), in which the court found that a worker’s motion for reinstatement was not deemed denied by operation of law under NMSA 1978, § 39-1-1 (1917) because it was filed “pursuant to [Rule] 1-041(E) [NMRA 2005], which does not contain a provision saying that motions filed pursuant to it are deemed denied if not acted upon within a certain amount of time.” State v. Shirley, 103 N.M. 731, 732-733, 713 P.2d 1, 2-3 (Ct. App. 1985), which did not address Section 39-1-1, is nonetheless instructive because again, the court held that where the governing rule of criminal procedure did not provide a time limit for the district court’s decision on a post-conviction motion for a new trial and absent any showing that the court failed to act within a reasonable amount of time, the motion was not deemed denied automatically after thirty days but only when the trial court actually ruled on the motion.

(25) Because there is no provision stating that a motion for reconsideration is deemed denied if not acted upon within a certain time frame, we conclude that the petitions were timely filed when they were filed within twenty days of the district court’s final order. Therefore, we reject Respondents’ assertion that this may have been the basis on which the Court of Appeals quashed the writ.

(26) We now turn to the issues raised in the certiorari petition and simultaneously review the decisions of the district court and the Commission regarding the Commission’s approval of SkyHigh’s variance application. In administrative appeals, we review the administrative decision under the same standard of review used by the district court while also determining whether the district court erred in its review. Rio Grande, 2003-NMSC-005, ¶ 16. Administrative decisions are reviewed under an administrative standard of review. Id. ¶ 17. Under this standard of review, reviewing courts are limited to determining whether the administrative agency acted fraudulently, arbitrarily or capriciously; whether the agency’s decision is supported by substantial evidence; or whether the agency acted in accordance with the law. See § 39-3-1.1(D); Rule 1-074(Q); Rio Grande, 2003-NMSC-005, ¶ 17. In the present case, the district court reversed the Commission’s decision on the grounds that it was arbitrary and capricious, and was not supported by substantial evidence. We review each ground in turn.

(27) The district court’s decision that the Commission acted arbitrarily and capriciously in approving SkyHigh’s application was based on the district court’s determination that the Commission failed to comply with its procedural rules when it voted on the application at the public hearing on December 12. At the start of the Commission’s December 12 meeting, the Commission passed Resolution 2000-164. Resolution 2000-164 altered the chairperson’s voting power and was intended to repeal Resolution 1999-154. Under Resolution 1999-154, the chairperson voted only in the instance of a tie vote. In the instance where there were more affirmative votes than negative votes, but still insufficient votes to constitute a majority, the chairperson’s vote was automatically deemed to apply to the majority position in order to create an actual majority. Resolution 2000-164, on the other hand, did not limit the chairperson’s voting power to breaking tie votes, but instead gave him or her the same voting power as the other commissioners. Unlike Resolution 1999-154, under Resolution 2000-164, the chairperson’s vote was not automatically attributed to the majority position. Both resolutions required a majority vote of all commissioners present for all motions and action items to pass. Thus, to be approved under either resolution, SkyHigh’s variance application needed the votes of at least three of the four present and participating commissioners. After passing Resolution 2000-164 and resolving other matters, the Commission heard SkyHigh’s variance application. After hearing from SkyHigh and the public, the Commission immediately voted on the application. Two commissioners voted to approve
the application, one commissioner voted against the application, and the chairperson did not vote. The meeting immediately ended without any announcement of the Commission’s decision. The Commission issued a final written order a few weeks later in which it approved the application subject to certain conditions.

{28} In its review, the district court determined that SkyHigh’s application had been arbitrarily and capriciously approved because the application had failed to garner enough votes for approval under the Commission’s procedural rules. The district court’s determination was based on its conclusion that Resolution 2000-164 was in effect when the Commission voted on the application at the public hearing on December 12. The district court opined that without any language in Resolution 2000-164 specifying the date that the resolution was to go into effect, the presumption was that it went into effect immediately. The district court also did not view the Commission’s written order as a ratification of its December 12 actions.

{29} Petitioners SkyHigh and Gonzales assert that the district court should not have reviewed this issue because it was not raised at the administrative hearing. However, we conclude that preservation of this issue was not necessary for judicial review. Generally, arguments relating to “theories, defenses, or other objections will not be considered when raised for the first time on appeal.” Wofley v. Real Estate Comm’n, 100 N.M. 187, 189, 668 P.2d 303, 305 (1983). The issue in the case at hand, however, concerns the Commission’s decision approving SkyHigh’s variance application. That decision was made during a meeting at which the Commission voted to change its voting procedure. The effective date of the change was not made clear. Under these circumstances, we are not persuaded Petitioner had an “opportunity to object” within the meaning of Rule 12-216(A) NMRA 2005 (discussing the requirements for preserving issues for review). Further, we are persuaded the question of what voting procedure applied was a question the district court had to address in reviewing the Commission’s action. “Any judicial review of administrative action, statutory or otherwise, requires a determination whether the administrative decision is arbitrary, unlawful, unreasonable, capricious, or not based on substantial evidence.” Dick v. City of Portales, 118 N.M. 541, 543, 883 P.2d 127, 130 (1994) (quoting Regents of the Univ. of N.M. v. Hughes, 114 N.M. 304, 309, 838 P.2d 458, 463 (1992) (emphasis added). Since the present issue was whether the Commission acted arbitrarily and capriciously in approving SkyHigh’s variance application, it was appropriate for the district court to review this issue.

{30} When we review an administrative decision for arbitrary and capricious conduct, we review “the whole record to ascertain whether there has been unreasoned action without proper consideration or disregard of the facts and circumstances.” Las Cruces Prof’l Fire Fighters v. Las Cruces, 1997-NMCA-044, ¶ 7, 123 N.M. 329, 940 P.2d 177. Our review of the record leads us to conclude that the Commission did not abuse its discretion when it approved SkyHigh’s variance application. Contrary to the district court’s determination, the record shows that the application was approved in accordance with the Commission’s procedural rules. The actions of the Commission and chairperson demonstrate that they considered Resolution 1999-154 to be in effect when the application was voted upon, a determination to which we believe we should defer. Except for an ordinance, which required the majority vote of all commissioners, the chairperson did not vote on any matters at the meeting, including SkyHigh’s variance application. This was consistent with the voting procedures in Resolution 1999-154. When the participating commissioners voted on the application, there were more affirmative votes than negative votes, but not enough votes for the application to be approved. In this scenario, Resolution 1999-154 provided that the chairperson’s vote would be applied to the majority position to allow the item to pass. The Commission issued a final order a few weeks later in which it formally approved the application which was presumably ratified by a majority of the commissioners. Again, this was consistent with the voting procedures in Resolution 1999-154. Thus, based on the record, it is reasonable to infer that Resolution 1999-154 was in effect when the Commission voted and approved the application. Therefore, since the record shows that Resolution 1999-154 governed the Commission’s voting procedure, the application was not arbitrarily and capriciously approved because it was properly approved in accordance with the Commission’s procedural rules.

{31} Respondents assert that the chairperson did not vote “because he had left the meeting and did not hear [them] discuss the issues.” The record belies Respondents’ assertion, however. The record shows that the chairperson actively participated in the hearing. He ran the hearing, he heard from the applicant and the public, and he engaged in discussions with the public when they spoke on the application. He was also present when the commissioners discussed and voted on the matter. Consequently, we conclude that the Commission’s approval of the application was conducted in conformance with Resolution 1999-154, and thus, the district court erred in concluding that the application was arbitrarily and capriciously approved.

{32} The second issue we discuss is whether the Commission’s approval of SkyHigh’s variance application was supported by substantial evidence. In its review, the district court concluded that the Commission’s approval of the variance was not supported by substantial evidence. Courts reviewing a zoning authority’s decision for substantial evidence must review the entire record to determine whether there is substantial evidence to support the decision. Bennett v. City Council, 1999-NMCA-015, ¶ 20, 126 N.M. 619, 973 P.2d 871. Substantial evidence means “relevant evidence that a reasonable mind would accept as adequate to support a conclusion.” Watson v. Town Council of Bernalillo, 111 N.M. 374, 376, 805 P.2d 641, 643 (Ct. App. 1991). Since reviewing courts are obligated to review the entire record to determine whether the zoning authority’s decision was supported by substantial evidence, they may not substitute their decision for that of the zoning authority and conclude that there is evidence supporting a different conclusion. Siesta Hills Neighborhood Ass’n v. City of Albuquerque, 1998-NMCA-028, ¶ 6, 124 N.M. 670, 954 P.2d 102. In its review, the court must view the evidence in the light most favorable to the decision. Id. Reviewing courts must uphold the zoning authority’s decision if the decision is supported by substantial evidence. Id.

{33} The Commission’s authority for granting variances is limited by the terms of the authorizing zoning statute. See Downtown Neighborhoods Ass’n v. City of Albuquerque, 109 N.M. 186, 189, 783 P.2d 962, 965 (Ct. App. 1989). The Commission’s authority for granting the variance that was granted in this case is found in Article II, Section 3 of the Santa Fe County Land Development Code. Section 3.1, which addresses variances related to proposed development, reads:

Where in the case of proposed development, it can be shown that strict compliance with the requirements of the Code
would result in extraordinary hardship to the applicant because of unusual topography or other such non-self-inflicted conditions or that these conditions would result in inhibiting the achievement of the purposes of the Code, an applicant may file a written request for a variance. A Development Review Committee may recommend to the Board and the Board may vary, modify or waive the requirements of the Code and upon adequate proof that compliance with [the] Code provision at issue will result in an arbitrary and unreasonable taking or [sic] property or exact a hardship, and proof that a variance from the Code will not result in conditions injurious to health or safety. In arriving at its determination, the Development Review Committee and the Board shall carefully consider the opinions of any agency requested to review and comment on the variance request. In no event, shall a variance, modification or waiver be recommended by a Development Review Committee, nor granted by the Board if by doing so the purpose of the Code would [be] nullified.

Santa Fe County Land Development Code, (N.M.1980). Further, Article II, Section 3.2 provides: “In no case shall any variation or modification be more than a minimum easing of the requirements.”

Thus, for a property owner to be considered for a variance under the code, he or she must show that because of unique circumstances, strict application of the zoning regulations would create an extraordinary hardship for him or her. The property owner must show that the hardship relates to the land or other “non-self-inflicted conditions,” or that “these conditions would result in inhibiting the achievement of the purposes of the Code.” Once the property owner has sufficiently shown his or her qualification for a variance, the Commission may then grant the variance when sufficient evidence has been shown demonstrating that strict compliance with the code would result in a confiscatory taking of the property or would “exact a hardship.” The evidence must also convince the Commission that the variance “will not result in conditions injurious to health or safety.” However, the code provides that the Commission may not grant the variance where doing so would result in the nullification of the code. The code decrees that the variance must be no more than a minimum easing of the regulations.

{34} Respondents assert that the district court correctly determined that the Commission had improperly granted SkyHigh’s variance application because SkyHigh had failed to show the facts necessary to justify the granting of the variance. Respondents assert that the only question relevant to determining the existence of a hardship is whether the owner is being denied all reasonable use of the property. Respondents assert that there was nothing unique about the land that would require a variance and that the land could be used for other residential or commercial purposes in accordance with the zoning regulations. Thus, Respondents contend that the statutory required hardship was not met. Respondents further assert that any hardship was self-inflicted and related to Skyhigh’s personal desire to “conduct commercial activities in an inappropriate place and in an inappropriate manner.” Respondents state that variances are not intended to cure such zoning defects or alleviate such “personal problems” of the property owner. Respondents additionally assert that the granting of the variance nullified the code’s purpose because “it ignored zoning restrictions and ignored the requirements for variances.” Finally, Respondents assert that the variance did not constitute a minimum easing of zoning requirements.

{36} The district court determined that the record did not support the Commission’s decision to grant SkyHigh’s variance application. In its decision the district court stated, “And in essence what I’m hearing is, if someone wants to make use of their property and the existing zoning ordinances say it’s not allowed, but someone says, ‘I want to use it for this purpose anyway,’ if a variance is going to be granted on that basis, we don’t need variances.” The district court then stated that there was no evidence in the record demonstrating the extraordinary hardship that would support the construction of a cellular tower on the property; there was no evidence of “an arbitrary or unreasonable restriction on the property.” The district court stated that what the record did show, however, was “that the applicants were not able to put the property to the use . . . they intended.” The district court stated that this fact did not justify the granting of SkyHigh’s variance application.

{37} We believe that the district court’s decision was premised on a mistaken belief that the activity that SkyHigh wanted to conduct on the relevant property was prohibited by the code. Respondents appear to share this same belief. However, the code permits the use of telecommunication facilities anywhere within the county. This fact was so found by the Commission. Thus, the manner in which SkyHigh wanted to use the land was appropriate under the code. The Commission apparently concluded that the county should, “[t]hrough the Community and district design process, design utilities to support and fit into the rural,
unique and diverse community character, aesthetics and environment of the County.”

{39} The Commission’s finding of unique circumstances justifying the consideration of SkyHigh’s variance application is supported by the documents and the testimony that were submitted in the case. The evidence shows that the property was at a low level, hilly and uneven. This made it impossible to operate a cellular tower at the restricted height level of 24 feet because the land was not high enough to allow the cellular transmissions to travel over the surrounding mesas and hills. In order for the transmissions to navigate the surrounding hills and mesas, the cellular tower needed at least 198 feet. Also, the height restriction made it impossible to operate a telecommunications facility at the restricted height level due to the conditions required by the technology and the telecommunications industry. SkyHigh’s owner Estevan Gonzales testified that due to these conditions, the facility would be unable to provide “any service whatsoever to any wireless provider” at the 24 feet height level.

{40} The Commission also determined that denying the variance would impede the code’s utility goals. We defer to the Commission’s determination on this fact.

{41} The question that we now must determine is whether there was sufficient evidence to justify the Commission’s granting of SkyHigh’s variance. The code provides that the Commission may grant the variance when there is sufficient evidence showing that strict compliance with the zoning regulations will result in an arbitrary and unreasonable taking of property or “exact a hardship.” There is no contention of a taking in this case. Thus, the only issue is whether the necessary hardship was shown.

{42} “Hardship” is not defined in the code. To determine whether the requisite hardship was shown, the Commission looked at the type of variance that was being sought by SkyHigh. The Commission determined that SkyHigh was requesting an area or dimensional variance. After making this determination, the Commission relied on the case of Hertzberg v. Zoning Bd. of Pittsburgh, 721 A.2d 43 (Pa. 1998), to determine whether SkyHigh’s variance should be granted. In Hertzberg, the Pennsylvania Supreme Court set forth a standard for determining the “unnecessary hardship” required for an area or dimensional variance. This standard is less stringent than that required for a use variance. See id. at 47-48. Under this standard, multiple factors may be considered in deciding whether to grant an area or dimensional variance, “including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.” Id. at 50. Relying on these factors, the Commission determined that “there would be significant cost and economic detriment to the applicant of erecting multiple, smaller towers.” The Commission also determined that “the rural characteristics of the area where the tower is proposed to be located are such that it would be more appropriate to erect a single, larger tower than multiple, small towers.”

{43} We cannot say that the Commission’s decision to grant the variance was erroneous under the Hertzberg standard. Under the Hertzberg standard, the property owner does not have to show “that the property is valueless without the variance and cannot be used for any other permitted purpose.” Id. at 47. Thus, under Hertzberg, Respondents’ assertion that SkyHigh had to show that it was being denied all reasonable use of the property in order to be granted an area or dimensional variance is incorrect. Hertzberg provides that unreasonable economic burden is one factor to consider when determining whether to grant an area or dimensional variance. Id. at 50. Here, the Commission determined, based on Gonzales’s testimony and submitted documents which indicated that the only alternative to one cellular tower was several cellular towers throughout the area, that SkyHigh would suffer an unreasonable economic burden if its variance was not granted.

{44} The Commission noted that denial would also “constitute a prohibition of provision of personal wireless services” under the federal Telecommunications Act of 1996. See 47 U.S.C. 332(c)(7)(B)(i)(II) (“The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”).

{45} Another Hertzberg factor is the surrounding neighborhood’s characteristics. Hertzberg, 721 A.2d at 50. Here, the Commission determined, based on Gonzales’s testimony and submitted documents regarding multiple towers and “tower slum,” that it would be more appropriate to erect one single tower rather than multiple towers due to the rural characteristics of the neighborhood.

{46} The Commission also found that granting the variance would result in a net public benefit. Benefit to the public is another factor that may be considered in the granting of an area or dimensional variance. Kenneth H. Young, 3 Anderson’s Am. Law of Zoning § 20.52, at 597 (4th ed.1996). There was evidence showing that the public would benefit from the granting of the variance. There was evidence showing that the cellular tower would lead to improvements in safety, economic development, and quality of life, through necessary and enhanced wireless services. Schools, businesses, area residents, and local governmental agencies would have access to the newer technologies.

{47} The code provides that a variance may be granted if there is sufficient evidence that the variance “will not result in conditions injurious to health or safety.” Here, the Commission concluded that it was precluded under the federal Telecommunications Act of 1996 from denying the variance solely on safety issues. See 42 U.S.C. § 332(c)(7)(B)(iv) (“No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.”).

{48} The code provides that the variance may not be granted when doing so would nullify the code’s purpose. In this case, the Commission found that the granting of the variance “ensures that the spirit of the zoning ordinance will be observed . . . and that substantial justice [is] done.”

{49} The Commission also determined that the height variance would be no more than a minimum easing of the code. Estevan Gonzales testified that the height variance “is the minimum height needed for the effectiveness of the antennas to be placed on the tower and in order to reduce the proliferation of multiple towers in the area.” “The height requested is the minimum height necessary to
provide telecommunication services in the area.” The height “is a minimum height needed to support the engineering needs of the wireless service providers.” The “height provides space for co-location for multiple service providers.”

Our review leads us to accept the conclusions of the Commission. We emphasize first that the code permits the use of telecommunication facilities anywhere within the county. Therefore, Skyhigh did not need a variance to construct the telecommunications tower, only a dimensional variance to amend the height restriction. While we acknowledge that the proposed 198-foot tall tower rose well above the code’s 24-foot height restriction and therefore may not appear to be a “minimal” easing of the code, we agree that the increased height was the minimum amount necessary to make the towers effective and to fulfill the purposes of both the code and federal legislation. The 198-foot tower, while surely a burden on adjacent landowners, was the minimum height necessary to provide adequate telecommunication services and to avoid the proliferation of other, shorter towers throughout the county. Therefore, we agree that the benefits provided by the construction of the 198-foot telecommunications tower to the county outweighed the possible burdens placed upon individual members of the county. Thus, we find that the record provides ample support for the conclusion that the requested variance in this case was the minimum variance necessary to afford relief to the applicant and fulfill the directives of both the code and federal legislation.

After reviewing the whole record, we conclude that there was substantial evidence to support the Commission’s granting of SkyHigh’s variance application. Consequently, we do not address whether the district court’s decision violates the federal Telecommunications Act of 1996.

CONCLUSION

The Commission’s decision approving SkyHigh’s variance application was not arbitrary and capricious, and was supported by substantial evidence. Thus, the district court erred in reversing the Commission’s decision. We therefore reverse the district court and remand this case for further proceedings consistent with this opinion.

IT IS SO ORDERED.

PETRA JIMENEZ MAES,
Justice

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. Serna, Justice
EDWARD L. CHÁVEZ, Justice
Jose S. (Child) appeals the denial of his motion to modify his sentence, claiming that his sentence was illegal under *State v. Adam M.*, 2000-NMCA-049, 129 N.M. 146, 2 P.3d 883. At a dispositional hearing on two separate petitions against Child, the district court adjudicated Child delinquent on both petitions. Pursuant to the Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through 2003), Child was committed for one year on the first case and for two years on the second case. The two-year commitment on the second case was suspended and Child was placed on probation. The district court ordered that these sentences run concurrently.

We hold that even though Child has already served his sentence, Child’s case is not moot. We further hold that the rationale of *Adam M.* does not prevent the imposition of two non-consecutive commitments based on separate petitions stemming from different underlying behavior during one dispositional hearing.

**FACTS AND PROCEDURAL HISTORY**

**The CSP Case**

Child was indicted by a grand jury for criminal sexual contact of a minor, criminal sexual penetration (CSP), and attempted CSP. At a first trial, the district court directed a verdict as to one count, the State filed a nolle prosequi as to one count, and trial on the remaining charge of CSP ended in a hung jury and mistrial. Child ultimately entered a no contest plea to attempted CSP.

**The Property Damage Case**

Child’s second case stemmed from Child committing a different criminal act on a different date. A second delinquency petition was filed alleging that Child had committed criminal misdemeanor property damage while he was in a detention center. On the day of trial, Child agreed not to contest the charge. Child was placed on probation and entered into a consent decree. The State petitioned to revoke the consent decree, alleging that Child had violated the terms of his probation by withdrawing from school, not going home so that his whereabouts were unknown, and removing his ankle monitor. Child was wearing the monitor while awaiting trial on the CSP case. The district court ultimately accepted Child’s admission to violating his probation on the property damage charge.

**Dispositional Hearing on the CSP Case and the Property Damage Case**

There was one dispositional hearing in these cases. For the CSP case, Child was adjudicated delinquent and committed to the Children, Youth and Families Department (CYFD) for an indeterminate period not to exceed one year, pursuant to Section 32A-2-19(B)(2)(a). For the property damage case, Child was adjudicated delinquent on the charge of violating the terms and conditions of his probation and committed to CYFD for an indeterminate period not to exceed two years, pursuant to Section 32A-2-19(B)(2)(b). This separate commitment was ordered to run concurrently with Child’s CSP case. This commitment was further suspended and Child was placed on probation for the same period of time. Child appeals the denial of his motion to modify this disposition.

**DISCUSSION**

This case asks us to interpret the district court’s authority under the Delinquency Act, which is a question of law that we review de novo. See *In re Ruben D.*, 2001-NMCA-006, ¶ 7, 130 N.M. 110, 18 P.3d 1063. The language of unambiguous provisions must be given effect without further interpretation. *Id.* Only ambiguous provisions require us to delve into the legislative purpose behind the statute. *Id.*

The State argues that Child’s appeal is moot because Child has already served his sentences on both charges. The State asserts that Child’s appeal is not susceptible to any of the mootness exceptions because this situation is unlikely to occur again. However, the fact sequence below does not appear too unusual to this Court and because of the short time frames for Children’s Code dispositions and the sometimes lengthy time for disposition of general calendar cases on appeal, such cases can evade review. We hold that this case could be susceptible to repetition without review, and is therefore not moot. See *State ex rel. Brandenburg v. Blackmer*, 2005-NMSC-008, ¶ 9, ___ N.M. ___, 110 P.3d 66.

Child argues that the district court could not impose two separate dispositions on two separate delinquency petitions in the course of a single dispositional hearing. Child asserts that this sentence is not allowed under the provisions of Section 32A-2-19 or under *Adam M.*. We disagree that this proceeding was a single dispositional hearing or that it resulted in an illegal disposition falling outside the perimeters of Section 32A-2-19(B).
In *Adam M.*, we said that the Children’s Code “does not contemplate consecutive commitments.” 2000-NMCA-049, ¶ 1. The two petitions at issue there stemmed from (1) the commission of a rape, (2) the commission of which violated the child’s probation. *Id.* ¶ 3. At a single dispositional hearing on both petitions, the district court ordered two separate commitments to run consecutively. *Id.* ¶ 4. This Court said that the Children’s Code, from which the district court derives its limited statutory authority to impose a commitment, “does not reveal any authority for the children’s court to order consecutive commitments for the same underlying behavior which is the subject of two separate petitions combined for disposition.” *Id.* ¶¶ 5-6. We held that “[i]f, as in this case, a single dispositional hearing is held on more than a single petition, Section 32A-2-19(B) permits only a dispositional judgment which includes a single commitment.” *Adam M.*, 2000-NMCA-049, ¶ 13. We hold that this rule does not apply to the case before us.

In this case, Child’s sentences were neither consecutive nor based on the “same underlying behavior.” *See id.* ¶ 6. In *Adam M.*, we stressed that consecutive sentences, while permissible at common law, were simply not permitted from a single dispositional hearing under Section 32A-2-19(B). *Id.* ¶¶ 7-8, 13. We noted further that a child could only receive a maximum two-year commitment on an initial petition no matter the number of offenses. *Id.* ¶ 9. It was only the statutory authority of Section 32A-2-19(D) that “provides a mechanism to continue the child’s commitment.” *Adam M.*, 2000-NMCA-049, ¶ 10. “[W]e do not read Section 32A-2-19 to include unexpressed authority for the children’s court to order consecutive commitments.” *Id.* Clearly, the concern was impermissibly extending the duration of a child’s commitment (for one act) beyond that permitted by Section 32A-2-19(B).

Here, on the other hand, Child’s sentences were concurrent, and thus combined did not extend beyond the statutory perimeters. Also, unlike *Adam M.*, we are not dealing with a single act of CSP giving rise to two petitions, but separate and distinct underlying acts giving rise to separate and distinct petitions. *See Adam M.*, 2000-NMCA-049, ¶ 6. It is undisputed that the district court could have handed down these same exact commitments at two different dispositional hearings set at different times. *See id.* ¶ 11; *In re Augustine R.*, 1998-NMCA-139, ¶ 7, 126 N.M. 122, 967 P.2d 462. Today we hold that the district court may hand down statutorily authorized sentences such as the sentences here at one time. We do not read Section 32A-2-19(B) as requiring the empty formality of having separate proceedings at different times regarding the same child simply to hand down separate non-consecutive commitments on separate petitions. *See State v. Herrera*, 2001-NMCA-073, ¶ 10, 131 N.M. 22, 33 P.3d 22 (stating that we will not read language into a statute when it makes sense as written). We hold that the rationale of *Adam M.* simply does not prevent two different, non-consecutive commitments based on separate petitions that are themselves based on separate conduct from being heard at the same time.

Finally, Child’s sentence was permissible under the plain language of Section 32A-2-19(B). Child’s short-term, one-year commitment for CSP was authorized by Section 32A-2-19(B)(2)(a). Child’s long-term, two-year commitment for violating his probation and the consent decree was unrelated to the CSP charge and authorized by Section 32A-2-19(B)(2)(b). This second commitment was suspended and, as authorized by Section 32A-2-19(B)(3), Child was placed on probation. We hold that the plain language of Section 32A-2-19(B) allowed for these dispositions, so that further interpretation is unnecessary. *See In re Ruben D.*, 2001-NMCA-006, ¶ 7.

CONCLUSION

We affirm.

RODERICK T. KENNEDY,
Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

LYNN PICKARD, Judge
OPINION

LYNN PICKARD, JUDGE

{1} Respondent (sometimes called Motor Vehicle Division or MVD) appeals from the district court’s granting of Petitioner’s petition for a writ of mandamus, ordering that her plea of guilty to a traffic offense, made pursuant to signing a uniform traffic citation, be withdrawn and that the metropolitan court proceed to trial on the matter. We reverse because no one was ever properly served with process in this matter and it appears, as a result, that no one appeared for Respondent below.

FACTS

{2} Petitioner’s verified petition alleged that she was accused of running a red light and that the officer gave her the option of “setting the matter for court or admitting her guilt and paying the penalty assessment.” The petition further alleged that Petitioner did not know that she was waiving her “right to Driving Improvement School” and that the plea was not knowing and voluntary. A certificate of service appears at the end of the petition, indicating that “a true and correct copy of the foregoing was mailed to Respondent.” No other service was made.

{3} The matter came before the district court following a notice of hearing, also mailed to Respondent, but there was no appearance for Respondent. At the hearing, the district court granted the writ of mandamus and ordered that Petitioner’s plea be withdrawn and that MVD return a copy of the uniform citation to metropolitan court for a trial on the merits. The district court had been presented with a form of alternative writ, but since there was no appearance for MVD, the district court crossed out the portions that made the writ alternative and entered a final or peremptory writ. MVD appeals.

{4} After MVD filed its brief in this case, Petitioner did not respond and the case was submitted in accordance with Rule 12-312(B) NMRA. However, because this case is one of several raising similar issues, we perceived the matter to be of public importance, and we invited the participation of the New Mexico Criminal Defense Lawyers Association as amicus curiae. We are grateful for its participation, which has provided Petitioner with advocacy. When we refer in this opinion to Petitioner’s contentions, we are referring to arguments made on her behalf by amicus.

DISCUSSION

{5} MVD contends that the district court never acquired jurisdiction over it because neither it nor the Attorney General was ever personally served with process allowing the district court to acquire jurisdiction over it. MVD also contends that the face of the petition did not show a valid basis for issuance of the writ inasmuch as it did not show that MVD had any clear legal duty under the facts of the case to return the citation to metropolitan court.

{6} Although we need not address the merits of the involuntary plea issue in this case, we express our reservations about Petitioner’s claim on the merits. While the answer brief speaks of an involuntary plea due to “misrepresentations about the consequences of [the] plea,” the petition did not allege any such misrepresentations. The petition simply alleged that the officer gave Petitioner the choice of going to court or paying the assessment. This appeared to be an accurate statement of the choice Petitioner faced.

{7} The consequences to which Petitioner refers are a “right to avoid fines and points by participating in the Driver Improvement School.” However, as MVD notes, points appear to be collateral consequences about which there is no duty to advise at the time of the taking of a plea. See, e.g., People v. Hampton, 619 P.2d 48, 52 (Colo. 1980) (en banc); State v. Carney, 584 N.W.2d 907, 909 (Iowa 1998) (per curiam). To the extent that Petitioner claims that she was required to be advised that appearing in court might
result in a lesser sentence than the penalty assessment fine, we are holding today that such is not required. See *Vigil v. N.M. Motor Vehicle Div.*, 2005-NMCA-096, ¶¶ 13-15 ___ N.M. ___, ___ P.3d ___ [No. 24,208 (Mar. 30, 2005)].

[8] It is well established in our cases that a court lacks jurisdiction to pronounce judgment over a defendant or respondent unless that defendant or respondent has been properly summoned into court. See *Bourgeois v. Santa Fe Trail Stages, Inc.*, 43 N.M. 453, 456, 95 P.2d 204, 206 (1939). The jurisdictional requirement of perfecting service has survived the enactment of the Rules of Civil Procedure. *In re Application No. 0436-A Into 3841*, 101 N.M. 579, 581-82, 686 P.2d 269, 271-72 (Ct. App. 1984). The nature of the jurisdictional requirement was set forth as follows by our Supreme Court: “[F]ailure to serve a party with process in a proper manner generally means . . . that the court has no power over that party and cannot render [a] judgment binding that party.” *Jueng v. N.M. Dep’t of Labor*, 121 N.M. 237, 240, 910 P.2d 1177 (1996) (internal quotation marks and citations omitted).

[9] The proper manner of service in this case is provided in NMSA 1978, § 38-1-17(A) & (H) (1970) and Rule 1-004(F)(3)(b) NMRA, which state that service on the State of New Mexico in any action in which a department is named a party is by “handing,” § 38-17-17(H), or “delivering,” Rule 1-004(F)(3)(b), the summons and complaint, or in this case the alternative writ and petition, to the head of the department and the attorney general. It is undisputed that there was no such service in this case, as Petitioner certified that she mailed the petition to the department head. See *Wirtz v. State Educ. Ret. Bd.*, 1996-NMCA-085, ¶¶ 13-14, 122 N.M. 292, 923 P.2d 1177 (holding that mailing is insufficient when the statute requires delivery). At the hearing, Trujillo informed the district court that she also faxed the petition, but that does not amount to personally delivering the process, such as is required by Rule 1-004. Compare Rule 1-004(E) (permitting service by mail in certain circumstances), and Rule 1-005(C)(1) NMRA (defining delivery for papers other than those that initiate the action to include both handing the paper to the person and faxing it), with Rule 1-004(F) (requiring personal delivery).

[10] Petitioner relies on *Bombach v. Battershell*, 105 N.M. 625, 627-28, 735 P.2d 1131, 1133-34 (1987), for the proposition that we should overlook any technical deficiencies in the lack of personal service because the record reflects that MVD had actual notice of the case and the date of the hearing by mail. However, that case involved an alleged defect in the manner of service as provided in a lease, and not the defect in personal service as provided in the Rules of Civil Procedure. Petitioner cites no cases standing for the proposition that a district court has jurisdiction to issue a binding judgment against a party not served in accordance with Rule 1-004 who does not somehow waive the defects in service.

CONCLUSION

[11] As the court below lacked power to issue a binding judgment, we must reverse the issuance of the peremptory writ of mandamus and final order. We remand with instructions to vacate the writ and final order and for further proceedings when and if proper service is made upon Respondent.

[12] IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

A. JOSEPH ALARID, Judge
OPINION
CYNTHIA A. FYL, JUDGE

{1} This case involves a dispute between two state auditors, Plaintiff Robert E. Vigil and Defendant Domingo P. Martinez. After Vigil left office as state auditor, Martinez took over and had an independent audit performed on Vigil’s work at the agency by Defendant Dennis R. Kennedy, C.P.A., and his Albuquerque accounting firm, Dennis R. Kennedy, P.C. The report issued by Kennedy made several findings that were unfavorable to Vigil, and Vigil subsequently filed a complaint against Defendants Martinez, Kennedy, and the Office of the State Auditor (OSA), for defamation, prima facie tort, negligence, and intentional infliction of emotional distress. The district court dismissed Vigil’s complaint, and Vigil now appeals, raising issues relating only to his claims for defamation and negligence. Unpersuaded by Vigil’s arguments, we affirm.

BACKGROUND
{2} Vigil’s complaint, which he filed pro se, contains the following factual allegations. Vigil is a former state auditor, who was subsequently replaced in that office by Martinez. In his capacity as state auditor, Martinez commissioned a special audit of Vigil’s activities as state auditor. The special audit was performed by Kennedy and his accounting firm (collectively referred to in this opinion as “Kennedy”). Vigil alleged that the audit report implied that during his tenure as state auditor, Vigil committed or permitted numerous violations of New Mexico state law. Television broadcasts aired the story, and a newspaper article in the Albuquerque Journal reported that the New Mexico State Police had conducted an investigation into the report and had found “every indication that [a] strong pattern of public corruption existed.”

{3} The district court dismissed Vigil’s claims against all defendants in two separate orders, determining that Kennedy had no legal duty to Vigil, that Vigil’s claims against the OSA and Martinez were barred by the statute of limitations, that the actions of Martinez and the OSA were within the scope of their governmental duties, and that no waiver of immunity existed for the alleged acts.

DISCUSSION
{4} “We review a ruling on a grant of a motion to dismiss de novo, accepting all well-pleaded factual allegations as true and resolving all doubts in favor of the sufficiency of the complaint.” Stoneking v. Bank of Am., N.A., 2002-NMCA-042, ¶ 4, 132 N.M. 79, 43 P.3d 1089. Dismissal is proper only when the law does not support a claim under the facts presented. Id.

Preliminary Matters
{5} On appeal, Vigil has abandoned certain of the claims asserted below. Vigil’s complaint brought claims for defamation against the OSA and Martinez under the Tort Claims Act (TCA), NMSA 1978, §§ 41-4-1 to -29 (1976, as amended through 2004), for defamation and prima facie tort against Martinez personally, and for negligence against Kennedy. Although the caption of the complaint lists a claim for intentional infliction of emotional distress, no allegations supporting this tort are stated in the complaint itself or were argued below. See Hakkila v. Hakkila, 112 N.M. 172, 182, 812 P.2d 1320, 1330 (Ct. App. 1991) (Donnelly, J., specially concurring) (stating the following elements must be alleged to state a claim of intentional infliction of emotional distress: “(1) the conduct in question was extreme and outrageous; (2) the conduct of the defendant was intentional or in reckless disregard of the plaintiff; (3) the plaintiff’s mental distress was extreme and severe; and (4) there is a causal connection between the defendant’s conduct and the claimant’s mental distress”). Similarly, no allegations supporting a claim of prima facie tort were made in the complaint or argued below. See Schmitz v. Smentowski, 109 N.M. 386, 394, 785 P.2d 726, 734 (1990) (stating that a claim for prima facie tort requires (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” (citation omitted)). Vigil raises no issues on appeal arising from these two claims.
Vigil also makes several arguments that we decline to address because they were not preserved. Vigil raises issues concerning Martinez’s alleged breaches of statutes and regulations; because these issues were not alleged in the complaint and were not raised below, we will not address them separately. "Celaya v. Hall, 2004-NMCA-005, ¶ 22, 85 N.M. 778, 779, 517 P.2d 1304, 1305 (Ct. App. 1973) (noting an exception to the preservation requirement for “questions of a general public nature affecting the interest of the State, we will not consider this unpreserved issue. See State v. Pacheco, 85 N.M. 778, 779, 517 P.2d 1304, 1305 (Ct. App. 1973) (noting an exception to the preservation requirement for “questions of a general public nature affecting the interest of the State at large”’’ (internal quotation marks and citation omitted)).

8} We also note that Plaintiff’s lawsuit names Martinez in his official and individual capacities. Because this lawsuit was not a civil rights action brought pursuant to 42 U.S.C. § 1983, those descriptions are inappropriate in this case, which alleged tort claims against both the OSA and Martinez.

9} Vigil argues that his claims against Martinez and the OSA should not have been dismissed. Specifically, he argues that these Defendants were not immune from his defamation claims under the TCA because they were not acting within the scope of their duties. Addressing the district court’s alternative ground for dismissal, Vigil also argues that his claim was not time-barred.

10} The TCA “delimits the scope of liability for government entities and their employees by: (1) retaining immunity for torts not waived by the TCA; and (2) waiving immunity and recognizing liability, subject to certain protections, for employees acting within their scope of duty.” "Celaya v. Hall, 2004-NMSC-005, ¶ 8, 135 N.M. 115, 85 P.3d 239 (citations omitted). Section 41-4-17(A) of the TCA provides the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim. The actions for which immunity is waived are set out in Sections 41-4-5 to -12 of the TCA and the Religious Freedom Restoration Act, NMSA 1978, § 28-22-4 (2000).

11} In this case, Vigil does not argue that immunity is waived for his defamation claims under the express waiver provisions in Sections 41-4-5 to -12 or under Section 28-22-4. "Celaya v. Hall, 2004-NMSC-005, ¶ 22, 85 N.M. 778, 779, 517 P.2d 1304, 1305 (Ct. App. 1973) (stating that unless a plaintiff alleges defamation by a law enforcement officer, immunity is not waived under the TCA). Instead, Vigil contends that because Martinez was acting outside his scope of duty, the TCA does not apply and Martinez is not immune.

12} As the State argued to the district court, such an argument misconstrues the statutory scheme of the TCA. Under Section 41-4-4(D), the State is only liable for its employees’ negligence when those employees are acting in their scope of duty. Thus, the State’s liability is similar to that of a private employer under the doctrine of respondeat superior. "Celaya v. Hall, 2004-NMSC-005, ¶ 12, 85 N.M. 778, 779, 517 P.2d 1304, 1305 (Ct. App. 1973) (noting an exception to the preservation requirement for “questions of a general public nature affecting the interest of the State at large”’’ (internal quotation marks and citation omitted)). In this case, Vigil does not argue that immunity is waived for his defamation claims under the express waiver provisions in Sections 41-4-5 to -12 or under Section 28-22-4.

13} Vigil asserts that Martinez was not acting within his scope of duty because (1) Martinez’s decision to audit his predecessor violated statutory and regulatory procedures for audits; and (2) Martinez permitted a false report to be published and he was not “requested, required or authorized” to publish false reports. We are not persuaded. As our Supreme Court observed in "Celaya v. Hall, 2004-NMSC-005, ¶ 22, “scope of duties” is defined in Section 41-4-3(G), as “performing any duties that a public employee is requested, required or authorized to perform to the governmental entity, regardless of the time and place of performance.” The Court clarified that scope of duty is not limited to acts “officially requested, required or authorized because, contrary to legislative intent, it would render all unlawful acts, which are always unauthorized, beyond the remedial scope of the TCA.” “Celaya v. Hall, 2004-NMSC-005, ¶ 25 (citing Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, ¶ 20, 129 N.M. 778, 14 P.3d 43). “Thus,” the Court explained, “the TCA..."
clearly contemplates including employees who abuse their officially authorized duties, even to the extent of some tortious and criminal activity.” *Id.*

{14} Under Celaya and McBrayer, assuming that Martinez violated state and federal law in conducting the audit, “even to the extent of some tortious or criminal activity,” if he was performing an act that he was “requested, required or authorized to perform,” he was acting within his scope of duty and thus covered by the statutory grant of immunity provided by the TCA. See Celaya, 2004-NMSC-005, ¶¶ 25, 26. The Audit Act, NMSA 1978, §§ 12-6-1 to -14 (1969, as amended through 2003), establishes the requirements for audits of state agencies. Under Section 12-6-3, Martinez, as the state auditor, was authorized either to perform, or to designate independent auditors approved by him to perform, annual and special audits of state agencies. In addition, under Section 12-6-5, Martinez was required to produce, or have the independent auditor produce, a written report of any audit performed, which would subsequently become part of the public record. Thus, Martinez was acting within his scope of duty when he designated an independent auditor to perform a special audit and when he published the report.

{15} Because Martinez was acting within his scope of duty in commissioning the special audit and publishing the report, and because no waiver of immunity exists under the TCA for claims of defamation, we affirm the district court’s dismissal of Vigil’s claims against the OSA and Martinez. In light of this disposition, we need not address Vigil’s claim challenging dismissal pursuant to the statute of limitations.

**Claims Against Kennedy**

{16} Vigil argues that he stated claims for both negligence and defamation against Kennedy. As we discussed earlier, the issue of defamation as to Kennedy was not preserved. Therefore, the issue before us is whether, under a theory of negligence, a certified public accountant owes a duty to a third party who is the subject of an audit. Whether a person owes a duty is a question of policy determined by the courts when the legislature has not spoken. *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995). New Mexico courts have not specifically addressed the scope of an auditor’s liability for a negligent audit. Analogizing to *Garcia v. Rodey, Dickason, Sloan, Akin & Robb*, P.A., 106 N.M. 757, 750 P.2d 118 (1988), however, Kennedy argued successfully to the district court that no such duty exists in New Mexico. Although *Garcia* focused on whether an attorney owes a duty to a non-client adverse party in the context of litigation, *Id.* at 760-61, 750 P.2d at 121-22, both *Garcia* and a later case, *Leyba v. Whitley*, 120 N.M. 768, 907 P.2d 172 (1995), offer us some direction when considering the scope of a duty to third parties.

{17} In *Garcia*, our Supreme Court determined that “[a]n attorney has no duty . . . to protect the interests of a non-client adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the attorney’s services and that the attorney’s undivided loyalty belongs to the client.” 106 N.M. at 761, 750 P.2d at 122. In *Leyba*, the Court clarified when an attorney would have a duty to a non-client, stating that

[i]n considering relationships giving rise to duty, it seems logical to treat an intended (not incidental) third-party beneficiary as though in privity of contract and accord such a beneficiary traditional remedies in the enforcement of promises and common-law duties in his or her own right and not simply in the enforcement of the promisee’s right.

120 N.M. at 773, 907 P.2d at 177. The Court noted in *Leyba* that “[i]t is not, of course, the foreseeability of injury that gives rise to duty. It is the intent of attorney and client to benefit the third party that gives rise to a duty imposed by law.” *Id.* at n.2.

{18} With *Garcia* and *Leyba* in mind, we consider Kennedy’s reliance on *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985), and *Bily v. Arthur Young & Co.*, 834 P.2d 745 (Cal. 1992) (In Bank), to argue that accountants should not be liable to third parties like Vigil who are subjects of an audit. In *Bily*, the Supreme Court of California described the three schools of thought on the issue of auditor liability to third parties: (1) the approach of a substantial number of jurisdictions, taken from *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), which denies recovery to third parties “in the absence of a third party relationship to the auditor that is ‘akin to privity’”; (2) the majority approach, based on the Restatement (Second) of Torts § 552, which “generally imposes liability on suppliers of commercial information to third persons who are intended beneficiaries of the information”; and (3) the minority approach, which allows “recovery based on auditor negligence to third parties whose reliance on the audit report was ‘foreseeable.’” *Bily*, 834 P.2d at 752 (citations omitted). In *Credit Alliance Corp.*, the Court of Appeals of New York required “the existence of a relationship between the parties sufficiently approaching privity” in order for liability to extend to third parties. 483 N.E.2d at 119.

{19} In this case, we do not need to determine which of the approaches outlined in *Bily* New Mexico might adopt because Vigil can satisfy none of them, although we note that the Restatement approach appears closest to our Supreme Court’s position in *Leyba*, which focuses on the intent to benefit the plaintiff rather than either foreseeability or strict privity. 120 N.M. at 775, 907 P.2d at 179. First, with respect to the *Ultramares* test described in *Bily*, Vigil argues that he was in privity with the OSA and Martinez. We are not persuaded that he was. As this Court summarized in *Tarin’s, Inc. v. Tinley*, 2000-NMCA-048, ¶ 12, 129 N.M. 185, 3 P.3d 680, privity of contract is the connection or legal relationship between contracting parties. Here, there is no such legal relationship.

{20} This brings us to the second, majority view noted in *Bily*, which imposes liability on those who supply commercial information to third persons who are intended beneficiaries. 834 P.2d at 752. But a party claiming third-party-beneficiary status has the burden of showing that “the parties to the contract intended to benefit him.” *Tarin’s, Inc.*, 2000-NMCA-048, ¶ 13. Vigil asserts that as the target of a government audit, he was the intended beneficiary of the audit, but he provides no authority for such an assertion, and we are not persuaded that he, as an individual, was an intended beneficiary of the audit.

{21} Third, we are not persuaded that Vigil satisfies the minority view because he cannot demonstrate that he relied on the audit and that his reliance was foreseeable under a theory of direct negligence. Vigil cites *Jorgensen v. Massachusetts Port Authority*, 905 F.2d 515 (1st Cir. 1990), *Kennedy v. McKesson Co.*, 448 N.E.2d 1332 (N.Y. 1983), *Oksenholt v. Lederle Laboratories*, 656 P.2d 293 (Or. 1982), and *Quinones v. United States*, 492 F.2d 1269 (3rd Cir. 1974), to support his argument that he should be entitled.
to bring a negligence claim for damage to his reputation. These cases are not relevant to the facts of the case before us. In all four cases, the recovery of damages for loss of reputation was premised on a duty established by the relationship between the defendant and the plaintiff.

{22} In *Oksenholt*, the Supreme Court of Oregon recognized a physician’s right to bring a claim for negligence when he suffered damages to his reputation by relying on a drug manufacturer’s representations about a drug. 656 P.2d at 298. Analyzing the case under a theory of negligence per se, the court permitted recovery because it determined that the drug manufacturer violated a safety regulation and that physicians were in the class protected by the regulation. *Id.* at 297-98. In *Kennedy*, the plaintiff, a dentist, was permitted to recover damages for loss of reputation under a negligence theory when the repairer of an anesthetic machine reversed the labels for administration of oxygen and nitrous oxide, which resulted in the death of a patient. 448 N.E.2d at 1333-34. In that case, as the Court of Appeals of New York observed, the repairer of the machine owed a duty to the dentist. *Id.* at 1334. In *Quiñones*, the Third Circuit determined that Pennsylvania would recognize a duty of an employer to use due care in maintaining an employee’s work history, thus permitting a cause of action in negligence. 492 F.2d at 1273. And in *Jorgensen*, which was a suit by airline pilots against the port authority for its alleged negligence in contributing to an aircraft accident, the First Circuit considered whether “Massachusetts would recognize the validity of a reputation-damage claim in a general negligence setting.” 905 F.2d at 520. The court noted, however, that in order to recover such damages, all the elements of a claim for negligence would have to be established and that the existence of a duty in that case was not at issue. *Id.* at 522.

{23} In the case before us, however, the existence of a duty has not been established and Vigil cannot demonstrate a relationship between himself and Kennedy that is similar to the relationships in *Oksenholt*, *Kennedy*, *Quiñones*, and *Jorgensen*. And, absent a duty, no damages, including damages to reputation, can be recovered under a negligence claim. See *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d 181 (“[A] negligence claim requires the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff’s damages.”). Furthermore, the present case is unlike *Oksenholt* because, although Vigil alleged in his claims against the OSA and Martinez that various statutes and regulations were violated, he neither alleged nor argued below that Kennedy was liable under a theory of negligence per se. See 656 P.2d at 297-98. Instead, Vigil argues that because he was a foreseeable victim of Kennedy’s alleged negligent audit, Kennedy owed him a duty. Under the facts alleged by Vigil, we are not persuaded that Vigil has demonstrated that he relied on the accuracy of the audit. He did not allege in his complaint or argue on appeal what action he took in justifiable reliance on the report that resulted in any damages.

{24} Unpersuaded that Kennedy owed a duty to Vigil under any of the approaches outlined in *Bily*, and guided by the rationales of *Garcia* and *Leyba*, we affirm the district court’s dismissal of Vigil’s claims against Kennedy and his accounting firm.

CONCLUSION

{25} For the foregoing reasons, we affirm the dismissal of this case against all Defendants.

{26} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

RODERICK T. KENNEDY, Judge
OPINION
LYNN PICKARD, JUDGE

{1} Healthsource, Inc. (Plaintiff) appeals from a district court’s order dismissing its lawsuit against X-Ray Associates and Dr. Jerome Burstein (Defendants). Plaintiff sued Defendants for breach of contract, tortious interference with contractual relations, civil conspiracy, negligent misrepresentation, and prima facie tort. Both Defendants filed motions to dismiss Plaintiff’s complaint, with each motion claiming that Plaintiff lacked standing to bring suit against Defendants or that Plaintiff had failed to state claims upon which relief could be granted. The district court granted Defendants’ motions to dismiss on December 10, 2003. On appeal, Plaintiff argues that the district court erred by ruling that Plaintiff did not have standing to assert the claims against Defendants, and that the court also erred when it determined that Plaintiff had not stated claims upon which relief could be granted. In their answer brief, Defendants contend that Plaintiff’s appeal as to Dr. Burstein was filed prematurely, and therefore this Court lacks jurisdiction to hear that portion of the appeal. We conclude that this Court does have jurisdiction to hear this appeal. We also hold that the district court did not err in dismissing Plaintiff’s complaint because Plaintiff lacked standing to bring the claims against Defendants or Plaintiff failed to state claims upon which relief could be granted. Thus, we affirm.

FACTS AND BACKGROUND

{2} Plaintiff is a New Hampshire corporation. Until January 15, 2003, it owned 100% of the stock of Lovelace Health Systems, Inc. (Lovelace), a New Mexico corporation. CIGNA Health Corporation owns 100% of Plaintiff’s stock. In turn, CIGNA Corporation owns all of the stock of CIGNA Health Corporation.

{3} At some point prior to July 2002, Plaintiff agreed to sell all of its Lovelace stock to Ardent Health Services (Ardent). Plaintiff and Ardent entered into a purchase agreement, which set the closing date for the sale as December 31, 2002. The purchase price that Ardent paid Plaintiff for Lovelace’s stock was nearly a quarter of a billion dollars.

{4} Defendant Dr. Burstein is a physician who was employed by Lovelace as the Chair of Lovelace’s Radiology Department. Dr. Burstein was employed by Lovelace from 1982 until December 30, 2002. In June or July 2002, Dr. Burstein became aware that Plaintiff’s sale of Lovelace stock to Ardent was expected to close by the end of 2002. On December 13, 2002, Dr. Burstein left a voice mail message for Dr. Richard Rolston, Chief Executive Officer and Chief Medical Officer of Lovelace, informing Dr. Rolston that he intended to resign his employment with Lovelace and to commence employment with Defendant X-Ray Associates (X-Ray), which provides radiology services to various health facilities in New Mexico. Dr. Burstein also informed Dr. Rolston that X-Ray had decided to offer positions to all Lovelace’s radiologists.

{5} In late December 2002, Dr. Rolston was informed by Keith Winterkorn, President of X-Ray, that X-Ray had signed up all of Lovelace’s radiologists and X-Ray planned to use the enlistment of Lovelace’s radiologists as “leverage” to force Ardent to contract with X-Ray for radiology services. Upon learning of X-Ray’s attempt to employ the entire Lovelace radiology staff, Ardent informed Plaintiff that it would not agree to close the sale of Lovelace stock until the situation regarding Lovelace’s radiology department was settled.

{6} On December 31, 2002, Lovelace filed a lawsuit against X-Ray and Dr. Burstein. Lovelace’s complaint alleged that Dr. Burstein and X-Ray had interfered with employment agreements between Lovelace and its radiology staff by soliciting the staff to work for X-Ray and that Dr. Burstein and X-Ray had conspired for this purpose. The complaint further claimed that Dr. Burstein had breached his confidentiality agreements with Lovelace and that X-Ray had unfairly competed with Lovelace in attempting to hire away Lovelace’s radiologists.
radiology staff. On the day that Lovelace filed its lawsuit, it also filed for a temporary restraining order, requesting that Dr. Burstein and X-Ray be enjoined from using any of Lovelace’s confidential business and employee information in an effort to solicit Lovelace radiologists to leave their employment with Lovelace and to commence employment with X-Ray. The district court granted the temporary restraining order, after which Ardent and Plaintiff closed on the purchase of Lovelace stock. Yet, the closing date of the sale was delayed until January 15, 2003, which was fifteen days after the sale had originally been set to close.

(7) After the sale of Lovelace stock had been completed, Lovelace amended its original complaint to add Plaintiff as a party to the complaint. On March 11, 2003, the district court entered a stipulated order dismissing, without prejudice, all claims that Lovelace had brought against X-Ray, which was followed on March 26, 2003, with a stipulated order dismissing, without prejudice, all claims that Lovelace had brought against Dr. Burstein. After Lovelace had dismissed its claims against X-Ray and Dr. Burstein, X-Ray filed a motion pursuant to Rule 1-012(B)(6) NMRA to dismiss the complaint, alleging that Plaintiff lacked standing to sue X-Ray. In its motion, X-Ray argued that Lovelace was the real party in interest and that any claims Plaintiff had set out in the complaint were derivative of duties owed to Lovelace, not Plaintiff. The district court denied the motion to dismiss, but it did order Plaintiff to amend the complaint to state claims that belonged to Plaintiff and not Lovelace.

(8) Plaintiff’s second amended complaint alleged breach of contract on the part of Dr. Burstein and stated causes of action against X-Ray and Dr. Burstein for tortious interference with existing contractual relationships, civil conspiracy, negligent misrepresentation, and prima facie tort. After Plaintiff filed its second amended complaint, Dr. Burstein filed a counterclaim alleging that Plaintiff had defamed him in its complaint. In addition, both Defendants filed Rule 1-012(B)(6) motions to dismiss Plaintiff’s second amended complaint. The district court granted Defendants’ motions to dismiss Plaintiff’s second amended complaint on December 10, 2003, in an order that did not address Dr. Burstein’s counterclaim against Plaintiff. Plaintiff filed its notice of appeal on December 17, 2003. On January 30, 2004, the district court issued an order dismissing Dr. Burstein’s counterclaim against Plaintiff. Plaintiff did not file another notice of appeal as to Dr. Burstein.

(9) On appeal, Plaintiff claims that the district court erred when it dismissed its complaint against Defendants because it is the real party in interest in the causes of actions it filed in its second amended complaint and it has properly stated claims on which relief could be granted. In addition to the merits of these issues, Defendants argue that because the appeal in this case was filed before a final order was issued by the district court, this Court lacks jurisdiction to hear the appeal as to Dr. Burstein.

DISCUSSION

(10) We will begin our discussion by analyzing whether this Court has jurisdiction to hear this appeal, after which we discuss Plaintiff’s breach of contract claim. We will then address each of Plaintiff’s tort claims separately.

1. This Court has jurisdiction to hear this entire appeal.

Defendants argue that this Court lacks jurisdiction to hear the appeal as to Dr. Burstein because Plaintiff’s appeal was filed before the district court entered a final judgment as to Dr. Burstein. Defendants argue that the district court’s order filed on December 10, 2003, from which Plaintiff appealed, was not a final judgment because the order adjudicated only Plaintiff’s claims against Defendants and not Dr. Burstein’s counterclaim against Plaintiff. Defendants state that Plaintiff’s appeal, which was filed on December 17, 2003, was filed prematurely and that Plaintiff should not have filed an appeal until after January 30, 2004, which is the date that the district court dismissed Dr. Burstein’s counterclaim against Plaintiff.

(12) To support their assertion that the December 10, 2003, order was not a final judgment, Defendants cite to Montoya v. Anaconda Mining Co., 97 N.M. 1, 3, 635 P.2d 1323, 1325 (Ct. App. 1981), overruling recognized by San Juan 1990-A, L.P. v. El Paso Production Co., 2002-NMCA-041, 132 N.M. 73, 43 P.3d 1083, which held that a “judgment or order is not final unless all the issues of law and of fact necessary to be determined, were determined, and the case completely disposed of so far as the court has power to dispose of it.” Montoya, 97 N.M. at 3, 635 P.2d at 1325 (internal quotation marks and citation omitted). Our Court in Montoya also held that appellate review is limited to a final order or judgment. Id. Defendants also direct our attention to Rule 1-054(B)(1) NMRA, which provides that:

- when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

(13) Defendants assert that because the December 10, 2003, order did not resolve all the claims before the district court, the order could be considered final as to Dr. Burstein pursuant to Rule 1-054(B)(1) only if the district court had expressly determined that there was no just reason for delay. Here, because the district court did not make this determination, Defendants contend that the order was not final. Defendants also argue that pursuant to Rule 12-201(A)(2) NMRA, Plaintiff had thirty days from January 30, 2004, which was the date Dr. Burstein’s counterclaim was dismissed, to file an appeal with this Court, and because Plaintiff did not file the appeal in that time frame, the appeal as to Dr. Burstein should be dismissed for lack of jurisdiction. Although we agree in part with Defendants that the December 10, 2003, order was not a final order or judgment as to Dr. Burstein, we disagree that this Court lacks jurisdiction to hear this appeal.

(14) Rule 1-054(B)(2) makes the order final as to X-Ray. Rule 1-054(B)(2) provides:

- When multiple parties are involved, judgment may be entered adjudicating all issues as to one or more, but fewer than all parties. Such judgment shall be a final one, unless the court, in its discretion, expressly provides otherwise and a provision to that effect is contained in the judgment.

In this case, the district court adjudicated all issues regarding X-Ray when it entered its order to dismiss on December 10, 2003. Unlike Dr. Burstein, X-Ray had not filed a counterclaim against Plaintiff, and therefore the district court’s dismissal of Plaintiff’s second
amended complaint resolved all the claims involving X-Ray. Furthermore, the district court did not expressly provide within the order that the judgment was not final. Thus, although Defendants do not argue to the contrary, we clarify that pursuant to Rule 1-054(B)(2), the December 10, 2003, order was final as to X-Ray and this Court has jurisdiction over the portion of the appeal that deals with X-Ray.

Yet, the district court’s December 10, 2003, order did not resolve all issues involving Dr. Burstein, because Dr. Burstein’s counterclaim against Plaintiff was not adjudicated by the December 10, 2003, order. Thus, Rule 1-054(B)(1) and Rule 1-054(B)(2) do not provide a basis for concluding that the December 10, 2003, order was final as to Dr. Burstein. However, it is this Court’s practice, when a notice of appeal is filed prematurely, to take jurisdiction if the final order is entered during the early pendency of the appeal. For example, in many calendar notices, we will propose dismissal, but then give the appellant an opportunity to obtain and file the final order within the time provided for responding to the calendar notice. Here, although we conclude that the December 10, 2003, order was not a final order or judgment consistent with Montoya and Rule 1-054(B)(1) as to Dr. Burstein, the January 30, 2004, order, which dismissed Dr. Burstein’s claim against Plaintiff, did constitute a final judgment since that order resolved all claims before the court. This situation may be viewed analogously to the portion of Rule 12-201(A) providing that an appeal filed after the announcement of a decision, but before the final judgment is filed, will be treated as filed after the final judgment. Therefore, because we seek to determine cases on their merits, see Trujillo v. Serrano, 117 N.M. 273, 276, 871 P.2d 369, 372 (1994), we conclude that because part of the case was final on December 10, 2003, and the final judgment as to Dr. Burstein was issued on January 30, 2004, at about the same time that the record proper was filed in this Court and well before this Court’s first calendar notice, a dismissal based on a premature appeal or Plaintiff’s failure to file a notice of appeal after January 30, 2004, would be the sort of technicality that should not result in a dismissal. Thus, we hold that this Court has jurisdiction to review Plaintiff’s appeal as to Dr. Burstein.

2. The district court did not err when it dismissed Plaintiff’s breach of contract claim because Dr. Burstein never entered into the contract from which the breach of contract claim originates.

In this case, the district court dismissed Plaintiff’s second amended complaint based on Defendants’ motions to dismiss. A district court’s decision to dismiss a complaint for failure to state a claim is reviewed de novo. Wallis v. Smith, 2001-NMCA-017, ¶ 6, 130 N.M. 214, 22 P.3d 682. A Rule 1-012(B)(6) motion to dismiss tests the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for the purposes of ruling on the motion, the court must accept as true. Coleman v. Eddy Potash, Inc., 120 N.M. 645, 650, 905 P.2d 185, 190 (1995), overruled on other grounds by Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, ¶ 23 n.3, 131 N.M. 272, 34 P.3d 1148. A complaint should not be dismissed unless there is a total failure to allege some matter essential to the relief sought. Las Luminarias of the N.M. Council of the Blind v. Isengard, 92 N.M. 297, 300, 587 P.2d 444, 447 (Ct. App. 1978).

For purposes of a motion to dismiss, we accept all well-pleaded facts as true and question whether the plaintiff might prevail under any of Plaintiff’s claims as to Dr. Burstein. Plaintiff bases its breach of contract claim on a Compliance Acknowledgment Form signed by Dr. Burstein. Plaintiff claims that Dr. Burstein agreed in his Compliance Acknowledgment Form to abide by CIGNA’s policies which required him, according to Plaintiff’s briefs, “to keep information about Lovelace’s business confidential, and not disclose such information to competitors or to any other person.” A copy of the Compliance Acknowledgment Form appears in the record. The district court, after reviewing the breach of contract claim contained in the second amended complaint as well as the Compliance Acknowledgment Form, dismissed the claim.

Our review of the record indicates a conflict between Plaintiff’s pleadings and the Compliance Acknowledgment Form. Plaintiff alleges that Dr. Burstein “agreed” in the Compliance Acknowledgment Form to abide by CIGNA policies; yet we find no language within the Compliance Acknowledgment Form that would indicate Dr. Burstein entered into any agreement with CIGNA. The relevant portion of the Compliance Acknowledgment Form provides only that Dr. Burstein “received, read, and understood” a CIGNA booklet entitled “Doing Things the Right Way—An Employee Guide to CIGNA Policies and Ethics,” a CIGNA business and practices policy, and the employee responsibility section of the Lovelace Employee Resources Information Handbook. It is important to note that Plaintiff argues that the agreement that Dr. Burstein allegedly entered into was contained within the Compliance Acknowledgment Form itself and not the publications mentioned within the Compliance Acknowledgment Form. Moreover, to the extent that the record contains Dr. Burstein’s employment and confidentiality agreements, they are agreements with Lovelace, not with either Plaintiff or CIGNA.

Contrary to Plaintiff’s second amended complaint, we conclude that the Compliance Acknowledgment form contains no language indicating Dr. Burstein entered into an agreement. In Cecil v. Hydorn, 725 S.W.2d 781, 782 (Tex. Ct. App. 1987), the court held that where an obligation in the pleading does not conform to the writing exhibited as a basis thereof, the document rather than the pleading controls. Similarly, in Davis v. Nichols, 124 S.W.2d 881, 884 (Tex. Ct. App. 1939), the court held that:

It is always the duty of the plaintiff to allege facts sufficient to make out a prima facie cause of action, and where his declarations or complaint[s] are sufficient, but in conflict with the written instruments copied, in extenso, in his petition, such declarations or complaint[s] are mere conclusions of the pleader and must yield to the terms and conditions of the written instruments.

Here, although Plaintiff’s claims assert that there was an agreement entered into by Dr. Burstein, the Compliance Acknowledgment Form does not indicate such an agreement. Following the rule outlined in Cecil and Davis, which appears consistent with New Mexico law, see Rule 1-009(I) NMRA (requiring any document to be served with the pleading when the document is the basis for an action or defense referred to within the pleading), we conclude that no such agreement existed. Thus, having determined that Dr. Burstein did not enter into an agreement through the Compliance Acknowledgment Form, we determine that the Compliance Acknowledgment Form was not a contract. Trujillo v. Glen Falls Ins. Co., 88 N.M. 279, 281, 540 P.2d. 209, 211 (1975) (holding that in order for a contract to be valid, the agreement must ordinarily be expressed plainly and explicitly enough to show what the parties agreed upon). Therefore, because we determine that the Compliance Acknowledgment Form was not a contract, we hold that the district court did not err when it dismissed Plaintiff’s breach of contract claim. See Joseph E. Montoya & Assocs. v. State, 103 N.M. 224, 226, 704 P.2d 1100, 1102
However, even if we were to hold that the Compliance Acknowledgment Form constituted a contract or that the employment and confidentiality agreements were contracts, we would still conclude that the district court did not err when it dismissed the breach of contract claim because our review of the record indicates that Plaintiff was not a party to the Compliance Acknowledgment Form or the other agreements. As stated above, the relevant portion of the Compliance Acknowledgment Form indicated that Dr. Burstein had "received, read, and understood" two CIGNA publications and a portion of the Lovelace Employee Resources Information Handbook. Furthermore, the actual title of the document is "Lovelace Health Systems Compliance Acknowledgment Form." The other agreements were similarly with Lovelace. Plaintiff is neither mentioned nor named within the documents. Plaintiff does not argue that it is a third party beneficiary of the contract, but rather that Dr. Burstein owed Plaintiff a contractual duty under the Compliance Acknowledgment Form because Plaintiff is a CIGNA entity. We do not agree.

In this case, CIGNA Corporation, CIGNA Health Corporation, Plaintiff, and Lovelace are all separate corporations. CIGNA Health Corporation owned 100% of Plaintiff's stocks. Yet, a corporation and a shareholder, even a sole shareholder, are separate entities for legal purposes. London v. Bruskas, 64 N.M. 73, 78, 324 P.2d 424, 427 (1958). Here, CIGNA was named in the Compliance Acknowledgment Form, and therefore if any entity but Lovelace was a party to the contract, it was CIGNA as an individual entity. Plaintiff, on the other hand, as a separate entity from CIGNA, was not a party to the Compliance Acknowledgment Form. Plaintiff, also a separate entity from Lovelace, was not a party to the employment agreement or confidentiality agreement. Therefore, we conclude that the district court did not err when it dismissed Plaintiff's breach of contract claim because we do not find a contract, and even if there was a contract, Plaintiff was not a party to the contract. Fleet Mortgage Corp. v. Schuster, 112 N.M. 48, 49, 811 P.2d 81, 82 (1991) (holding that generally one who is not a party to a contract cannot maintain suit upon the contract).

The district court did not err when it dismissed the tortious interference with existing contractual relationships claim because Plaintiff lacked standing to bring the claim.

Plaintiff contends that Defendants tortiously interfered with Plaintiff's purchase agreement with Ardent, which had set December 31, 2002, as the closing date for Plaintiff's sale of Lovelace stock to Ardent. Plaintiff argues that Defendants interfered with the purchase agreement by soliciting and attempting to solicit Lovelace radiologists. Furthermore, Plaintiff asserts that Defendants knew that the purchase of Lovelace stock was scheduled to be closed on December 31, 2002, and attempted to solicit Lovelace radiologists prior to the closing date so that Defendants would be able to force Ardent into contracting with them for radiology services. As stated in the facts above, Ardent indicated to Plaintiff that it would not close on the purchase of Lovelace stock until the situation regarding Lovelace's radiologists was resolved. Plaintiff contends that due to Defendants' attempts to solicit the radiologists, the closing date for the sale of stock was delayed until January 15, 2003, which resulted in damages of at least $400,000 in interest on the multi-million dollar sale.

Defendants, on the other hand, argue that Plaintiff lacks standing to bring any claims against them. "Whether one is the real party in interest is to be determined by whether one is the owner of the right being enforced and is in a position to discharge the defendant from the liability being asserted in the suit." Jesko v. Stauffer Chem. Co., 89 N.M. 786, 790, 558 P.2d 55, 59 (Ct. App. 1976). Defendants claim that, in this case, the real party in interest is Lovelace and not Plaintiff. Defendants direct our attention to Marchman v. NCNB Texas National Bank, 120 N.M. 74, 898 P.2d 709 (1995), as support for their argument that Plaintiff is not the real party in interest in this case. Our reading of Marchman leads us to agree with Defendants that Plaintiff lacks standing to assert the claims against Defendants.

Marchman involved a lawsuit filed by a sole shareholder of a corporation, in which the shareholder alleged that he had suffered financial damages due to the injuries inflicted upon the corporation by the defendant. 120 N.M. at 79-80, 898 P.2d at 714-15. In concluding that the shareholder did not have standing to bring claims against the defendant, our Supreme Court in Marchman stated:

A stockholder of a corporation does not acquire standing to maintain an action in his own right, as a shareholder, when the alleged injury is inflicted upon the corporation and the only injury to the shareholder is the indirect harm which consists in the diminution in value of his corporate shares resulting from the impairment of corporate assets. In this situation, it has been consistently held that the primary wrong is to the corporate body and, accordingly, that the shareholder, experiencing no direct harm, possesses no primary right to sue. Id. at 81, 898 P.2d at 716 (internal quotation marks and citation omitted). The Court in Marchman ruled that “[a] corporation and a shareholder—even a sole shareholder—are separate entities, and a shareholder of a corporation does not have an individual right of action against a third person for damages that result because of an injury to the corporation.” Id.

The Marchman Court did identify two exceptions to the general rule that a shareholder cannot sue individually for injuries to his or her corporation. Id. at 81-82, 898 P.2d at 716-17. Those exceptions are where there is a special duty, such as a contractual duty, between the defendant and the shareholder, or when the shareholder suffers an injury separate and distinct from that suffered by other shareholders. Id.

Therefore, in accordance with Marchman, the framework in which to analyze Plaintiff's claims against Defendants is to first ask whether Plaintiff's injury is an indirect harm arising primarily from an injury inflicted upon Lovelace by Defendants. We then proceed to analyze whether Plaintiff's damages are a diminution in the value of Lovelace's stock resulting from the impairment of corporate assets. If the first two steps in the process are answered in the affirmative, then Plaintiff lacks standing to sue unless we conclude that Defendants had a special duty to Plaintiff or Plaintiff suffered an injury separate and distinct from other shareholders. Id. Keeping this analytical process in mind, we now turn our attention to Plaintiff's claim that Defendants tortiously interfered with Plaintiff's contract with Ardent.

Plaintiff’s claims assert that Defendants interfered with Plaintiff’s contract with Ardent by “soliciting and attempting to solicit and hire Lovelace’s radiologists.” Thus, Plaintiff admits that any injury it suffered was primarily due to Defendants’ actions aimed at Lovelace or Lovelace radiologists, rather than Plaintiff. Plaintiff’s complaint does not allege any injury that would have been inflicted upon Plaintiff but for the injury to Lovelace. Therefore, the first step in the Marchman process is satisfied in this case because Plaintiff’s
claim arises primarily from a direct injury aimed at Lovelace, which led to Plaintiff’s being indirectly harmed.

{28} We must now inquire whether Defendants’ actions caused an impairment to the corporation’s assets, which led to a diminution in the value of Plaintiff’s corporate stock. Here, Plaintiff admits that Defendants’ attempts to hire all of the Lovelace radiologists would “negatively impact” the Lovelace corporation. Thus, Plaintiff admits that Defendants’ actions caused damage to Lovelace, the corporate asset in this case. Furthermore, Plaintiff admits that because of Defendants’ actions aimed at Lovelace, Ardent refused to carry through with its agreement to purchase all of Plaintiff’s stock in Lovelace. Therefore, prior to Defendants’ actions against Lovelace, the value of Plaintiff’s stock was valued at almost a quarter of a billion dollars; yet after Defendants’ actions, the value of the stock was decreased so much that Ardent would not pay what it had previously agreed to due to the damage that had been done to the corporate asset. Furthermore, the interest on the purchase price, which accumulated due to the delay in the closing of the purchase, was a direct result of Ardent’s concern that any injury to the corporation be resolved prior to the closing on the sale for the agreed-upon amount.

Ardent’s concern reinforces the conclusion that the primary injury here was to Lovelace, the corporation. Thus, there was a diminution in the value of the stock due to the damage caused by Defendants to Plaintiff’s asset, and the second step of the process outlined in *Marchman* is satisfied. Therefore, having determined that Plaintiff’s claim of tortious interference with an existing contract is primarily based on a direct injury to Lovelace and not Plaintiff, and also having concluded that the injury led to damages to the corporate asset, which led to a decrease in the value of Plaintiff’s stock, we hold that Plaintiff lacks standing to bring a cause of action in this case unless Plaintiff can show that one of the two *Marchman* exceptions applies in this case.

{29} Plaintiff argues that it falls within one of the two exceptions of *Marchman* because it suffered an injury that is separate and distinct from Lovelace. Plaintiff misreads *Marchman*. In *Marchman*, the Court did not note an exception for a shareholder who suffers an injury that is separate and distinct from the corporation, but rather recognized an exception for a shareholder who suffers an injury separate and distinct from other shareholders. *Id.* at 82, 898 P.2d at 717. Here, because Plaintiff holds 100% of the shares in Lovelace, it cannot claim an injury separate and distinct from other shareholders. *Id.* (holding that the shareholder in that case could not claim a separate and distinct injury because the shareholder held 100% of the stock). Therefore, we do not agree that Plaintiff suffered the type of separate and distinct injury that is provided for as an exception in *Marchman*. Furthermore, Plaintiff does not argue that either X-Ray or Dr. Burstein owed Plaintiff a special duty. Therefore, we hold that Plaintiff does not fall within either of the exceptions provided for in *Marchman* and thus does not have standing to bring a claim against Defendants for tortious interference with an existing contract. In so holding, we do not mean to state that there is not a cause of action presented within the fact pattern of this case; we simply conclude that if there is a cause of action, that claim belongs to Lovelace and not Plaintiff.

4. The district court did not err when it dismissed the negligent misrepresentation claim because Plaintiff lacks standing to bring the claim and Plaintiff failed to state a claim upon which relief could be granted.

{30} Plaintiff contends that the district court erred when it dismissed Plaintiff’s claim for negligent misrepresentation. We disagree. To sufficiently state a claim for negligent misrepresentation, Plaintiff must claim that (1) Defendants made a material misrepresentation of fact to Plaintiff, (2) Plaintiff relied upon such representation, (3) Defendants knew the representation was false at the time it was made or made the representation recklessly, and (4) Defendants intended to induce Plaintiff to rely on such representation. *Saylor v. Valles*, 2003-NMCA-037, ¶ 17, 133 N.M. 432, 63 P.3d 1152.

{31} Here, Plaintiff does not assert in its second amended complaint that Defendants made any representation to Plaintiff. Plaintiff does claim, however, that Defendants made representations to Lovelace radiologists. It is true that the first element of the uniform jury instruction on negligent misrepresentation does not require that the misrepresentation be made to the plaintiff. UJI 13-1632 NMRA. It is clear, however, from reading the instruction as a whole that the instruction contemplates that the misrepresentation will be made to the plaintiff in the ordinary case. The first element of the instruction does not contain the requirement that the misrepresentation be made to the plaintiff to allow for the possibility, explained in the commentary, that a “defendant[,] in the course of his business . . . supplies incorrect information for the guidance of others in their business transaction[].” Committee comment to UJI 13-1632 (internal quotation marks and citation omitted). In this situation, the instruction requires that the defendant intend that the information be received by the plaintiff or a group of persons of which plaintiff was a member, and the instruction’s fourth element requires the plaintiff to rely on the information in all events. UJI 13-1632. Here there is no indication that Plaintiff relied on any of Defendant’s representations or that Defendants intended any information to be received by Plaintiff. Therefore, Plaintiff’s negligent misrepresentation claim fails for failure to state a claim on which relief could be granted. See *Saylor*, 2003-NMCA-037, ¶ 17.

{32} Furthermore, we conclude that Plaintiff lacks standing to bring this claim against Defendants. Once again we rely on *Marchman* for support that a shareholder does not acquire standing to maintain an action in its own right, when the alleged injury is inflicted upon the corporation and the only injury to the shareholder is an indirect harm. 120 N.M. at 81, 898 P.2d at 716. Here, Plaintiff pled that Defendants made negligent misrepresentations to Lovelace radiologists to induce those radiologists to leave their employment with Lovelace. Thus, Plaintiff admits in its complaint that the direct injury in this case was aimed at Lovelace or Lovelace’s employees rather than Plaintiff. Once again, our review of Plaintiff’s complaint does not indicate that Plaintiff alleges any injury that it would have suffered had it not been for the direct injury inflicted upon Lovelace or its employees. Thus, any injury that Plaintiff asserts is an indirect harm caused by the direct injury inflicted upon Lovelace or its employees. Additionally, Ardent’s refusal to carry through with the purchase agreement to buy all of Lovelace’s stock served as a diminution in the value of Plaintiff’s stock, which was a result of the direct injury that Defendants inflicted upon the corporation. Therefore, we conclude that the district court did not err when it dismissed Plaintiff’s negligent misrepresentation claim because Plaintiff failed to state a claim on which relief could be granted and Plaintiff also lacked standing to bring the claim.

5. The district court did not err when it dismissed the prima facie tort claim because Plaintiff lacked standing to bring the claim and Plaintiff failed to state a claim upon which relief could be granted.

{33} Plaintiff argues that the district court erred when it dismissed Plaintiff’s prima facie tort claim. We disagree. First, we believe that
Plaintiff’s prima facie tort claim must suffer the same fate as the prima facie tort claim in Marchman. In that case, the plaintiffs alleged prima facie tort along with claims for breach of covenants of good faith and fair dealing and tortious interference with business relationships, similar to the claims in this case. Marchman, 120 N.M. at 80, 898 P.2d at 715. The Court there did not distinguish the prima facie tort claim from the other claims and affirmed the dismissal of them all for lack of standing. Id. at 80-83, 898 P.2d at 715-18.

{34} In addition, we question whether the prima facie tort claim should be allowed to go forward in this case. To state a claim for prima facie tort, a plaintiff must allege (1) an intentional and lawful act, (2) with the intent to injure the plaintiff, (3) injury to the plaintiff as a result of an intentional act, and (4) the absence of sufficient justification for the injurious act. Schmitz v. Smentowski, 109 N.M. 386, 394, 785 P.2d 726, 734 (1990).

{35} In Hill v. Cray Research, 864 F. Supp. 1070, 1080 (D.N.M. 1991), the court dismissed the plaintiff’s prima facie tort claim because the court determined that a claim for prima facie tort should not lie when the pleaded factual basis is within the scope of an established tort. The court in Hill noted that the plaintiff’s prima facie tort claim was supported by identical facts that were used to support the other causes of action within the plaintiff’s complaint. Id. The Hill court stated that the plaintiff, in support of the prima facie tort cause of action, “merely realleges the facts in support of the other causes of action, adding only a bare recital of the elements of prima facie tort relating to intent and justification.” Id. The rationale used by the Hill court in dismissing the prima facie tort claim has also been articulated by this Court in Stock v. Grantham, 1998-NMCA-081, ¶¶ 38-39, 125 N.M. 564, 964 P.2d 125, in which we held that a prima facie tort claim may not be used as a means of avoiding the more stringent requirements of other torts. In Stock, this Court upheld the lower court’s dismissal of the plaintiff’s prima facie tort claim partly because the factual basis used to support the claim within the pleadings duplicated other claims. Id.

{36} Here, as in Hill, Plaintiff does not assert any separate factual basis to support its prima facie tort claim. The only facts used to support the claim are those incorporated from other causes of action mentioned within the complaint. Thus, even if there was standing, we would likely conclude, as we did in Stock, that the district court did not err in dismissing Plaintiff’s prima facie tort claim because the cause of action duplicates other claims made by Plaintiff. As the court in Hill stated, “the value and validity of prima facie tort as a separate cause of action depends upon its ability to offer relief for the intentional infliction of harm where the actor’s otherwise lawful conduct cannot be brought within other more traditional categories of liability.” Hill, 864 F. Supp. at 1080.

{37} Finally, since we have held that Plaintiff has failed to state a claim for any underlying cause of action that would support a civil conspiracy claim, the district court was correct in dismissing that claim as well. See Ettenson v. Burke, 2001-NMCA-003, ¶ 23, 130 N.M. 67, 17 P.3d 440 (holding that a civil conspiracy claim requires an underlying claim independent of the conspiracy cause of action).

CONCLUSION

{38} We affirm the district court’s order granting dismissal of Plaintiff’s claims.

{39} IT IS SO ORDERED.

LYNN PICKARD, Judge

I CONCUR:
A. JOSEPH ALARID, Judge
JONATHAN B. SUTIN, Judge (concurring in part and dissenting in part)

JONATHAN B. SUTIN, Judge

(Concurring In Part And Dissenting In Part)

{40} I concur in all of the majority opinion except that part affirming the dismissal of Plaintiff’s claim for interest lost because of the postponement of the closing date of the sale. I do not read Marchman v. NCNB Texas National Bank, 120 N.M. 74, 898 P.2d 709 (1995), to preclude Plaintiff’s claim for interest. Marchman should not be read so broadly. Lovelace was not the owner of the right to or claim for lost interest. Lovelace could not discharge any liability for that lost interest. There exists no contention or evidence that this alleged injury to Plaintiff was inflicted on Lovelace with only an indirect injury to Plaintiff resulting from a diminution in value of Plaintiff’s corporate shares. The same wrongful conduct could independently and separately (1) impair Lovelace’s corporate assets, and (2) cause Ardent to hesitate to close and to delay closing, resulting in Plaintiff’s lost interest. Bringing Plaintiff’s lost interest claim within Marchman is too great a stretch of Marchman. I therefore respectfully dissent as to the majority’s affirmance based on Marchman of the district court’s dismissal of Plaintiff’s claim of lost interest.

JONATHAN B. SUTIN, Judge
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The 3rd Judicial District Attorney’s Office has a vacancy for an Associate to Senior Trial Attorney, depending upon experience. Qualifications and salary are pursuant to the New Mexico District Attorney’s Personnel & Compensation Plan. Resumé can be faxed to Kelly Kuenstler at (505) 524-6379, or mailed to 201 W. Picacho, Suite B, Las Cruces, NM 88004. Deadline for application is August 22, 2005.

Assistant District Attorney

The 1st Judicial District Attorney’s Office is accepting resumes for positions of Assistant District Attorney in the trial division. Salary is commensurate with experience. Please send a resume to: Shari Weinstein, Chief Deputy District Attorney, PO Box 2041, Santa Fe, New Mexico 87501 or email to sweinstein@da.state.nm.us. Equal Opportunity Employer.
Attorney - Santa Fe
Seeking an intelligent, motivated individual with excellent research and writing skills, to work primarily in the areas of business, real estate, and insurance defense litigation. Candidate must be able to perform under pressure and to work as a positive team member. Experience preferred, but not required. Santa Fe area resident preferred. Please reply via email to freyes@simonsfirm.com or by fax to (505) 982-0185. All responses will be kept in confidence.

City of Las Vegas
Career Opportunity
Applications are being accepted for City Attorney of the City of Las Vegas. Nature of Job: This position serves as the City’s Legal Attorney on an in-house basis, and at the pleasure of the governing body. Attorney shall communicate, meet and work closely with Mayor, City Council and City Manager on matters of concern to the governing body; Provides legal advice, direction, and supervision on all personnel matters; Informs and provides legal advice on pending or potential litigation facing the City; Keeps Mayor and City Council informed of all suits and claims against the city; Initiates legal action based on direction from Mayor and/or City Council; Informs and provides legal advice during City Council meeting on matters listed on the Agenda; Performs legal advice during Executive Session; Represents the City of Las Vegas, Mayor and City Council in Court and before administrative agencies of Government; Prepares legal opinions as needed in any other area requested by Mayor and City Council; Advises and represents Mayor and City Council in any other area requested by Mayor and City Council; shall avoid all conflicts of interest and shall not practice law privately. (A detailed job description is available in Human Resource Office). Salary: Range between $65,000 and $75,000, depending on experience. Qualifications: Requires a Juris Doctorate Degree from an accredited law school and shall be licensed to practice law in the State of New Mexico. Requires three (3) years experience in the practice of Municipal Law. Knowledge of City Ordinances; City personnel Rules and Regulations; City Purchasing Regulations; State Statutes: Las Vegas Criminal and Motor Vehicle Codes; HUD Regulations related to Housing and Community Development. Experience in the area of public law, public speaking and negotiations. Deadline: Interested applicants shall submit an application, along with a letter of interest, resume, law school transcript, and short writing sample of no more than three (3) pages to the Human Resource Office at 1700 N. Grand Ave., Las Vegas, New Mexico 87701, by August 24, 2005. The City of Las Vegas is an equal opportunity employer. The City of Las Vegas is a drug free workplace.

Lawyer B Position
The New Mexico Public Education Department is seeking an attorney in the Office of General Counsel. This attorney will carry out all aspects of complaint management and resolution functions pursuant to the Individuals with Disabilities Education Act’s state-level complaint procedures. Working within state and federal special education laws and timelines, the attorney will perform intake, investigate complaints, prepare complaint resolution reports, recommend corrective and monitor corrective actions. This attorney will also carry out some general legal duties. Must hold a valid NM bar license. Primarily looking for someone experienced in special education laws and regulations, or secondarily someone with public school law or administrative law experience. Salary: $34,056 – 60,543 per year w/benefits, depending on experience. Perm. Send a copy of a letter of interest, your résumé, copy of bar card, under 15-pg writing sample, to: Public Education Department, Human Resources- Rm 131, 300 Don Gaspar, Santa Fe, NM 87501-2786, no later than September 9, 2005. The State of NM is an EOE.

Attorney
Excellent opportunity to join a growing law firm. We are looking for an attorney who is extremely organized with 0-3 years of experience in Consumer Bankruptcy. Must be a licensed attorney. Entrepreneurial as well as good people skills required. Candidate must have the ability to efficiently manage large caseload. Excellent salary and benefits. Please e-mail your resume to sandra@billgordon.com or call (505) 265-1000.

State of New Mexico
Human Services Department
Office of General Counsel
Lawyer Advanced
The New Mexico Human Services Office of General Counsel is currently seeking an experienced attorney to represent and provide general legal services primarily for the Child Support Division within the Department. The position requires at least six years of experience in the general practice of law with advanced legal skills in administrative law, regulatory process, litigation, and contract review. Advanced research and writing skills are preferred. Please send a cover letter, resume and writing sample to New Mexico Human Services Department, Office of General Counsel, PO Box 2348, Santa Fe, NM 87504-2348, ATTN: Paul R. Rizzma, General Counsel. Applications will be accepted until August 31, 2005. DOL Job Order #69600.

Lawyer B Position
The New Mexico Public Education Department is seeking an attorney in the Office of General Counsel. This attorney will carry out all aspects of complaint management and resolution functions pursuant to the Individuals with Disabilities Education Act’s state-level complaint procedures. Working within state and federal special education laws and timelines, the attorney will perform intake, investigate complaints, prepare complaint resolution reports, recommend corrective and monitor corrective actions. This attorney will also carry out some general legal duties. Must hold a valid NM bar license. Primarily looking for someone experienced in special education laws and regulations, or secondarily someone with public school law or administrative law experience. Salary: $34,056 – 60,543 per year w/benefits, depending on experience. Perm. Send a copy of a letter of interest, your résumé, copy of bar card, under 15-pg writing sample, to: Public Education Department, Human Resources- Rm 131, 300 Don Gaspar, Santa Fe, NM 87501-2786, no later than September 9, 2005. The State of NM is an EOE.

Associate Attorney
Albuquerque criminal defense attorney Billy R. Blackburn is seeking a full-time, experienced associate attorney. Please submit a statement of interest, resume, references, salary request and writing sample to: 1011 Lomas Blvd. NW, Albuquerque, New Mexico, 87102.

Notice Of Faculty Positions
University Of New Mexico School of Law
The University of New Mexico School of Law invites applications and nominations for faculty positions starting in the Fall of 2006 or Spring 2007. The Law School anticipates filling two tenure track positions, one in business and commercial law and the other in natural resources. Both entry level and experienced teachers are encouraged to apply. Academic rank and salary will be based on experience and qualifications, as well as resources available. The business and commercial law position includes teaching subject matter such as UCC courses, Business Associations, Real Estate Transactions, and a Small Business and Economic Development Clinic. Candidates must have two years of experience practicing in general business law. The natural resources law position includes teaching subject matter such as water law, land use, environmental issues, utilities, energy, federal lands, and biodiversity. The UNM Law School supports its natural resources program by offering a Natural Resources Certificate, publishing the Natural Resources Journal, and collaborating with the Utton Transboundary Resources Center. Please see our website at law.unm.edu. Preferred qualifications include at least two years of legal practice in the field of natural resources. All candidates for these tenure track positions must possess a J.D. or equivalent legal degree. Preferred qualifications include a record or promise of academic scholarship; demonstrated excellence or the promise of excellence in the practice of law, and demonstrated excellence or the promise of excellence in teaching in the relevant subject areas. To apply, send a signed letter of interest that addresses your qualifications, curriculum vitae, and names, addresses, and phone numbers of three references to: Professor Gloria Valencia-Weber, Chair, Appointments Committee, UNM School of Law, 1117 Stanford, N.E., Albuquerque, NM 87131-1431. For best consideration, submit applications by September 16, 2005. Recruitment will continue until openings are filled. The University of New Mexico is an equal opportunity, affirmative action employer and educator.
Associate
Walsh, Anderson, Brown, Schulze & Aldridge, P.C., a Texas based law firm is seeking an asso- ciate for the firms Albuquerque, NM office. Candidates should possess 1-5 years experience in a general school law practice. Candidates with litigation experience or a background in governmental/education entities are encour- aged to apply. Both State and Federal Court experience required. Please send resume, with writing samples to Jobs@WABSA.com or via fax to 512.467.9318 attn: Office Manager. No phone calls please.

Part Time Legal Assistant
Busy plaintiff’s sole practitioner seeks an expe- rienced permanent half-time legal secretary/as- sistant/paralegal. Litigation experience a must. Confidentiality will be maintained. Please send resume to PO Box 92860, ABQ., NM 87199. ATTN: Box B.

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Albuquerque law firm seeks paralegal/legal as- sistant for established plaintiffs’ lawyer. Must be experienced in obtaining, organizing, and sum- marizing medical records, internet research, and performing other litigation tasks. Must be good with clients, and have excellent analytical skills. We will honor confidentiality of inquiries and applications if requested. Please forward your resume/references to PO Box 92860, ABQ., NM 87199. ATTN: Box C.

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