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Proposed Revision of the Rules Governing Admission to the Bar

Proposed Revisions to the Rules of Appellate Procedure

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The University of New Mexico

Law School

Courses Open to Lawyers for CLE Credit Fall 2005!

Spanish for Lawyers I, Presiliano Torrez, J.D. Wednesday, 4:00–7:00pm (August 24 to November 30, 2005). 54 General CLE credits.

This course will stress and teach the basic legal terminology that is used in our judicial system in a variety of practice settings. The course will strive to give the practitioner a basic understanding of the legal framework that their Spanish-speaking clients come from if they are from countries with civil system traditions. Basic terminology will be taught in the areas of criminal law, domestic relations and minor civil disputes. There will be an emphasis in practical aspects of language usage and the student should enroll with the idea of actively participating.

Tribal Courts, The Honorable Robert Yazzie, Chief Justice Emeritus of the Navajo Nation. Wednesday 5:00–7:00pm (August 24 to November 30, 2005). 36 General CLE credits.

This course will explore the many facets of tribal courts in the United States, ranging from historical origins to the modern day operations of tribal courts. Among the topics will be the inherent power of tribal courts, judicial independence, separation of powers within tribal government, inter-tribal appellate courts, and the interplay among federal, state, and tribal courts. We will also analyze the fundamental characteristics of tribal courts and their function in the context of cutting edge cases involving jurisdictional issues, Indian civil rights, the use of tribal custom and tradition, criminal law, torts, and consumer law.

• To register, lawyers may contact Gloria Gomez: (505) 277-5265, gomez@law.unm.edu

• Members of the UNM Clinical Law Program, Access to Justice Network may take the course for the $5.00 per credit. Members may attend the course NOT FOR CLE and pay $5.00 per session. For more information about the Access to Justice Network visit http://lawschool.unm.edu/Clinic/pro_bono/index.htm or call Associate Dean Antoinette Sedillo Lopez: 277-5265.

• Non-members may take the course for $30.00 per CLE credit. (1 credit = 50 minutes of class attendance). Non-members may take course NOT FOR CLE and pay $10.00 per session or $100.00 per unlimited sessions.

• Fees are paid in advance and are not refundable.
STATE OF NEW MEXICO  EXECUTIVE OFFICE  SANTA FE, NEW MEXICO

Proclamation

WHEREAS, paralegals are an essential component of our legal system, providing an important link between lawyers and the clients they represent; and

WHEREAS, paralegals make invaluable contributions through case planning, research, client interviews, and the development of legal pleadings, as well as the drafting and analysis of legal documents; and

WHEREAS, due to the rapidly evolving nature of our legal system, the responsibilities of New Mexico’s paralegals are constantly growing and expanding; and

WHEREAS, the Paralegal Division of the State Bar of New Mexico represents the paralegal profession and works toward enhancing professional development; and

WHEREAS, the goals of the Paralegal Division of the State Bar of New Mexico include providing efficient administration to accommodate growth and development of paralegals through education; and

WHEREAS, the Paralegal Division of the State Bar of New Mexico supports the expansion of the delivery of legal services in an economic and efficient manner;

NOW, THEREFORE I, Bill Richardson, Governor of the State of New Mexico, do hereby proclaim August 26, 2005 as:

“Paralegal Day”

throughout the State of New Mexico.

Attest:

Rebecca Vigil-Giron
Secretary of State

Done at the Executive Office this 23rd day of May, 2005.

Witness my hand and the Great Seal of the Great State of New Mexico

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

Co-Sponsor: Real Property, Probate and Trust 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, Probate and Trust Section Member $159

Annual Meeting
Back to the Basics: Building Blocks to a Better Practice
Thursday, September 22 - Saturday, September 24, 2005
Ruidoso Convention Center - Ruidoso
7.2 General, 2.4 Ethics and 2.4 Professionalism CLE Credits

Featured speakers include Dustin Cole on the Seven Keys of Maintaining a Safe and Successful Practice, and Jack Marshall on Ethics Rock!

For a complete schedule of events and programs see the insert in the July 25 issue of the Bar Bulletin or visit the State Bar’s Web site at www.nmbar.org.
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• Professionalism Tip •

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

I will commit to the goals of the legal profession, and to my responsibilities to public service, improvement of administration of justice, civic influence, and my contribution of voluntary and uncompensated time for those persons who cannot afford adequate legal assistance.

Meetings

August
24 Membership Services Committee, noon, via teleconference
25 Committee on Diversity and the Legal Profession, 3 p.m., State Bar Center
26 International and Immigration Law Section Annual Meeting, 3:00 p.m., State Bar Center

State Bar Workshops

August
24 Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces
24 Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center

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

COURT NEWS

NM Supreme Court

Rules of Criminal Procedure for District Court Committee Vacancy

One attorney vacancy exists on the Rules of Criminal Procedure for District Court Committee due to the recent resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest or resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for letters and resumes is Sept. 9.

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.

NM Board of Legal Specialization

Comments Solicited

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

Bankruptcy Law - Consumer
Stephen C. M. Long

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: Criminal

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 1978 to 1984 included but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and wish to have duplicates made 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 Sept. 9.

Destruction of Tapes: Domestic Relations

Pursuant to the Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy tapes and logs filed with the court, in domestic relations cases for years 1974 to 1986 included but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and logs, and wish to have duplicates made, should verify tape information with the Special Services Division, (505) 841-6787, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Sept. 5.

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.

Judicial Vacancies

Two vacancies on the Second Judicial District Court will exist as of Sept. 30 due to the resignations of Judges Tommy Jewell and Robert Thompson. The chair of the Second Judicial District Court Nominating Commission now solicits nominations and applications for these positions from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/index.htm, or e-mailed, faxed, or mailed by contacting Reva Chapman, (505) 277-4700. The deadline for applications has been set for Sept. 16 at 5 p.m. Applications received after that time will not be considered. The Commission will meet on Oct. 17 and, if the number of applications warrant, Oct. 18.

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.

Swearing-In Ceremony

Judge Kenneth H. Martinez will be formally sworn in as a Second Judicial District Court Judge, Division XXIV, at 4:30 p.m., Sept. 15 in Chief Judge William F. Lang’s Courtroom, No. 338, of the Bernalillo County Courthouse, 400 Lomas Blvd. NW. A reception will follow the swearing-in ceremony at La Posada de Albuquerque.

STATE BAR NEWS

2005 Section Elections

In accordance with the section bylaws, each State Bar section is required to appoint a nominating committee for its annual election and provide notice of the election
so that any section member may indicate to the committee his or her interest in serving on the Board of Directors. The nominating committee appointment deadline is Aug. 31. Section members interested in serving on their Board of Directors should contact a member of the nominating committee by Sept. 15.

See the Aug. 8 Bar Bulletin (Vol. 44, No. 31) for a complete list of positions to be elected and for nominating committee appointments to New Mexico Commission on Professionalism. Information for the Elder Law, Public Law, and the Solo and Small Firm Practitioners Sections follow:

Elder Law Section
Mary H. Smith, Chair
(505) 222-9000
msmith@ago.state.nm.us

Rosalie Fragoso
(505) 883-1772
Rosalie_fragoso@yahoo.com

Rae Ann Shanley
(505) 982-9229
rshanley@newmexico.com

Ann T. Sims
(505) 865-1449
Elaine S. Wright
(505) 687-3073
rewright@pvtn.net

Public Law Section
William R. Brancard, Chair
(505) 476-3405
bbrancard@state.nm.us

Paul L. Biderman
(505) 277-8789
biderman@unm.edu

Douglas Meiklejohn
(505) 989-9022
dmeiklejohn@nmelc.org

Helen P. Nelson
(505) 827-1300
Richard B. Word
(505) 827-6075
rword@ago.state.nm.us

Solo and Small Firm Practitioners Section
Brian Escobedo, Chair
(505) 720-8064
escobedo7174@msn.com

Jill A. Douthett
(505) 896-6662
jilldouthett@aol.com

Mark A. Keller
(505) 842-1444
crossx@aol.com

John F. Moon Samore
(505) 244-0450
samorejm@aol.com

Richard D. Stoops
(505) 265-5560
rstoops@swcp.com

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.

Attorney Support Group Monthly Meeting
The next Attorney Support Group meeting will be held at 5:30 p.m., Sept. 12 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month, but is meeting one week later due to the Labor Day holiday.

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

Board of Bar Commissioners Appointments to New Mexico Legal Aid (NMLA) Board
The Board of Bar Commissioners will make three appointments to the New Mexico Legal Aid (NMLA) Board at its next meeting on Sept. 22. Two of the appointments are for two-year terms to end December 2007 and one appointment is for a one-year term to end December 2006. Members wishing to serve on the NMLA Board should send a letter of interest and brief resume by Sept. 9 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

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 NAE LA 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.)

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

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

BAR BULLETIN - AUGUST 22, 2005 - VOLUME 44, NO. 33 7
**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 further education among its members; to carry out programs within the State Bar; and to establish good fellowship among division members, the State Bar of New Mexico and the members of the legal community. 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.

**Retirement Reception**

The State Bar of New Mexico will be hosting a reception from 5:30 to 7:30 p.m., Aug. 24 to honor Jack Lovell, State Bar Center facility manager, on his retirement. The reception will be held at the State Bar Center, 5121 Masthead NE, Albuquerque. Please R.S.V.P. to (505) 797-6000.

**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 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 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 completely 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 one full day of interviews with one of 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 NMDLA Web site at www.nmdla.org or contact Rhonda Dahl, (505) 797-6021, for more information.
Visiting Professorships

Legal Studies

Center for International Professionalism CLE

Association

Sandoval County 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.

Sandoval County Bar Association

August Monthly Meeting and Professionalism CLE

The Sandoval County Bar Association will hold its next monthly meeting and offer “2005 Professionalism: Lawyers Concerned For Lawyers” professionalism CLE Aug. 25 at the Pasta Café Italian Grill, 3201 Southern Blvd., Rio Rancho. The luncheon will be from noon to 12:30 p.m. and the CLE will be from 12:30 to 2:30 p.m. and will satisfy the professionalism CLE requirement. There will be no charge for the CLE and attendees should respond to (505) 892-1050 by Aug. 23.

OTHER NEWS

Center for International Legal Studies Visiting Professorships

The Center for International Legal Studies, in cooperation with law faculties in Eastern Europe and the former republics of the Soviet Union, will offer short-term appointments to as many as 40 senior lawyers from Canada and the U.S. during spring 2007 and autumn 2007. A “senior lawyer” has at least 25 years of experience in the area of law he or she proposes to lecture. Teaching terms are between two to six weeks. Subject areas are not limited, but there is special interest in corporate and business law, intellectual property, litigation, arbitration and criminal procedure. These appointments are not remunerated and the appointee is responsible for his or her travel. The host university will assist with lodging. A one-week orientation seminar in Salzburg, Austria, is mandatory prior to assumption of the appointment. Interviews will be conducted at various locations in summer 2006. Applications may be requested by e-mail, cils@cils.org, or by fax, (509) 356-0077.

National Notary Association

NM Notary Training

New Mexico Secretary of State Rebecca Vigil-Giron has announced a new partnership with the National Notary Association (NNA) to support continuing education and training for Notaries Public throughout New Mexico. New Mexico notaries will now be able to take a state specific training course online through the NNAs online program at a substantial discount. New Mexico notaries can register for the course through the Secretary of State’s Web site at www.sos.state.nm.us. In addition to the online course, the NNA will host an Identity Theft live training symposium Sept. 20 at the Wyndham Hotel in Albuquerque. The symposium was developed for New Mexico notaries to increase understanding of identity security issues and to increase skills to help prevent identity theft. The Attorney General’s office and the Department of Motor Vehicles will participate in the symposium.

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, 335 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 participates, 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, Crowpoint 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.
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
'Lets Kill All the Lawyers'
An Exercise in Wishful Thinking

By The Hon. John W. Pope

Recently a piece in The New Mexico Trial Lawyer caught my attention. It was an exposition on the phrase from Shakespeare’s play Henry VI Part 2., In Act II, Scene IV line 68, “the first thing we do let’s kill all the lawyers.” This phrase is spoken by Dick the Butcher, a follower of the rebel leader Jack Cade. This may rank as one of the most quoted and misquoted lines in Shakespeare, used and misused to represent lawyers misanthropy or their status as protectors of society from anarchy, depending on the interlocutor’s biases.

The particular article, which was a letter in defense of lawyers, chooses to characterize Cade as desiring to “undermine society and establish corruption and anarchy, or worse” and contrasts lawyers as the pillar of order and “the general good.” As beauty is in the eye of the beholder, so is virtue, and one man’s good may be another man’s oppression. Of note, Henry VI is considered one of Shakespeare’s lesser plays.

Shakespeare’s motives in writing this distinctive phrase are particularly complex and not amenable to glib characterization. In Shakespeare After All, Marjorie Garber points out that this remark embodies a whole range of topics, including law and literacy, and continuing on further to comment on animal rights with tongue firmly in cheek, “Nay, that I mean to-do, Is this not a lamentable thing that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o’er, should undo a man.”

A look at the historical context is helpful. In 1450 Jack Cade led a peasants’ army against London in aid of Richard, Duke of York, and against Henry VI. However, Jack also makes claims to the title of King of England. For the most part in the play he is able to lead his followers with anti-nobility and anti-establishment rhetoric, but not necessarily anti-royalty, since he makes claims to the throne. Now we have to remember Shakespeare is not writing history as a historian. He is a playwright writing historical fiction.

As noted in the introduction to “The Second Part of Henry the Sixth” in The Complete Pelican Shakespeare, Shakespeare was not writing ”... so much to achieve a scientific re-creation of events as to point out morals and cautionary tales.” The example of a king such as Henry VI, later perceived as a failure, could help the Elizabethans avoid calamities like the Wars of the Roses.

Thus, Shakespeare had it in his power to rewrite actual events to make moral and political points. Shakespeare is acknowledged as the great master of this form. Taking for example Jack Cade’s rebellion, which did occur much as I described, it is not the sole model for the phrase, “First let’s kill all the lawyers.” The peasants’ revolt of Wat Tyler and Jack Straw of 1380 is almost universally acknowledged as the origin of Jack Cade’s pronouncement. The rebellion of 1380 was mostly a true peasants’ revolt protesting the wide inequities of the time. Most importantly, it was sharply anti-literacy.

In our time anti-literacy would seem to be counter intuitive. In 1380 and 1450, literacy was more than a sign of privilege, it could save your life. Literacy was a sign of the arrogance of the upper class. Jack Cade said to Lord Say, who is begging for his life, “thou hast put them (poor persons) in prison, and because they cold not read thou hast hangs them.” This refers to system of benefit of clergy. Clergy could not be tried in secular courts, where the death penalty was extremely common, only in ecclesiastical courts, which did not have the death penalty. This benefit of clergy was eventually extended to all who could read and write. If a person who was convicted of a capital crime could read a passage from the Bible, he was exempt from execution and was only branded on the hand.

Of course, literacy was virtually confined to the clergy and the legal profession, which sprang from the clerical courts. Lawyers and priests were seen to have an unfair advantage and this prerogative came to exemplify the social grievances of the underclass. By extension, lawyers then became symbols of oppression. Lord Say was beheaded by the insurrectionists mostly on the charge of encouraging literacy. A clerk is likewise hung as traitor with his pen and inkhorn around his neck for his “monstrous” crime of literacy.

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So we can see that the phrase, “First let us kill all lawyers” is not used because lawyers somehow are a threat to civil society, but that may not be much consolation if Shakespeare meant to portray lawyers as oppressors. There has been some suggestion that Shakespeare had an unpleasant experience with a lawyer, but this has not been historically verified.

Using Shakespeare’s and company’s approach of using history to draw morals, I believe that the moral of this tale is that we cannot take comfort from or mourn the past reputation of our profession. Rather, the profession’s reputation and status are built by all of our professional conduct each day. To quote from a play about another Englishman, Sir Thomas More, in *A Man for All Seasons,*

“The Duke of Norfolk: Oh confound all this. I’m not a scholar, I don’t know whether the marriage was lawful or not but damn Thomas, look at these names! Why can’t you do as I did and come with us, for fellowship?

Sir Thomas More: And when we die, and you are sent to heaven for doing your conscience, and I am sent to hell for not doing mine, will you come with me, for fellowship?”

Judge John W. Pope graduated from UNM Law School and practiced law for 15 years before becoming a workers’ compensation judge for five years. He’s been on the Thirteenth Judicial District bench for 12 years and has taught at the UNM Valencia County campus, main campus and Law School for 20 years. He’s twice received outstanding part-time instructor awards. Pope serves on the State Bar’s Bench and Bar Committee and co-chairs the Historical Committee. He has also received the Judicial Service Award from the State Bar. The Belen Chamber of Commerce named Pope their Citizen of the Year. Pope is a historian of the legal profession in New Mexico and writes and lectures on a variety of topics. He has three grown children.

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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 19, 2005

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WRITS OF CERTIORARI

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

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NO. 28,997  Maestas v. Zager (COA 24,200) 6/14/05
NO. 28,982  Atler v. Murphy (COA 23,620) 8/15/05
NO. 29,032  State v. Morales (COA 24,061) 8/15/05
NO. 28,983  Callahan v. New Mexico (COA 23,645) 8/16/05
NO. 28,908  Prince v. State (COA 23,657) 8/16/05
NO. 29,110  State v. Lackey (COA 24,355) 8/16/05
NO. 29,011  State v. Frawley (COA 23,758) 8/16/05
NO. 29,075  Concerned Residents of Santa Fe North v. Santa Fe (COA 24,516) 9/29/05
NO. 29,058  Sanchez v. Pellicer (COA 25,082) 9/29/05

CERTIORARI GRANTED AND SUBMITTED TO THE COURT:

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

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<tr>
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<td>Manning v. New Mexico Energy &amp; Minerals (COA 23,396)</td>
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<td>NO. 29,349</td>
<td>State v. Yanes (COA 24,623)</td>
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REMANDED TO DISTRICT COURT:

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<td>NO. 29,383</td>
<td>Owen v. State (12-501)</td>
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RULES/ORDERS
From the New Mexico Supreme Court

NO. 05-8300-09
IN THE MATTER OF THE AMENDMENTS OF FORM 10-471 NMRA OF THE CHILDREN’S COURT RULES

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Children’s Court Rules Committee to adopt amendments to Form 10-471 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Form 10-471 NMRA of the Rules of Civil Procedure for the District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments to Form 10-471 NMRA of the Children’s Court Rules shall be effective for cases filed on or after September 1, 2005; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above form by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 12th day of July, 2005.

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

10-471
[For use in abuse, neglect and termination of parental rights proceedings]

STATE OF NEW MEXICO
COUNTY OF __________________________
JUDICIAL DISTRICT
IN THE CHILDREN’S COURT

No. ___________

In the Matter of ____________________,
(insert name of each child)

State of New Mexico
Children, Youth and Families
Department, petitioner
v.
__________________________, respondent

REPORT OF MEDIATION

We the undersigned, participated in a mediation session today, __________ (date).

We acknowledge that the purpose of this meeting is to candidly discuss and attempt to resolve outstanding issues in this case. Pursuant to Rule 11-408 NMRA of the Rules of Evidence, any opinions, admissions and comments made during this proceeding are confidential. Except as otherwise provided by the Rules of Evidence of Children’s Code, these opinions, admissions and comments are not subject to discovery, and cannot be used as an admission or for any other purpose by any party in any proceeding governing this action. New information of abuse or neglect is subject to being reported pursuant to the Children’s Code.

Signatures:

Mediator
Children’s Court Attorney

Respondent
Respondent’s Attorney

Social Work Supervisor
Social Worker

Guardian ad litem
CASA

Other
Other

(To be completed by mediator. Choose one.)

___ parties reached complete agreement
___ parties reached a partial agreement
___ no agreement was reached
___ continued
___ reset
___ vacated

USE NOTE

1. Form 6559 NTC: Report of Mediation. For use in neglect and abuse proceedings. The children’s court attorney shall file this report with the court and provide a copy to each party to the proceeding.

[Approved, effective September 1, 2005.]
NO. 05-8300-11
IN THE MATTER OF THE AMENDMENTS TO RULES 5-401 AND 5-610 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Criminal Procedure for the District Courts Committee to adopt amendments of Rules 5-401 and 5-610 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 5-401 and 5-610 NMRA of the Rules of Criminal Procedure for the District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 5-401 and 5-610 of the Rules of Criminal Procedure for District Courts shall be effective for cases filed on and after September 1, 2005; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced rule by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 12th day of July, 2005.

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

5-401. Bail.

A. Right to bail; recognizance or unsecured appearance bond. Pending trial, any person bailable under Article 2, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the person’s personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, subject to any release conditions imposed pursuant to Paragraph C of this rule, unless the court makes a written finding that such release will not reasonably assure the appearance of the person as required.

B. Secured bonds. If the court makes a written finding that release on personal recognizance or upon execution of an unsecured appearance bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, in addition to any release conditions imposed pursuant to Paragraph C of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds which will reasonably assure the appearance of the person as required and the safety of any person and the community:

1. the execution of a bail bond in a specified amount executed by the person and secured by a deposit of cash of ten percent (10%) of the amount set for bail or secured by such greater or lesser amount as is reasonably necessary to assure the appearance of the person as required. The cash deposit may be made by or assigned to a paid surety licensed under the Bail Bondsmen Licensing Law provided such paid surety also executes a bail bond for the full amount of the bail set;

2. the execution of a bail bond by the defendant or by unpaid sureties in the full amount of the bond and the pledging of real property as required by Rule 5-401(A) NMRA; or
3. the execution of a bail bond with licensed sureties as provided in Rule 5-401(B) NMRA or execution by the person of an appearance bond and deposit with the clerk of the court, in cash, of one-hundred percent (100%) of the amount of the bail set, such deposit to be returned as provided in this rule.

Any bail, property or appearance bond shall be substantially in the form approved by the Supreme Court.

C. Factors to be considered in determining conditions of release. The court shall, in determining the type of bail and which conditions of release will reasonably assure appearance of the person as required and the safety of any other person and the community, take into account the available information concerning:

1. the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
2. the weight of the evidence against the person;
3. the history and characteristics of the person, including:
   a. the person’s character and physical and mental condition;
   b. the person’s family ties;
   c. the person’s employment status, employment history and financial resources;
   d. the person’s past and present residences;
   e. the length of residence in the community;
   f. any facts tending to indicate that the person has strong ties to the community;
   g. any facts indicating the possibility that the person will commit new crimes if released;
   h. the person’s past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and
   i. whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;
4. the nature and seriousness of the danger to any person or the community that would be posed by the person’s release; and
5. any other facts tending to indicate the person is likely to appear.

D. Additional conditions; conditions to assure orderly administration of justice. The court, upon release of the defendant or any time thereafter, may enter an order, that such person’s release be subject to:

1. the condition that the person not commit a federal, state or local crime during the period of release; and
2. the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice:
   a. a condition that the person remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;
   b. a condition that the person maintain employ-
ment, or, if unemployed, actively seek employment;
   (c) a condition that the person maintain or
       commence an educational program;
   (d) a condition that the person abide by
       specified restrictions on personal associations, place of abode or
       travel;
   (e) a condition that the person avoid all contact
       with an alleged victim of the crime and with a potential witness
       who may testify concerning the offense;
   (f) a condition that the person report on a regu-
       lar basis to a designated pretrial services agency or other agency
       agreeing to supervise the defendant;
   (g) a condition that the person comply with a
       specified curfew;
   (h) a condition that the person refrain from
       possessing a firearm, destructive device or other dangerous
       weapon;
   (i) a condition that the person refrain from
       excessive or any use of alcohol and any use of a narcotic drug or
       other controlled substance without a prescription by a licensed
       medical practitioner;
   (j) a condition that the person undergo available
       medical, psychological or psychiatric treatment, including treat-
       ment for drug or alcohol dependency, and remain in a specified
       institution if required for that purpose;
   (k) a condition that the person submit to a urine
       analysis or alcohol test upon request of a person designated by
       the court;
   (l) a condition that the person return to custody
       for specified hours following release for employment, schooling,
       or other limited purposes;
   (m) a condition that the person satisfy any other
       condition that is reasonably necessary to assure the appearance of
       the person as required and to assure the safety of any other person
       and the community.

E. Explanation of conditions by court. The release order of
the court shall:
   (1) include a written statement that sets forth all the
       conditions to which the release is subject, in a manner sufficiently
       clear and specific to serve as a guide for the person’s conduct;
   (2) advise the person of:
       (a) the penalties for violating a condition
           of release, including the penalties for committing an offense while
           on pretrial release;
       (b) the consequences for violating a condition
           of release, including the immediate issuance of a warrant for the
           person’s arrest; and
       (c) the consequences of intimidating a witness,
           victim or informant or otherwise obstructing justice; and
   (3) unless the defendant is released on personal recogni-
       zance, set forth the circumstances which require that conditions
       of release be imposed.

F. Detention. Upon motion by the state to detain a person
without bail pending trial, the court shall hold a hearing to de-
termine whether bail may be denied pursuant to Article 2, § 1 of
the New Mexico Constitution.

G. Review of conditions of release. A person for whom bail
is set by the district court and who after twenty-four (24) hours
from the time of transfer to a detention facility continues to be
detained as a result of the person’s inability to meet the bail set,
shall, upon motion, be entitled to have a hearing to review the
amount of bail set. Unless the release order is amended and the
person is thereupon released, the court shall state in the record
the reasons for continuing the amount of bail set. A person who
is ordered released on a condition which requires that the person
return to custody after specified hours, upon application, shall
be entitled to have a hearing to review the conditions imposed.
Unless the requirement is removed and the person is thereupon
released on another condition, the court shall state in the record
the reason for the continuation of the requirement. A hearing to
review conditions of release pursuant to this paragraph shall be
held by the district court.

H. Amendment of conditions. The court ordering the release
of a person on any condition specified in this rule may amend
its order at any time to increase the amount of bail set or impose
additional or different conditions of release. If such amendment
of the release order results in the detention of the person as a
result of the person’s inability to meet such conditions or in the
release of the person on a condition requiring the person to return
to custody after specified hours, the provisions of Paragraph F of
this rule shall apply.

I. Record of hearing. A record shall be made of any hearing
held by the district court pursuant to this rule.

J. Return of cash deposit. If a person has been released by
executing an appearance bond and depositing a cash deposit set
pursuant to Subparagraph (1) or (3) of Paragraph B of this rule,
when the conditions of the appearance bond have been performed
and the defendant for whom bail was required has been discharged
from all obligations, the clerk shall return to the defendant, the
person’s personal representatives or assigns the sum which has
been deposited.

K. Cases pending in magistrate or metropolitan court. A
person charged with an offense which is not within magistrate or
metropolitan court trial jurisdiction and who has not been bound
over to the district court may file a petition any time after the
person’s arrest with the clerk of the district court for release pur-
suant to this rule. Jurisdiction of the magistrate or metropolitan
court to release the accused shall be terminated upon the filing of
a petition for release in the district court. Upon the filing of the
petition, the district court may:
   (1) continue the bail set and any condition of release
       imposed by the magistrate or metropolitan court;
   (2) impose any bail or condition of release authorized
       by Paragraph A or D of this rule;
   (3) continue any revocation of release imposed pursuant
to Rule 5-403 NMRA; or
   (4) after a hearing, revoke the release of a defendant
       pursuant to Subparagraph (2) of Paragraph A of Rule 5-403
       NMRA.

L. Release from custody by designee. Any or all of the provi-
sions of this rule, except the provisions of Paragraphs F, G and K
of this rule, may be carried out by responsible persons designated
in writing by the chief judge of the district court. No person shall
be qualified to serve as a designee if such person or such person’s
spouse is:
   (1) related within the second degree of blood or marriage
to a paid surety who is licensed to sell property or corporate bonds
within this state; or
   (2) employed by a jail or detention facility unless design-
       nated in writing by the chief judge of the judicial district in which
       the jail or detention facility is located.

M. Bind over in district court. The bond shall remain in the
magistrate or metropolitan court, except that it shall be transferred
to the district court upon indictment or bind over to that court.
N. Evidence. Information stated in, or offered in connection with, any order entered pursuant to this rule need not conform to the Rules of Evidence.

O. Forms. Instruments required by this rule shall be substantially in the form approved by the Supreme Court.

COMMITTEE COMMENTARY

Under Section 13 of Article 2 of the New Mexico Constitution, every accused, except a person accused of first degree murder where the proof is evident or the presumption great, is entitled to bail. Paragraph E was added in 1990 to recognize the amendment of Article 2, Section 13 of the New Mexico Constitution which permits the denial of bail for 60 days by an order entered within 7 days after incarceration if:

1. the defendant is accused of a felony and has been previously been convicted of two or more felonies within the state; or
2. the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction within this state.

This rule was derived from the Federal Bail Reform Act of 1966, as amended. Under the federal bail law, the right to bail is reinstalled as the right to have conditions of release set by the court. See 18 U.S.C. §§ 3142 et seq. The 1990 amendments to Paragraphs B and C of this rule were taken from Subsections (g) and (e), respectively, of 18 USCA § 1342.

In 1990 this rule was amended to encourage more releases on personal recognizance. Release conditions may now be imposed in addition to the execution of a unsecured personal appearance bond or a secured bond.

Because bail and additional conditions of release will usually be set initially by a magistrate or metropolitan court judge Rules 6-401 and 7-401 NMRA govern the procedure in those courts. The magistrate, municipal and metropolitan court bail rules were derived from and are substantially identical to this rule.

Under this rule, the types of bonds authorized to be posted are set forth in the order of priority they are to be considered by the judge or designee. The first priority is release upon the execution of a personal recognizance or unsecured appearance bond. If the court determines that release on personal recognizance or upon the execution of an unsecured bond will not reasonably assure the appearance of the defendant as required, the court may require a secured bond.

If a secured bond is required to assure the appearance of the defendant, the judge or designee must first consider requiring an appearance bond with a cash deposit of 10% or such other percentage of the amount of the bond. If this is inadequate, the court then must consider a property bond where the property belongs to the defendant or other unpaid surety. If the court has not authorized a cash deposit of less than 100% of the amount of bond set, the defendant may execute an appearance bond and deposit one hundred percent (100%) of the amount of the bond with the court. Last of all the defendant may purchase a bond from a paid surety. A paid surety may execute a corporate surety bond or a property bond.

A real or personal property bond may only be executed by a paid surety if the conditions of Rule 5-401B are met. Under the 1990 amendments to Rule 5-401B, a bond which has as collateral real or personal property is authorized only in those districts in which an order has been entered finding that the pledging of an irrevocable letter of credit will result in the detention of persons otherwise eligible for release.

Although bail hearings are not required to be a matter of record in the magistrate, metropolitan or municipal courts, Form 9-302A requires the judge or designee to set forth the reasons why a secured bond was required rather than release on personal recognizance.

Normally the court can exercise its discretion as to the adequacy of the sureties and not as to the type of sureties. State v. Lucero, 81 N.M. 578, 469 P.2d 727 (Ct. App. 1970). Cash, property or licensed surety will each provide sufficient security for any of the secured bonds described in Subparagraphs (2) or (3) of Paragraph B of this rule. See Rule 5-401A for the requirements of unpaid surety property bonds. If the court sets a secured bond pursuant to Subparagraph (3) of Paragraph B, the bond may be secured by cash, property or licensed surety. The court may not require a particular type of security. State v. Lucero, supra.

The provision allowing the court to set additional conditions of release “in order to assure the orderly administration of justice” was derived from American Bar Association Standards Relating to Pretrial Release, Section 5.5 (Approved Draft 1968) and 18 USCA §3142 and Rule 46(b) of the Federal Rules of Criminal Procedure.

Pursuant to 31-3-1 NMSA 1978, the court may appoint a designee to carry out the provisions of this rule. Designees must be named in writing. A person may not be appointed as a designee if such person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may not be appointed as a designee.

Paragraph M of this rule dovetails with Subparagraph (2) of Paragraph D of Rule 11-1101. Both provide that the Rules of Evidence are not applicable to proceedings in either the magistrate or district court with respect to matters of release or bail.

5-610. Additional instructions to jury following retirement; communications between court and jury.

A. Upon jurors’ request. After the jurors have retired to consider their verdict, if they desire additional instructions or to have any testimony read to them, they may in the discretion of the court be returned to the courtroom and the court may give them such additional instructions if authorized by UJI Criminal or may order such testimony read to them. Such instruction shall be given and such testimony read only after notice to, and in the presence of, the attorneys and the defendants.

B. Recall of jurors by court. The court may recall the jurors after they have retired to consider their verdict to give them additional instructions if authorized by UJI Criminal, or to correct any erroneous instructions it has given them. Such additional or corrective instructions may be given only after notice to and in the presence of the attorneys and the defendants.

C. Additional evidence prohibited. After the jurors have retired to consider their verdict, the court shall not recall the jurors to hear additional evidence.

D. Communications; judge and jury. The defendant shall be present during all communications between the court and the jury unless the defendant has signed a written waiver of the right to be personally present. All communications between the court and the jury must be in open court in the presence of the defendant and counsel for the parties unless the defendant waives on the record the right to be present or unless the communication involves only a ministerial matter. Unless requested by counsel for the defendant, communications between the court and the jury on a ministerial matter may be made in writing after notice to all counsel without recalling the defendant.

COMMITTEE COMMENTARY

This rule incorporated the holding in State v. Lindwood, 79...
N.M. 439, 444 P.2d 766 (Ct. App. 1968), that it was not prejudicial error for the court to recall the jury and give it an instruction previously overlooked after the charge had been given and arguments of counsel made.

In addition to authorizing additional instructions, Paragraph A of this rule specifically allows the reading of testimony to the jury. See State v. Montoya, 86 N.M. 316, 523 P.2d 814 (Ct. App. 1974).

Paragraph D of this rule has been added to clarify the procedure for communications between the judge and the jury, after the jury has retired to consider the verdict, without recalling the jury. See State v. McClure, 94 N.M. 440, 612 P.2d 232 (Ct. App. 1980); State v. Hinojos, 95 N.M. 659, 625 P.2d 588 (Ct. App. 1980); State v. Saavedra, 92 N.M. 242, 599 P.2d 395 (Ct. App. 1979); State v. Orona, 92 N.M. 450, 589 P.2d 1041 (1979); State v. Brugger, 84 N.M. 135, 500 P.2d 420 (Ct. App. 1972); State v. Beal, 48 N.M. 84, 146 P.2d 175 (1944). In addition, provision has been made for those communications which do not relate to issues in the case at trial to be made without having the defendant present, provided the defendant’s presence has not been requested by his attorney. Rule 43 of the Federal Rules of Criminal Procedure, regarding the presence of the defendant, has been interpreted to allow such communications without the presence of the defendant. United States v. Mesteth, 528 F.2d 333 (8th Cir. 1976); United States v. Reynolds, 489 F.2d 4 (6th Cir. 1973), cert. denied, 416 U.S. 988, 40 L. Ed. 2d 766, 94 S. Ct. 2395 (1974); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970, 35 L. Ed. 2d 706, 93 S. Ct. 1443 (1973); United States v. Alper, 449 F.2d 1223 (3rd Cir. 1971), cert. denied, 405 U.S. 988, 31 L. Ed. 2d 453, 92 S. Ct. 1248, reh. denied, 406 U.S. 911, 31 L. Ed. 2d 822, 92 S. Ct. 1605 (1972); and United States v. Stone, 452 F.2d 42 (8th Cir. 1971).

All communications between the judge and jury should be made a part of the record, whether made in the presence of defense counsel and defendant or not.

While a case is pending, a judge may not entertain any ex parte communications from any party, from counsel for any party, from any advocacy group on behalf of any party, or with any member of the probation department except as allowed by law. Any authorized ex parte communication between the court and the probation department must be in writing.
to any variance to conform to the evidence. If the court finds that the defendant has been prejudiced by an amendment, the court may postpone the trial or grant such other relief as may be proper under the circumstances.

D. Effect. No appeal, or motion made after verdict, based on any such defect, error, omission, repugnancy, imperfection, variance or failure to prove surpluseage shall be sustained unless it is affirmatively shown that the defendant was in fact prejudiced in the defendant’s defense on the merits.

E. Refiled proceedings. If an indictment or information is dismissed and a subsequent indictment or information is filed arising out of the same incident, the bond shall continue in effect pending review by the district court.

F. Effect on bail. The dismissal of an indictment or information shall not exonerate a bond prior to the expiration of the time for automatic exoneration pursuant to Subparagraphs (1) or (2) of Paragraph A of Rule 5-406 NMRA of these rules.

9-405
[For use with District Court Rule 5-303 NMRA]

STATE OF NEW MEXICO
COUNTY OF ________________

IN THE DISTRICT COURT

No. ________________

STATE OF NEW MEXICO

v.

________________________________, Defendant

WAIVER OFarraignment
ENTRY OF PLEA OF NOT GUILTY

I understand that I am charged with the following criminal offense or offenses under the law of the State of New Mexico: ________________ (list all offenses charged).

I understand that I am entitled to personally appear before the district court and enter my plea to the crime or crimes charged and to have my rights explained to me.

I hereby acknowledge receipt of a copy of the complaint, indictment or information which I have read and had explained to me by defense counsel. I understand the crime or crimes charged and the penalty provided by law for the crime or crimes charged.

I further understand that: I have a right to trial by jury; I have a right to the assistance of an attorney at all stages of the proceeding, and to an appointed attorney, to be furnished free of charge, if I cannot afford one; I have a right to confront the witnesses against me and to cross-examine them as to the truthfulness of their testimony; I have a right to present evidence on my own behalf and to have the state compel witnesses of my choosing to appear and testify; I have a right to remain silent and that any statement made by me may be used against me; I have a right to trial by jury and that all jurors must agree on my guilt of the crime charged beyond a reasonable doubt for me to be found guilty.

After reading and understanding the above, I hereby give up my right to personally appear before the district court for arraignment and I hereby enter a plea of not guilty to all criminal offenses charged in the above-styled cause.

I have been released from custody and I do not intend on having the court review the conditions of my release from custody.

Date______________________ ____________________

Name of Defendant

Defense Counsel

USE NOTE

1. This waiver must be served on the state in time for the state to notify victims and others that an arraignment will not be held.

23-111. Court interpreters; code of professional responsibility.

A. Defendants in criminal proceedings. A court interpreter who is assigned to interpret for a non-English speaking defendant in a criminal proceeding shall not interpret for a non-English speaking juror in the same proceedings.

B. Release of court interpreter. A court interpreter who begins to interpret in any civil or criminal proceeding shall continue to interpret until the conclusion of the proceedings unless released by the trial judge.

C. Interpreter Code. Each certified court interpreter shall agree and sign the following “Court Interpreters Code of Professional Responsibility”:

“Court Interpreters Code of Professional Responsibility”

A. Officers of the court. Certified court interpreters are highly skilled professionals who fulfill an essential role in the administration of justice and in the protection of the Fourth and Sixth Amendment rights for non-English speaking persons. In their capacity as officers of the court, court interpreters are bound to a professional code of ethics to ensure due process of law.

B. Canons.

(1) Canon 1. Official court interpreters act strictly in the interests of the court they serve.

(2) Canon 2. Official court interpreters reflect proper court decorum and act with dignity and respect to the officials and staff of the court.

(3) Canon 3. Official court interpreters avoid professional or personal conduct which would discredit the court.

(4) Canon 4. Official court interpreters, except upon court order, shall not disclose any information of a confidential nature about court cases obtained while performing interpreting duties.

(5) Canon 5. Official court interpreters respect the restraints imposed by the need for confidentiality and secrecy as protected under applicable federal and state law. Interpreters shall disclose to the court, and to the parties in a case, any prior involvement with that case, or private involvement with the parties or others significantly involved in the case.

(6) Canon 6. Official court interpreters undertake to inform the court of any impediment in the observance of this Code or of any effort by another to cause the Code to be violated.

(7) Canon 7. Official court interpreters work unobtrusively with full awareness of the nature of the proceedings.

(8) Canon 8. Official court interpreters fulfill a special duty to interpret accurately and faithfully without indicating any
personal bias, avoiding even the appearance of partiality.

(9) Canon 9. Official court interpreters maintain impartiality by avoiding undue contact with witnesses, attorneys, litigants and their families, and any unauthorized contact with jurors. This should not limit, however, those appropriate contacts necessary to prepare adequately for their assignment.

(10) Canon 10. Official court interpreters refrain from giving advice of any kind to any party or individual and from expressing personal opinion in a matter before the court.

(11) Canon 11. Official court interpreters perform to the best of their ability to assure due process for the parties, accurately state their professional qualifications, and refuse any assignment for which they are not qualified or under conditions which substantially impair their effectiveness.

Official court interpreters preserve the level of language used, and the ambiguities and nuances of the speaker, without any editing. Implicit in the knowledge of their limitations is the duty to correct any error of interpretation, and demonstrate their professionalism by requesting clarification of ambiguous statements or unfamiliar vocabulary and to analyze objectively any challenge to their performance. Interpreters have the duty to call to the attention of the court any factors or conditions which adversely affect their ability to perform adequately.

(12) Canon 12. Official court interpreters accept no remuneration, gifts, gratuities, or valuable consideration in excess of their authorized compensation in the performance of their official interpreting duties. Additionally, they avoid conflict of interest or even the appearance thereof.

(13) Canon 13. Official court interpreters support other official interpreters by sharing knowledge and expertise with them to the extent practicable in the interests of the court, and by never taking advantage of knowledge obtained in the performance of official duties, or by their access to court records, facilities, or privileges, for their own or another’s personal gain.

(14) Canon 14. Official court interpreters of the New Mexico state courts willingly accept and agree to this code, and understand that appropriate sanctions may be imposed by the court for willful violations.

C. Ethical standards and responsibilities.

(1) The interpreter shall render a complete and accurate interpretation.

(2) The interpreter shall remain impartial.

(3) The interpreter shall maintain confidentiality.

(4) The interpreter shall confine himself or herself to the role of interpreting.

(5) The interpreter shall be prepared for any type of proceeding or case.

(6) The interpreter shall ensure that the duties of the interpreter’s office are carried out under working conditions that are in the best interest of the court.

(7) The interpreter shall be familiar with and adhere to all of these ethical standards, and shall maintain high standards of personal and professional conduct to promote public confidence in the administration of justice.

Interpreter’s signature  Interpreter’s name (print)
Date  Address
IN THE MATTER OF THE AMENDMENTS OF RULES 5-103, 5-103.1, AND 5-503 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Criminal Procedure for the District Courts Committee to amend Rules 5-103, 5-103.1, and 5-503 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 5-103, 5-103.1, and 5-503 NMRA of the Rules of Criminal Procedure for the District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 5-103, 5-103.1, and 5-503 NMRA shall be effective for cases filed on and after September 15, 2005; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced rules and form by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 19th day of July, 2005.

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

5-103. Service and filing of pleadings and other papers.

A. Service; when required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the initial indictment, information or complaint, every order not entered in open court, every paper relating to discovery required to be served upon a party, unless the court otherwise orders, every written motion other than one which may be heard ex parte and every written notice, appearance, demand, designation of record on appeal, and similar paper shall be served upon each of the parties.

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, or by mailing a copy to the attorney or party at the attorney’s or party’s last known address, or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.

C. Definitions. As used in this rule:

(1) “delivery of a copy” means:

(a) handing it to the attorney or to the party;
(b) sending a copy by facsimile or electronic transmission when permitted by Rule 5-103.1 NMRA or Rule 5-103.2 NMRA;
(c) leaving it at the attorney’s or party’s office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or

(d) if the attorney’s or party’s office is closed or the person to be served has no office, leaving it at the person’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein;

(e) depositing it in an outgoing mail container which is maintained in the usual and ordinary course of business of the serving attorney; and

(2) “mailing a copy” means sending a copy by first class mail with proper postage;

D. Filing; certificate of service. All papers after the complaint, indictment or information required to be served upon a party, together with a certificate of service indicating the date and method of service, shall be filed with the court within a reasonable time after service.

E. Filing of papers and pleadings by a party represented by counsel. The clerk shall not file a pleading or paper of a defendant who is represented by an attorney, unless the paper is a request to dismiss counsel or to appear pro se. If the paper is a request to dismiss counsel or appear pro se, the clerk shall serve a copy of the request on all counsel of record in the proceedings. Except for a request to dismiss counsel or to appear pro se, all documents or items received by the court from a defendant who is represented by an attorney shall be forwarded, without filing, to the defendant’s attorney of record. Nothing in this paragraph shall restrict a defendant’s right to file pro se post-conviction motions pursuant to Rule 5-802 NMRA.

F. Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. “Filing” shall include filing a facsimile copy or filing an electronic copy as may be permitted pursuant to Rule 5-103.1 NMRA or 5-103.2 NMRA of these rules. A paper filed by electronic means in compliance with Rule 5-103.1 NMRA constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

G. Proof of service. Except as otherwise provided in these rules or by order of court, proof of service shall be made by the certificate of service indicating the date and method of service signed by an attorney of record, or if made by any other person, by the affidavit of such person. Such certificate or affidavit shall be filed with the clerk or endorsed on the pleading, motion or other paper required to be served.

5-103.1 Service and filing of pleadings and other papers by facsimile.

A. Facsimile copies permitted to be filed. Subject to the provisions of this rule, a party may file a facsimile copy of any pleading or paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a pleading or paper has the same effect as any other filing for all procedural and statutory purposes. The filing of pleadings and other papers with the court by facsimile copy shall be made by faxing them to the clerk of the court at a number designated by the clerk, except if the paper or pleading is to be filed directly with the judge, the judge may permit the papers to be faxed to a number designated by the judge, in which
event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Each judicial district shall designate one or more telephone numbers to receive fax filings.

B. Facsimile service by court of notices, orders or writs. Facsimile service may be used by the court for issuance of any notice, order or writ or receipt of an affidavit. The clerk shall note the date and time of successful transmission on the file copy of the notice, order or writ.

C. Paper size and quality. No facsimile document shall be filed with the court unless it is on plain paper and substantially satisfies all of the requirements of Rule 5-118 of these rules.

D. Filing pleadings or papers by facsimile. A pleading or paper may be filed with the court by facsimile transmission if:
   (1) a fee is not required to file the pleading or paper;
   (2) only one copy of the pleading or paper is required to be filed;
   (3) unless otherwise approved by the court, the pleading or paper is not more than ten (10) pages in length excluding the facsimile cover page; and
   (4) the pleading or paper to be filed is preceded by a cover sheet with the names of the sender and the intended recipient, any applicable instructions, the voice and facsimile telephone numbers of the sender, an identification of the case, the docket number and the number of pages transmitted.

E. Facsimile copy filed by an intermediary agent. Facsimile copies of pleadings or papers filed in person by an intermediary agent are not subject to the restrictions of Paragraph D of this rule.

F. Time of filing. If facsimile transmission of a pleading or paper faxed is begun before the close of the business day of the court in which it is being filed, it will be considered filed on that date. If facsimile transmission is begun after the close of business, the pleading or paper will be considered filed on the next court business day. For any questions of timeliness the time and date affixed on the cover page by the court’s facsimile machine will be determinative.

G. Service by facsimile. Any document, required to be served by Paragraph A of Rule 1-005 NMRA may be served on a party or attorney by facsimile transmission if the party or attorney has;
   (1) listed a facsimile telephone number on a pleading or paper filed with the court in the action;
   (2) a letterhead with a facsimile telephone number; or
   (3) agreed to be served with a copy of the pleading or paper by facsimile transmission.

   Service by facsimile is accomplished when the transmission of the pleading or paper is completed.

H. Demand for original. A party shall have the right to inspect and copy any pleading or paper that has been filed or served by facsimile transmission if the pleading or paper has a statement signed under oath or affirmation or penalty of perjury.

I. Conformed copies. Upon request of a party, the clerk shall stamp additional copies provided by the party of any pleading filed by facsimile transmission.

5-503. Depositions; statements.

A. Statements. Any person, other than the defendant, with information which is subject to discovery shall give a statement. A party may obtain the statement of the person by serving a written “notice of statement” upon the person to be examined and upon each party not less than five (5) days before the date scheduled for the statement. The notice shall state the time and place for taking of the statement. A subpoena may also be served to secure the presence of the person to be examined or the materials to be examined during the statement. If a subpoena is served to secure a witness or materials, a copy of the subpoena shall be served upon each party.

   * * *

(Paragraphs B through J have not been amended.)
IN THE MATTER OF THE AMENDMENTS OF RULE 12-209 NMRA OF THE RULES OF APPELLATE PROCEDURE

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Appellate Rules Committee to amend Rule 12-209 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 12-209 NMRA of the Rules of Appellate Procedure hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rule 12-209 of the Rules of Appellate Procedure shall be effective immediately; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the Rule 12-209 NMRA by publishing the same in the Bar Bulletin and the NMRA.

DONE at Santa Fe, New Mexico, this 29th day of July, 2005.

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

12-209. The record proper (the court file).

*B * *

B. Transmission. Upon receipt of a copy of the docketing statement or statement of issues, the district court clerk shall number consecutively the pages of the record proper and send it to the appellate court. The first page, after the title page, of the record proper shall consist of a copy of the district court clerk’s docket sheet with references to the page of the record proper for each entry. The district court clerk shall send a copy of this docket sheet to all counsel of record. The district court clerk shall include a statement of the costs of the record proper. The appellant shall pay for the record proper within ten (10) days of the filing of the docketing statement or statement of issues.

*B * *

PROPOSED REVISION OF THE RULES GOVERNING ADMISSION TO THE BAR

The Supreme Court is considering the following revisions to Rules 15-103, 15-105 and 15-301.1 NMRA and a proposed new Rule 15-301.2 NMRA of the Rules Governing Admission to the Bar. If you would like to comment on the proposed amendments set forth below, please send your written comments to: Kathleen J. Gibson, Clerk New Mexico Supreme Court P.O. Box 848 Santa Fe, New Mexico 87504-0848 Comments must be received by September 9, 2005.

15-103. Qualifications.

(No amendments are proposed for Paragraphs A and B.)

C. Character and fitness standards and investigation.

(1) The purpose of character and fitness investigation before admission to the bar is to assure the protection of the public and to safeguard the justice system.

(2) The applicant bears the burden of proving good character in support of the application.

(3) The revelation or discovery of any of the following may be treated as cause for further inquiry before the board determines whether the applicant possesses the character and fitness to practice law:

(a) unlawful conduct
(b) academic misconduct;
(c) misconduct in employment;
(d) acts involving dishonesty, fraud, deceit or misrepresentation;
(e) acts which demonstrate disregard for the rights or welfare of others;
(f) acts involving dishonesty, fraud, deceit or misrepresentation;
(g) abuse of legal process, including the filing of vexatious or frivolous lawsuits;
(h) neglect of financial responsibilities; neglect of professional obligations;
(i) violation of an order of a court, including child support orders;
(j) conduct that evidences current mental or emotional instability that may impair the ability to practice law;
(k) conduct that evidences current drug or alcohol dependence or abuse that may impair the ability to practice law;
(l) denial of admission to the bar in another jurisdiction on character and fitness grounds;
(m) disciplinary action by a lawyer, disciplinary agency or other professional disciplinary agency of any jurisdiction; (xiv) making of false statements, including omissions, on bar applications in this state or any other jurisdiction;
(n) or as otherwise determined by the board for just and good cause.

(4) The board shall determine whether the present character and fitness of an applicant qualifies the applicant for admission. In making this determination, the following factors should be considered in assigning weight and significance to prior conduct:

(a) the applicant’s age at the time of the conduct;
(b) the recency of the conduct;
(c) the reliability of the information concerning
the conduct;

(d) the seriousness of the conduct;

(e) the factors underlying the conduct;

(f) the cumulative effect of the conduct or information;

(g) the evidence of rehabilitation;

(h) the applicant’s positive social contributions since the conduct;

(i) the applicant’s candor in the admissions process; and

(j) the materiality of any omissions or misrepresentations.

(5) The applicant has a continuing obligation to update the application with respect to all matters inquired of on the application. This obligation continues during the pendency of the application, including the period when the matter is on appeal to the board or the Court.

(Paragraphs C and D have been relettered as Paragraphs D and E.)

15-105. Application fees.

A. Fees. Every applicant shall pay the fees as prescribed by the board from time to time. The following fees are fixed, until changed by the board:

(1) four hundred and fifty dollars ($450.00) for applicants whose graduation from law school is less than one (1) year prior to filing the application and who have not engaged in the practice of law in any state;

(2) a reduced fee of one hundred dollars ($100.00) for applicants who apply to repeat the examination; provided, however, that if the investigation report is dated more than fifteen (15) months prior to the date of application, an additional fee will be required to update the investigation report as provided in Rule 15-106 NMRA of these rules;

(3) reasonable additional expenses to be determined by the Board of Bar Examiners, in connection with any investigations or hearings. The board shall assume its costs of the first completed investigation and hearing for an applicant who presents character and fitness issues. The board shall assess costs for subsequent investigations and hearings. If an applicant has been denied admission or has withdrawn the applicant’s application after the first completed investigation and hearing, the board shall assess costs against the applicant for each reaplication thereafter which involves an investigation and hearing. Such costs shall include, but not be limited to, board attorney fees, court reporter fees, medical evaluations and any other fees for services to complete the investigation and hearing. Payment of such fees shall be a prerequisite for admission or for consideration of subsequent reaplication. In all cases, the applicant shall bear the applicant’s costs associated with the application, investigation and hearing;

(4) eight hundred dollars ($800.00) for all other applicants;

(5) later filing fees shall be assessed as follows:

(a) fifty dollars ($50.00) if an application is filed within thirty (30) days of the filing deadline;

(b) one hundred dollars ($100.00) if an application is filed within sixty (60) days of the filing deadline;

(c) one hundred and fifty dollars ($150.00) if an application is filed within ninety (90) days of the filing deadline;

(d) two hundred dollars ($200.00) for applications filed ninety (90) days or more after the filing deadline; provided, however, that no new applications will be accepted after January 5th for the February exam or June 5th for the July exam.

B. Remittance of fees. All remittances for fees shall be made payable to: secretary, New Mexico Board of Bar Examiners, and shall be deposited in an account designated as New Mexico Board of Bar Examiners general fund and shall be disbursed by order of the Board of Bar Examiners in carrying out the functions, duties and powers vested in said board. Application fees and costs are not refundable and will be applied toward the expenses of the board, including appropriate investigation by the National Conference of Bar Examiners.

C. Budget. The Board of Bar Examiners shall submit on or before January 1 of each year a proposed budget to the Supreme Court.

D. Audit. It shall likewise, on or before March 1 of each year, submit to the Supreme Court an accounting and audit of all funds received and disbursed during the prior calendar year. Such audit shall be performed by an auditor to be selected by the Supreme Court.

E. [Per diem and mileage] Compensation. The members of the Board of Bar Examiners shall receive [any compensation but] mileage and per diem at the same rate as provided for public officials and employees of the state and any other compensation for service to the board as approved by the Court.

15-301. Public employee limited license.

A. Definitions. As used in this rule:

(1) “public employee” means any officer, employee or servant of a governmental entity, excluding independent contractors;

(2) “governmental entity” means the state or any local public body as defined in subparagraphs (3) and (4) of this paragraph;

(3) “local public body” means all political subdivisions of this state and their agencies, instrumentalities and institutions; and

(4) “state” means any branches, agencies, departments, boards, instrumentalities or institutions of the state of New Mexico.

B. Eligibility. Upon application, the clerk of the Supreme Court may issue a limited non-renewable one (1) year license to an attorney who:

(1) is admitted to practice law in another state, territory or protectorate of the United States or the District of Columbia;

(2) is in good standing to practice law in each state in which the attorney is licensed; and

(3) satisfies the limited license requirements set forth in this rule.

C. Application procedure. An applicant for a limited license to represent public defender clients or any governmental entity in this state shall file with the clerk of the Supreme Court an application for limited license which shall be accompanied by:

(1) a certificate of admission to practice law and proof of compliance with Subparagraphs (1) and (2) of Paragraph B of Rule 15-103 NMRA;

(2) a letter from the head of the governmental entity which has employed the applicant certifying employment with that governmental entity;

(3) a certificate signed by the applicant that the applicant has read and is familiar with the New Mexico Rules of Professional Conduct and rules of the Supreme Court of New Mexico and the New Mexico statutes relating to the conduct of attorneys; and

(4) a docket fee in the amount of one hundred twenty-
five dollars ($125.00) payable to the New Mexico Supreme Court and disciplinary fee in the amount of one hundred thirty dollars ($130.00) payable to the Disciplinary Board.

All fees and costs associated with an application for limited license are not refundable.

D. License; issuance and revocation.

(1) If an applicant for a limited license to represent public defender clients or a governmental entity complies with the provisions of this rule, the clerk of the Supreme Court may issue a limited, one (1) year license to represent public defender clients or practice law as an employee of a governmental entity. This license shall not be renewed.

(2) A limited license issued pursuant to this rule only permits the licensee to practice law in New Mexico as a public employee representing public defender clients or a governmental entity.

(3) The clerk shall revoke the limited license of any person found in violation of these rules, any rule approved by the Supreme Court or any state or federal law. Upon revocation of a limited license, the applicant shall not appear in any court in this State as an attorney:

(4) once a limited license expires or is revoked, an attorney who resides or maintains a legal residence in this State shall not be admitted to the practice of law for a particular case under the pro hac vice rules approved by this Court.

E. Expiration. An attorney who is issued a limited license to represent public defender clients or practice law as an employee of a governmental entity shall take the next New Mexico bar examination for which the applicant is eligible. A limited license issued pursuant to this rule shall expire upon occurrence of the earliest of the following events:

(1) the expiration of one (1) year from the date of issuance by the New Mexico Supreme Court;
(2) notification that the applicant has failed the New Mexico bar exam;
(3) termination of employment with the governmental entity;
(4) failure of the limited licensee to take the next bar examination for which the limited licensee is eligible; or
(5) admission to the New Mexico Bar upon passing the bar examination.

F. Limited licensee status. An attorney granted a limited license pursuant to this rule shall not be a member of the state bar but shall be subject to the Rules of Professional Conduct and the Rules Governing Discipline. Licensees shall pay the annual disciplinary fee as part of the application process.

PROPOSED NEW RULE 15-301.2
15-301.2. Legal services limited license to practice law.

A. Definitions. As used in this rule:

(1) “qualified legal services provider” means a not for profit legal services organization whose primary purpose is to provide legal services to low income clients;
(2) “emeritus attorney” means any person, retired from the active practice of law, who is or was admitted to practice before the highest court of New Mexico or any other state or territory of the United States of America or the District of Columbia.

B. Eligibility. Upon application, the clerk of the Supreme Court may issue a legal services limited license to represent legal services clients through a qualified legal service provider to an attorney who:

(1) is admitted to practice law in another state or the District. of Columbia;
(2) is in good standing to practice law in each state in which the attorney is licensed;
(3) satisfies the legal services limited license requirements set forth in this rule, and
(4) supplies a statement that the applicant has not been the subject of disciplinary action by the bar or courts of any jurisdiction during the preceding five (5) years.

C. Application procedure. An applicant for a legal services limited license to represent legal services clients through a qualified legal services provider shall file with the clerk of the Supreme Court an application for a legal services limited license which shall be accompanied by:

(1) a certificate of admission to practice and good standing from each state in which the applicant is licensed to practice law;
(2) a letter from the director of the legal services provider which has employed the applicant certifying applicant’s employment;
(3) a certificate signed by the applicant that the applicant has read and is familiar with the New Mexico Rules of Professional Conduct and rules for the Supreme Court of New Mexico and the New Mexico Statutes relating to the conduct of attorneys; and
(4) a docket fee in the amount of one hundred twenty-five dollars ($125.00) payable to the New Mexico Supreme Court and disciplinary fee in the amount of one hundred and thirty dollars ($130.00) payable to the disciplinary board.

All fees and costs associated with an application for legal services limited license are not refundable.

D. License; issuance and revocation.

(1) If an applicant for a legal services limited license to represent legal services clients through a qualified legal services provider complies with the provisions of this rule, the clerk of the Supreme Court may issue a legal services limited license,

(2) A legal services limited license issued pursuant to this rule only permits the licensee to practice law in New Mexico as an attorney representing legal services clients through a qualified legal services provider.

(3) Under a legal services limited license, an emeritus attorney, under the supervision of a supervising attorney, will be allowed to provide legal services for legal service clients through a qualified legal services provider.

(4) The clerk shall revoke the legal services limited license if any person issued such license is found in violation of these rules, any rule approved by the Supreme Court or any state or federal law. Upon revocation of a legal services limited license, the applicant shall not appear in any court in this State as an attorney representing any legal services client.

E. Expiration. An attorney who is issued a legal services limited license to represent legal services clients through a qualified legal services provider shall expire upon occurrence of any of the following events:

(1) termination of employment with the qualified legal services provider;
(2) admission to the New Mexico Bar upon passing the bar examination.

F. Legal services limited licensee status. An attorney granted a legal services limited license pursuant to this rule shall not be a member of the state bar but shall be subject to the Rules of Professional Conduct and the Rules Governing Discipline. Licensees shall pay the annual disciplinary fee as part of the application process.
PROPOSED REVISIONS TO THE RULES OF APPELLATE PROCEDURE

The Supreme Court is considering the following new rules. If you would like to comment on the proposed amendments set forth below, please send your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Comments must be received by September 9, 2005.

12-202. Appeal as of right; how taken.
   A. Filing the notice of appeal. An appeal permitted by law as of right from the district court shall be taken by filing a notice of appeal with the district court clerk within the time allowed by Rule 12-201 NMRA.
   B. Content of the notice of appeal. The notice of appeal shall specify:
      (1) each party taking the appeal and each party against whom the appeal is taken, except that in appeals concerning children involved in litigation under the provisions of the Children's Code, the provisions of Paragraph D of Rule 12-305 NMRA, shall be followed;
      (2) the name and address of appellate counsel if different from the person filing the notice of appeal; and
      (3) the name of the court to which the appeal is taken.
   C. Attachment to notice of appeal. A copy of the judgment or order appealed from, showing the date of the judgment or order, shall be attached to the notice of appeal.
   D. Additional requirements for appeals in criminal cases. In addition to the requirements set forth in Paragraph B of this rule, the following are required, when applicable, with a notice of appeal in criminal cases:
      (1) a notice of appeal by the state under Section 39-3-3(B)(2) NMSA 1978 shall also include the certificate of the district attorney required by the statute;
      (2) if the notice of appeal names the appellate division of the public defender department as appellate counsel, a copy of the order appointing the appellate division of the public defender department shall be attached to the notice of appeal; and
      (3) if the appeal is an appeal taken from the district court in which a sentence of death or life imprisonment has been imposed, and the proceedings are not audio recorded, a designation of proceedings shall be filed at the same time as the notice of appeal in accordance with Subparagraph (5) of Paragraph C of Rule 12-211 NMRA.
   E. Service of the notice of appeal. The appellant shall give notice of the filing of a notice of appeal:
      (1) in criminal cases, including criminal contempt cases, and cases governed by the Children's Court Rules, by serving a copy on the appellate court, appellate division of the attorney general, appellate division of the public defender when the public defender is appointed on appeal, trial judge, trial counsel of record for each party other than the appellant, and the court monitor or court reporter who took the record;
      (2) in child abuse and neglect proceedings and proceedings involving the termination of parental rights, in addition to those required in Subparagraph (1) of this paragraph, by serving a copy on the Legal Services Bureau of the Human Services Department; and
      (3) in all other cases, by serving a copy on the appellate court, trial judge, court monitor or court reporter who took the record and trial counsel of record for each party other than the appellant.
   F. Service on party. If a party is not represented by counsel, service shall be made by mailing a copy of the notice of appeal to the party's last known address.
   G. Joint or consolidated appeals.
      (1) If two or more persons are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in an appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant.
      (2) Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties.
The Supreme Court is considering proposed revisions to the District Court Criminal rules. If you would like to comment on the proposed amendments set forth below, please send your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received by the clerk on or before Sept. 9, 2005, to be considered by the court.

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**PROPOSED NEW RULE**

5-302A. Grand jury proceedings.

A. Target notice.

(1) Content. The target notice shall set forth the essential facts constituting the offenses being presented, the common name of the offense and, if applicable, a specific section number of the NMSA 1978 which defines the offenses. Target notices shall be substantially in the form approved by the Supreme Court.

(2) Time. Notice shall be delivered to a target no later than four (4) days before the scheduled grand jury proceeding if the target is incarcerated at the time the notice is delivered. Notice shall be served on the target no later than thirty (30) days before the scheduled proceeding if the target is not incarcerated.

(3) Notice not required. Notice shall not be required if, prior to the grand jury proceeding, the district judge presiding over the grand jury determines by clear and convincing evidence that providing notification may result in flight by the target, result in obstruction of justice or pose a danger to another person.

B. Evidence.

(1) Lawful, competent, and relevant evidence. All evidence presented shall be competent, relevant, and lawful, and shall otherwise be fairly presented.

(2) Exculpatory evidence. All lawful, competent and relevant evidence that might disprove or reduce a charge or accusation or that might make an indictment unjustified shall be presented to the grand jury.

(3) Evidence provided by target. If the target notifies the prosecuting attorney assisting the grand jury of the existence of competent, lawful and relevant evidence that might disprove or reduce an accusation, the prosecutor shall present that evidence to the grand jury for consideration unless the supervising judge, after a hearing, finds that the evidence should not be presented before the grand jury.

C. Disclosure of evidence. Within forty-eight (48) hours of request by the target, the prosecutor shall make available for inspection and copying all evidence reasonably available to the prosecution which is relevant to charges set forth in the target notice, unless disclosure of the information would present an imminent danger to a specific individual.

D. Instructions to grand jury.

(1) Elements and defenses. The prosecuting attorney who is assisting the grand jury shall provide the grand jurors with instructions setting forth the elements of each offense being investigated and the definitions of any defenses raised by the evidence.

(2) Other instructions. The prosecuting attorney shall provide the grand jury with other instructions approved by the Supreme Court which are necessary to fairly consider the issues presented.

(3) Record. A copy of all instructions submitted to the grand jury shall be made a part of the record.

(4) Proceedings recorded. Any grand jury questions or discussion about instructions shall be on the record.

E. Review by court.

(1) Supervisory authority. The district court has supervisory authority over all grand jury proceedings.

(2) Scope of review. The sufficiency of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury, but the grand jury proceedings and indictment shall be otherwise reviewable by the district court.
ADVANCE OPINIONS
FROM THE NEW MEXICO SUPREME COURT AND COURT OF APPEALS

OPINION

PATRICIO M. SERNA, JUSTICE

{1} The Court of Appeals consolidated two related actions, the first involving foreclosure on a judgment lien and the second involving voluntary waste of the foreclosed property. The district court had ruled in the waste proceeding that Defendant Robin G. Wakeland was equitably estopped from asserting her statutory homestead exemption in the foreclosure proceeding. The Court of Appeals affirmed the judgment in the waste proceeding on the question of liability and damages. The Court also determined that the district court erred in finding equitable estoppel but allowed the district court to use its equitable powers to supervise the execution of judgment in order to ensure the satisfaction of judgment in the waste proceeding with the homestead exemption. We granted Wakeland’s petition for writ of certiorari to the Court of Appeals on the sole issue of the Court of Appeals’ equitable remedy. We affirm but clarify and limit the rationale of the Court of Appeals.

I. Facts

{2} Plaintiffs Paul D. Mannick and Kathy P. Mannick (the Mannicks) filed a foreclosure action in district court on a judgment lien against Wakeland’s real property. The underlying judgment supporting the lien, in the amount of $87,895.08 plus interest, was based on Wakeland’s intentional tortious acts and bad faith. In its initial judgment, the district court ordered the foreclosure of Wakeland’s property and found that Wakeland was not entitled to a homestead exemption. The Court of Appeals, in a memorandum opinion, reversed the district court with respect to the homestead exemption and remanded to the district court with instructions to grant Wakeland her statutory homestead exemption.

{3} In a separate action, Plaintiffs Coppler and Mannick, P.C., and the Mannicks filed suit against Wakeland for voluntary waste in relation to the foreclosed property. Wakeland, with knowledge of the foreclosure, had removed permanent fixtures from the foreclosed property, including all heaters, sinks, cabinets, and doors, as well as the water heater, and had damaged the property by making large holes in the walls and covering the windows with varnish. The extensive damage to the property required over $10,000 in repairs. In addition, Wakeland had fraudulently attempted to encumber the water rights of the property.

{4} While the waste action was pending, the district court reviewed the mandate of the Court of Appeals in the foreclosure case and awarded a homestead exemption of $30,000 to Wakeland “subject to the judgment of this Court in” the voluntary waste action. The Court of Appeals reversed this order as an improper set-off against the homestead exemption. The Court remanded for the district court to award the homestead exemption to Wakeland. However, the district court declined to enter judgment on the mandate until the resolution of the waste action.

{5} Following a trial in the waste claim, the district court found that Wakeland’s conduct was willful and malicious and committed with the intent to violate the Mannicks’ rights under the foreclosure judgment. The court entered judgment in favor of the Mannicks and Coppler and Mannick, P.C., and awarded $34,100 in actual damages and $10,000 in punitive damages. The district court also concluded on the basis of this award, as well as the lack of any other means for Wakeland to satisfy the judgment, that Wakeland was equitably estopped from pursuing her homestead exemption. Noting the binding Court of Appeals’ mandate in the foreclosure action to grant a homestead exemption to Wakeland, the district court stated, “Nevertheless, the court finds and concludes that, under these particular and unusual circumstances, it would be unjust and inequitable to allow . . . Wakeland to pursue any legal action against [the Mannicks] to recover the $30,000 homestead exemption and that [she] would be unjustly enriched by any such legal action.”

{6} Wakeland appealed the judgment in the waste action and the district court’s failure to award the homestead exemption in the foreclosure action. The Court of Appeals consolidated the appeals on its own motion. Among other issues, the Court of Appeals addressed the district court’s application of equitable estoppel to the homestead exemption. Mannick v. Wakeland, No. 24,078, slip op. ¶¶ 27-33 (N.M. Ct. App. Aug. 24, 2004). The Court determined that the district court improperly relied on equitable estoppel because of the absence of deceptive conduct, false representation, or concealment of material facts by Wakeland.1 Id. ¶¶ 30-33. Nonetheless, the Court of Appeals noted the
The egregiousness of Wakeland’s conduct and the inherent injustice of allowing Wakeland to benefit from her malicious acts. Id. ¶¶ 34-35. The Court of Appeals reviewed comparable homestead exemptions in other states and observed that New Mexico’s homestead exemption, by not having the type of limits imposed in other states, is more susceptible to abuse and “makes our creditors especially vulnerable to the debtor who uses the homestead exemption as a perpetual shield of assets.” Id. ¶ 37. As a result, the Court invoked the district court’s inherent equitable power “to do justice.” Id. ¶ 34. In the initial appeals of the foreclosure action, the Court had rejected the notion of a set-off based on a judgment in the voluntary waste proceeding. The Court indicated that a set-off would be equivalent to a garnishment of the homestead exemption, which was prohibited by this Court’s opinion in Laughlin v. Lumbert, 68 N.M. 351, 353-54, 362 P.2d 507, 509-10 (1961). In the present appeal, however, the Court of Appeals stated that the district court could use its equitable supervisory powers to ensure that Wakeland receive her homestead exemption and be required to satisfy the judgment in favor of the Mannicks simultaneously. 

Mannick, No. 24,078, slip op. ¶ 38. The Court indicated that the district court could accomplish this outcome “through the appointment of a limited receiver or through an offset to the waste judgment.” Id. Although the Court of Appeals acknowledged that its remedy in the present appeal “may appear similar to a garnishment, the extraordinary circumstances of this case require equitable intervention to assure that justice is done.” Id. The Court did not view this remedy as inconsistent with its earlier orders in the foreclosure action because, at that time, “the waste case had not yet been litigated.” Id.

II. Equitable Remedies Applied to a Homestead Exemption

{7} The Legislature has provided for “a homestead of thirty thousand dollars ($30,000) exempt from attachment, execution or foreclosure by a judgment creditor and from any proceeding of receivers or trustees in insolvency proceedings and from executors or administrators in probate.” NMSA 1978, § 42-10-9 (1993). In Laughlin, we addressed the question of whether “money claimed exempt from execution . . . and still in the hands of a Special Master appointed by one court is subject to garnishment to satisfy a judgment recovered in another court in this state.” 68 N.M. at 352, 362 P.2d at 508. This Court observed that “[t]he general rule applied almost universally is to the effect that absent statutes providing otherwise, property of a debtor in custodia legis is not subject to garnishment.” Id. at 353, 362 P.2d at 509.

{8} The district court’s attempted set-off and the Court of Appeals’ remedy in the present appeal, which effectively garnishes the exemption through a receivership or a set-off in order to satisfy another judgment, is in direct conflict with this authority. We do not believe that the general equitable power of the district court, upon which the Court of Appeals relied for its remedy, provides sufficient authority by itself to distinguish this case from Laughlin. “It is a basic maxim that equity is ancillary, not antagonistic, to the law. Equitable relief is not available when the grant thereof would violate the express provision of a statute.” Dept of Transp. v. Am. Ins. Co., 491 S.E.2d 328, 331 (Ga. 1997) (footnote, quotation marks, and quoted authority omitted). The general equitable power of the district court cannot overcome the public policy established by the Legislature in Section 42-10-9. See T.F. v. B.L., 813 N.E.2d 1244, 1253-54 (Mass. 2004) (“It is a maxim that equity follows the law as declared by a statute. . . . Equity is not an all-purpose judicial tool by which the ‘right thing to do’ can be fashioned into a legal obligation possessing the legitimacy of legislative enactment.”) (quotation marks and quoted authority omitted); see also Sims v. Sims, 1996-NMSC-078, ¶ 30, 122 N.M. 618, 930 P.2d 153 (“[O]nly if a statute so provides with express language or necessary implication will New Mexico courts be deprived of their inherent equitable powers.”).

{9} The purpose of a homestead exemption is to benefit the debtor.” Morgan Keegan Mortgage Co. v. Candelaria, 1998-NMCA-008, ¶ 7, 124 N.M. 405, 951 P.2d 1066. Its goal is to “prevent families from becoming destitute as the result of misfortune through common debts which generally are unforeseen.” Laughlin, 68 N.M. at 354, 362 P.2d at 509-10 (quotation marks and quoted authority omitted). The Legislature provided that the exemption is not subject to attachment, and this Court has held, in the specific context of the exemption being held by a Special Master, similar to the remedy proposed by the Court of Appeals, that an exemption is not subject to garnishment to satisfy a separate judgment. The homestead exemption law does not relieve one from his [or her] moral and legal obligation to pay what he [or she] owes. But experience has taught that in the long run obligations are more likely to be fulfilled by those whose connections with the community are stabilized by a protected interest in a relatively permanent place of abode than by those not so anchored. The result is that just claims of a particular claimant may be deferred or defeated. Nevertheless, review of our decisions . . . shows that the policy of giving the debtor “sanctuary” from just claims in his [or her] “homestead” has prevailed with significant uniformity.

Denzer v. Prendergast, 126 N.W.2d 440, 443 (Minn. 1964) (citations omitted). We believe that the Court of Appeals’ remedy, by failing to fully account for the legislative purposes of Section 42-10-9, has the potential of being overly broad and eroding the protection for homeowners established by the Legislature.

{10} Nonetheless, we understand the frustration of the Court of Appeals and the district court with respect to Wakeland’s actions. Wakeland’s conduct was unjustified and malicious. To allow her to benefit from these actions would, in our view, transform the homestead exemption from a necessary source of protection, as the Legislature intended, to an instrument for destruction and harm. This complete distortion of the Legislature’s purpose demands a judicial response. We therefore agree with the lower courts that the facts of this case warrant judicial intervention, but the source of authority for our action does not lie solely in our inherent equitable power; we believe that the exercise of our equitable power is necessary to ensure that the legislative intent of Section 42-10-9 is not frustrated. See Cox v. Waudby, 433 N.W.2d 716, 719 (Iowa 1988) (“Although exemption statutes are to be liberally construed in favor of the debtor, our construction must not extend the debtor privileges not intended by the legislature.”). We must therefore be cautious to limit our response in a manner that respects the public policy established by the Legislature. See Torres v. State, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (“[I]t is the particular

1The Mannicks did not seek review of the Court of Appeals’ analysis of equitable estoppel, and we therefore do not reach this issue.
domain of the legislature, as the voice of the people, to make public policy.”). In particular, we highlight the Court of Appeals’ undefined concern about the vulnerability of creditors in New Mexico as an insufficient basis, standing alone, upon which to exercise our equitable powers in light of express statutory language to the contrary; it is not the role of the judiciary to second guess the policy choices made by the Legislature. See Havoco of Am., Ltd. v. Hill, 790 So. 2d 1018, 1022 n.8 (Fla. 2001) (“[T]he use of the homestead exemption to shield assets from the claims of creditors is not conduct sufficient in and of itself to forfeit the exemption . . . .”). We will invoke our equitable powers when it is necessary to effectuate the intent of the Legislature, not to defeat that intent. See Kraus v. Trinity Mgmt. Servs., Inc., 999 P.2d 718, 728 n.14 (Cal. 2000) (“The court’s inherent equitable power may not be exercised in a manner inconsistent with the legislative intent underlying a statute . . . .”).

Other jurisdictions have observed that, as a general matter, constitutional and statutory homestead exemptions are not absolute. See 2 Richard R. Powell, Powell on Real Property § 1803[6], at 18-96 (rel. 74, 1996); Partridge v. Partridge, 790 So. 2d 1280, 1283 (Fla. Dist. Ct. App. 2001) (“The constitutional exemption on homestead property is not absolute. As such, the homestead can be the subject of an equitable lien and foreclosure by a forced sale in an appropriate case.”). Some courts have, for example, permitted an equitable lien on a homestead exemption for delinquent child support payments, reasoning that such debts are beyond the intended reach of the exemption. See Jensen v. Jensen (In re Application of Jensen), 414 N.W.2d 742, 745-46 (Minn. Ct. App. 1987) (“The basis of the exemption is to protect the family homestead from creditors. The spouse and any children are not outside creditors, but are the family. The exemption cannot be used to harm the ones it is designed to protect.”) (citation omitted); Gunn v. Gunn, 505 N.W.2d 772, 775 (S.D. 1993) (“A divorce court, being a court of equity, possesses the power to levy a lien upon a homestead for purposes of spousal or child support.”). Other courts have held that a homestead exemption is subject to an equitable lien “where funds obtained through fraud or egregious conduct were used to invest in, purchase, or improve the homestead.” Havoco, 790 So. 2d at 1028; accord Maki v. Chong, 75 P.3d 376, 379 & n.9 (Nev. 2003) (per curiam) (citing cases from other jurisdictions). See generally 2 Powell, supra, § 18.03[6][g], at 18-104 (rel. 81, 1997). These decisions protect the statutory or constitutional purposes of the exemption by preventing its use “as a sword to protect a thief.” Webster v. Rodrick, 394 P.2d 689, 691 (Wash. 1964).

In this case, Wakeland’s tortious and malicious conduct involved the very property for which she seeks her exemption. With knowledge of the foreclosure, Wakeland caused significant damage to the property for the sole purpose of sabotaging the Mannicks’ lawful interests. Cf. Butterworth v. Coggiano, 605 So. 2d 56, 60 n.5 (Fla. 1992) (discussing “situations where an equitable lien was necessary to secure to an owner the benefit of his or her interest in the property”). This conduct is thus distinguishable from the tortious conduct underlying the judgment lien and foreclosure and from other conduct that might support a collateral judgment, such as the one in Laughlin, for which garnishment of the exemption for the judgment creditor is explicitly precluded by statute. Unlike the underlying judgment lien, which is a debt against which the homestead exemption is designed to provide protection in order to prevent families from becoming destitute, the judgment in the waste action, somewhat like delinquent child support payments and fraud proceeds used to purchase the homestead, is not the type of debt the Legislature intended to shield. Cf. Maki, 75 P.3d at 379 (observing that “a parent who owed child support arrearages . . . was ‘not the type of debtor whom the legislature sought to protect’”) (quoting Breedlove v. Breedlove, 691 P.2d 426, 428 (Nev. 1984)). When malicious, fraudulent, or intentional tortious conduct involves the homestead itself, we believe that the Legislature did not intend for the debtor to gain from this conduct by receiving the exemption; under these limited circumstances, we believe that courts have the power to impose an equitable lien against the homestead exemption. See Havoco, 790 So. 2d at 1022 n.8 (“[T]he homestead protection should not be used to shield fraud or reprehensible conduct.”); Maki, 75 P.3d at 377 (“Although public policy favors homestead exemptions in all but a few situations, we cannot allow a debtor to be shielded by the homestead exemption to further a fraud or similar tortious conduct.”).

The Legislature did not create the homestead exemption with the intent that it be used to facilitate intentional or malicious tortious conduct. See Burrows v. Burrows, 886 P.2d 984, 991 (Okla. 1994) (“The homestead exemption is intended to be a shield, not a sword.”). Otherwise, a debtor could virtually destroy all of the subject property in excess of the value of the exemption, even beyond Wakeland’s partial destruction of the property in this case, and still receive the exemption. The Legislature could not have intended such an absurd result. Conduct of this nature indicates an intent on the part of the debtor to abandon the homestead exemption. We emphasize, however, that the conduct of the debtor must be egregious or fraudulent and must involve the homestead itself. Under the circumstances of this case, it is also critical that Wakeland’s destructive actions occurred after she knew of the foreclosure. We believe that these requirements ensure that the judicial remedy of an equitable lien is narrowly designed to protect the goals and public policy established by the Legislature in the homestead exemption statute. We conclude that Wakeland’s conduct of maliciously causing extensive damage to the homestead property and fraudulently attempting to encumber the water rights of the property with knowledge of the foreclosure meets these criteria. Though this equitable remedy is necessary in the present case, we anticipate that it will be required only in rare circumstances.

III. Conclusion

The Court of Appeals’ equitable remedy lacks sufficient limitations to protect the purposes of Section 42-10-9. However, we hold that, under the circumstances of this case, the district court has the authority to impose an equitable lien against Wakeland’s homestead exemption. The effect of the lien is that the homestead exemption is subject to enforcement of the judgment in the waste action. Cf. Maki, 75 P.3d at 378 (“Under the doctrine of equitable liens, [the debtor’s] homestead exemption does not extend to process of the court regarding enforcement of [the] default judgment.”). We remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

PATRICIO M. SERNA, Justice

WE CONCUR:

RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice

BAR BULLETIN - AUGUST 22, 2005 - VOLUME 44, NO. 33 33
OPINION
LYNN PICKARD, Judge

{1} This appeal involves two related cases: a foreclosure case, in which Paul and Kathy Mannick (the Mannicks) foreclosed on a judgment lien against Robin Wakeland’s (Wakeland) property, and a waste case, in which the Mannicks and their successor in interest, Coppler & Mannick, P.C., sought to recover damages from Wakeland for actions she took to devalue the property that was the subject of the foreclosure case. The district court denied Wakeland’s motion to enter judgment on an earlier mandate from this Court in the foreclosure case, in which she was awarded a $30,000 homestead exemption, until there had been a hearing in the pending waste case. Wakeland was found to have committed waste, and in addition to damages, the district court issued an order equitably stopping her from pursuing the homestead exemption to which she was legally entitled in the foreclosure case. We consolidate these cases on appeal to consider the issue of the district court’s equitable powers, holding that while equitable estoppel was not applicable to this case, equity demands that the court supervise the payments so that Wakeland is required to at least partially satisfy the Mannicks’ judgment against her.

{2} We also consider the other issues raised by Wakeland, which are (1) that this Court does not have the authority to consolidate the cases on appeal, (2) that the district court did not have a basis for finding that she had committed voluntary waste, (3) that the district court must have concluded that she committed prima facie tort and that the evidence did not support this conclusion, (4) that the court did not have the authority under the Uniform Fraudulent Transfer Act (the Act), NMSA 1978, §§ 56-10-14 to -25 (1989), to invalidate the Declaration of Covenants and Restrictions (the Declaration) that she filed or award damages in the form of attorney fees related to clearing title, (5) that she should win on appeal because Appellees have conceded the issue of the district court’s equitable powers, holding that while equitable estoppel was not applicable to this case, equity demands that the court supervise the payments so that Wakeland is required to at least partially satisfy the Mannicks’ judgment against her.

FACTS AND PROCEDURAL HISTORY

{3} At the outset, we note that in order to describe the background of this case, we take judicial notice, as Wakeland requests, of the records on file in this Court. See State v. Turner, 81 N.M. 571, 576, 469 P.2d 720, 725 (Ct. App. 1970). The parties also rely on these documents to lend clarity to their arguments. In addition, all of the records we notice were before the district court. See Gonzales v. Gonzales, 116 N.M. 838, 840-41, 867 P.2d 1220, 1222-23 (Ct. App. 1993) (indicating that appellate court will consider on appeal matters that were before the district court when it ruled).

{4} The Mannicks foreclosed on a house owned by Wakeland in a case that came to this Court in 2001. We refer to this case as the foreclosure case. In our 2002 opinion in the foreclosure case, we affirmed the district court’s decision in most respects, but we held that Wakeland was entitled to a $30,000 homestead exemption. Mannick v. Wakeland, No. 21,989, slip op. at 8-9 (N.M. Ct. App. Jan. 4, 2002).

{5} During the pendency of the foreclosure case, the Mannicks discovered that Wakeland had severely damaged the property that was the subject of the foreclosure and that its value had been considerably diminished. Among other things, Wakeland had covered the walls with graffiti, pounded large holes in the walls, and removed sinks, cabinets, water heaters, heaters, window cracks, lighting fixtures, and interior doors. Wakeland also filed the Declaration, which purported to be a covenant that permanently severed the domestic water rights to lend clarity to their arguments. In addition, all of the records we notice were before the district court. See Gonzales v. Gonzales, 116 N.M. 838, 840-41, 867 P.2d 1220, 1222-23 (Ct. App. 1993) (indicating that appellate court will consider on appeal matters that were before the district court when it ruled).

{6} In Wakeland’s appeal of the foreclosure judgment, the Mannicks asked this Court to “determine whether and to what extent [Wakeland] had already received her homestead exemption” through this waste. Id. slip op. at 2. We refused, holding that “[a]ny separate claims [the Mannicks] wish to bring against [Wakeland] for property damages should be brought in the district court.” Id. The Mannicks and Coppler & Mannick, P.C., sought to recover damages from Wakeland for actions she took to devalue the property that was the subject of the foreclosure case. The district court denied Wakeland’s motion to enter judgment on an earlier mandate from this Court in the foreclosure case, in which she was awarded a $30,000 homestead exemption, until there had been a hearing in the pending waste case. Wakeland was found to have committed waste, and in addition to damages, the district court issued an order equitably stopping her from pursuing the homestead exemption to which she was legally entitled in the foreclosure case. We consolidate these cases on appeal to consider the issue of the district court’s equitable powers, holding that while equitable estoppel was not applicable to this case, equity demands that the court supervise the payments so that Wakeland is required to at least partially satisfy the Mannicks’ judgment against her.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Carol Vigil, District Judge

ROBIN G. WAKELAND
Santa Fe, New Mexico
Pro Se Appellant

PAUL D. MANNICK
Santa Fe, New Mexico
for Appellees

Certiorari Granted, No. 28,913, January 4, 2005

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-098

Topic Index:
Appeal and Error: Appeal and Error, General
Judgment: Execution of Judgment
Property: Foreclosure; Fraudulent Conveyances;
Homestead Exemption; and Waste
Remedies: Equity

PAUL D. MANNICK and KATHY P. MANNICK,
Plaintiffs-Appellees,
versus
ROBIN G. WAKELAND,
Defendant-Appellant.
No. 24,078 (filed August 24, 2004)

COPPLER & MANNICK, P.C.,
PAUL D. MANNICK, and KATHY P. MANNICK
Plaintiffs-Appellees,
versus
ROBIN G. WAKELAND,
Defendant-Appellant.
No. 24,280

COPPLER & MANNICK, P.C.,
PAUL D. MANNICK, and KATHY P. MANNICK
Plaintiffs-Appellees,
versus
ROBIN G. WAKELAND,
Defendant-Appellant.
No. 24,280

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Carol Vigil, District Judge

ROBIN G. WAKELAND
Santa Fe, New Mexico
Pro Se Appellant

PAUL D. MANNICK
Santa Fe, New Mexico
for Appellees
The tort of voluntary waste and that any claim of waste must be predicated on a joint tenancy or a contractual relationship. We review these cases on appeal pursuant to Rule 12-202(F)(2) NMRA, which gives this Court the power to consolidate cases on its own motion. This power is independent of the district court’s power to consolidate cases. Contrary to Wakeland’s arguments, we do not recognize Rule 12-210(B)(3) NMRA as creating a substantive right to a panel of randomly chosen judges, and even if that right does exist generally, the consolidation of cases authorized by Rule 12-202(F)(2) would be an exception to it. Accordingly, we deny both of Wakeland’s motions to vacate the notices of submission, showing that both cases were assigned to the same panel.

Wakeland argues that this Court cannot consider facts proven in the waste case in its determination of the foreclosure case. We do not see any basis for this concern. As we discuss below, the sole issue on appeal of the foreclosure case is whether the judgment in the waste case can estop Wakeland from collecting the amount due to her. Therefore, we can use the factual record in the waste case to decide the propriety of that judgment, and we need only to consider legal principles in deciding whether the waste judgment can affect the foreclosure judgment. As is also clear from this discussion, the cases do have common issues that lend themselves to consolidation.

2. Waste

Wakeland challenges the district court’s conclusion that she committed voluntary waste, arguing that New Mexico does not recognize the tort of voluntary waste and that any claim of waste must be predicated on a joint tenancy or a contractual relationship. We review these questions of law de novo. Fernandez v. Walgreen Hastings Co., 1998-NMSC-039, ¶1, 126 N.M. 263, 968 P.2d 774.

Our starting point is the principle that New Mexico recognizes common law causes of action unless they are overruled or abrogated by statute. Gonzalez v. Whitaker, 97 N.M. 710, 714, 643 P.2d 274, 278 (Ct. App. 1982). At common law, waste had its roots in feudalism, where it “performed the important function of defining the extent of occupants’ rights of use and the consequences of misuse.” 8 David A. Thomas, Thompson on Real Property § 70.01, at 239 (Thomas ed. 1994) (hereinafter Thompson). In America, the cause of action evolved to become less harsh, requiring only single damages as opposed to higher damages and possible forfeiture. Id. While waste may be considered a tort, it is traditionally categorized as a property-based cause of action because it requires both the wrongdoer and the claimant to have a particular relationship to the property. Thompson, § 70.04, at 241-42. Wakeland does not indicate and we do not find any statute overruling or adversely affecting the availability of this cause of action today.

Through a claim of waste, “any concurrent non-possessor holders of an interest in land are enabled to prevent or restrain harm to land committed by persons in possession.” FDIC v. Mars, 821 P.2d 831, 831 (Colo. Ct. App. 1991). Waste generally has three elements:

1. There must be an act constituting waste. [This means there must be an act constituting the destruction, misuse, alteration, or neglect of premises.]
2. The act must be done by one legally in possession.
3. The act must be to the prejudice of the estate or interest therein of another.

Oquirrh Assocs. v. First Nat’l Leasing Co., 888 P.2d 659, 664 (Utah Ct. App. 1994); accord Thompson, § 70.05, at 242-43.

Wakeland is incorrect to state that New Mexico does not recognize the claim of waste. In Blake v. Hoover Motor Co., 28 N.M. 371, 373-74, 212 P. 738, 738-39 (1923), our courts followed the American trend and rejected the English common law rule that a tenant is liable to a landlord for treble damages in a waste case. Our Supreme Court felt this rule was unduly harsh and outdated, and in abolishing treble

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damages the Court noted that the English rule “has given way to and been superseded by the action for the recovery of single damages.” *Id.* at 374, 212 P. at 739. This indicates that it was not the action that was abolished, but merely the treble damages rule.

{17} Wakeland’s second legal argument appears to be based on the element of waste pertaining to the status of the claimant, who must have a vested interest in the property. *Mars*, 821 P.2d at 831. In the present case, the actions constituting waste occurred before January 10, 2001, the date by which Wakeland had to vacate the property. Before this time, Wakeland owned the property and the Mannicks had a lien on it that had been foreclosed as of December 1, 2000. We hold that this interest was sufficient to enable the Mannicks and their successor in interest, Coppler & Mannick, to maintain an action for waste. *See State ex rel. Tillman v. Dist. Ct. of Tenth Judicial Dist.*, 53 P.2d 107, 111 (Mont. 1936) (holding that the owner of a lien against a specific piece of property can maintain a waste action against the owner of that property).

{18} To the extent that Wakeland challenges the sufficiency of evidence to sustain the waste decision, we hold that this is also without merit. We review to determine whether the law was correctly applied to the facts, viewing the evidence in the light most favorable to the prevailing party and disregarding all evidence and inferences to the contrary. *Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd.*, 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991). The district court found that Wakeland had done a variety of things to intentionally and maliciously decrease the value of the property including filing the Declaration, removing most of the fixtures from the property, making large holes in the interior walls, and painting the windows. All of these facts and the damages stemming therefrom were supported by Paul Mannick’s testimony and the testimony of Louis Chavez, who had done the repairs to the premises, as well as by documentary evidence of the Declaration and the cost of repairs. We hold that this evidence was sufficient to support the conclusion that Wakeland committed voluntary waste through the intentional destruction, misuse, and alteration of the premises.

{19} To the extent that Wakeland argues that she did not waste the property to which the lien attached because the lien attached only to the land, we disagree. As a general proposition, real property includes structures and fixtures, which the undisputed evidence shows Wakeland damaged. *See State v. Ruiz*, 94 N.M. 771, 779, 617 P.2d 160, 168 (Ct. App. 1980) (indicating that lands includes buildings and fixtures and is synonymous with real property), *superceded by statute on other grounds as stated in State v. McCormack*, 101 N.M. 349, 682 P.2d 742 (Ct. App. 1984); *Cutter Flying Serv., Inc. v. Prop. Tax Dep’t*, 91 N.M. 215, 221, 572 P.2d 943, 949 (Ct. App. 1977) (opinion of Hernandez, J.) (indicating that real property includes structures, fixtures, and improvements).

3. Prima facie tort

{20} Because we hold that the district court properly found that Wakeland committed voluntary waste and because the district court judgment did not mention prima facie tort at any time, we do not agree with Wakeland that damages were awarded under a prima facie tort theory. We need not discuss Wakeland’s arguments pertaining to prima facie tort any further.

4. Declaration of Covenants and Restrictions

{21} Wakeland argues that there are no findings to support the decision to void the Declaration under the Act, Sections 56-10-14 to -25. The Act defines one type of fraudulent transfer as a transfer made by a debtor “if the debtor made the transfer or incurred the obligation . . . with actual intent to hinder, delay or defraud any creditor of the debtor.” Section 56-10-18(A).

{22} Wakeland asserts that the Declaration is not covered under the Act as a transfer and that voiding the Declaration was improper as a matter of law. As issues of statutory interpretation, we review these arguments de novo. *Morgan Keegan Mortgage Co. v. Candelaria*, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. We disagree.

{23} The Act defines “transfer” as “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance.” Section 56-10-15(L). A real property transfer is complete under the Act when “a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee.” Section 56-10-20(A)(1).

{24} The Declaration that Wakeland filed purports to restrict the “beneficial use of any water and pumping of any underground water” on the property to use by Wakeland for her lifetime and to her descendants after her death. “Water rights are real property rights that are generally tied to specific land.” *Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 115 N.M. 229, 238, 849 P.2d 372, 381 (Ct. App. 1993). The goal of the Declaration was to prevent any person, including a subsequent purchaser of the property, from using the water rights appurtenant to the property. Specifically, were this covenant to be effective, the Mannicks could not acquire an interest in the water rights superior to the interest of Wakeland and her descendants. Although flaws in the Declaration may have rendered it void on other grounds, the circumstances surrounding its execution satisfy the elements of a fraudulent conveyance, making it voidable under the Act. *See § 56-10-21* (including among the remedies of creditors avoidance of the transfer or obligation and “any other relief the circumstances may require”).

{25} Wakeland also appears to challenge the sufficiency of evidence to support the conclusion that the transfer was fraudulent under the Act. Initially, we note that “findings are sufficient where they justify the judgment, though they intermingle matters of fact and conclusions of law.” *Watson Land Co. v. Lucero*, 85 N.M. 776, 777, 517 P.2d 1302, 1303 (1974). The district court made findings that the Declaration purported to convey the water rights appurtenant to the property for Wakeland’s life and to her descendants at her death, that the water had beneficially served the property prior to the purported conveyance, and that Wakeland “had the actual intent to hinder, delay or defraud the claimants in the foreclosure lawsuit.” These findings were supported by the Declaration itself and the testimony of Paul Mannick, who explained how he discovered the Declaration and the extensive legal work that he had to undertake to clear the title because of it. Wakeland offered no alternative explanation of why she would file the Declaration apart from the intent to hinder, delay, and defraud. We hold that this evidence and these findings are adequate to support the conclusion that the Declaration was voidable under the Act.

{26} Wakeland also argues that the district court erred in awarding the attorney fees incurred to clear title of this Declaration, contending that it violates the “American rule” on attorney fees. However, the fees awarded were not fees incurred in this case, but instead were incurred in an ancillary case. *See First Nat’l Bank v. Dianne, Inc.*, 102 N.M. 548, 555, 698 P.2d 5, 12 (Ct. App. 1985).
5. Equitable Estoppel

{27} The Mannicks do not contest the determination that Wakeland is legally entitled to a homestead exemption in the foreclosure case. We have rejected Wakeland’s arguments regarding the validity of the liability and damage determinations in the waste case. There is, therefore, only one remaining issue that is determinative of both cases. If the district court properly applied the doctrine of equitable estoppel in the waste case, then the decision not to enter an amended judgment in the foreclosure case was appropriate. If the district court did not properly apply equitable estoppel, then the equitable estoppel portion of the waste case and the decision in the foreclosure case must be reversed. “The question of whether, on a particular set of facts, the district court is permitted to exercise its equitable powers is a question of law, while the issue of how the district court uses its equitable powers to provide an appropriate remedy is reviewed only for abuse of discretion.” United Properties Ltd. Co. v. Walgreen Props., Inc., 2003-NMCA-140, ¶ 7, 134 N.M. 725, 82 P.3d 535. We hold that equitable estoppel was improperly applied in this case.

{28} We acknowledge that there is broad language in the authorities describing equitable estoppel as preventing “a party from asserting rights when his own conduct renders that assertion contrary to equity and good conscience.” 28 Am. Jur. 2d Estoppel and Waiver § 28, at 454-55 (2000). However, the doctrine of equitable estoppel is considerably more limited; it is aimed at preventing a party from benefitting from deception or misleading conduct. “[A] party who knows or should know the truth is absolutely precluded . . . from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another . . . to believe and act upon them thereby . . . .” Id. at 455. The conduct of the party to be estopped “must be something which amounts either to a representation or a concealment of the existence of facts; and these facts must be material to the rights or interests of the party affected by the representation or concealment.” 3 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 808, at 206-07 (1941).

{29} The notion of preventing deceit and deceitful conduct is the basis for New Mexico’s formulation of the equitable estoppel doctrine. In order to apply equitable estoppel, the district court must find certain factual predicates with regard to the party against which estoppel is asserted, who in this case is Mannick. These requirements are:

1. (c)onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts.

Mem’l Med. Ctr., Inc. v. Tatsch Constr., Inc., 2000-NMSC-030, ¶ 9, 129 N.M. 677, 12 P.3d 431 (quoting Lopez v. State, 1996-NMSC-071, ¶ 18, 122 N.M. 611, 930 P.2d 146). The district court must also establish certain facts with respect to the party seeking equitable relief, which in this case is the Mannicks and Coppler & Mannick. These facts are:

1. [c]lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Id.

{30} In the present case, the district court clearly disapproved of Wakeland’s egregious conduct in destroying the property and attempting to use the legal system to encumber the title, and we share this sentiment. However, we are unable to discern any deception or deceptive conduct on which the Mannicks or Coppler & Mannick relied to their detriment that pertains to the homestead exemption, nor do we find any reference to any such deceptive conduct in the district court’s findings and conclusions.

{31} The parties do not indicate and the record is devoid of any representations in which Wakeland asserted that the Mannicks would be able to fully recover the amount that Wakeland owed them by foreclosing on the home. There is no indication that Wakeland ever represented or asserted the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another . . . to believe and act upon them thereby . . . .” Id. at 455. The conduct of the party to be estopped “must be something which amounts either to a representation or a concealment of the existence of facts; and these facts must be material to the rights or interests of the party affected by the representation or concealment.” 3 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 808, at 206-07 (1941).

6. Equitable Power of the Courts

{34} Despite our holding that equitable estoppel was improper in this case, we are swayed by the district court’s sense that it would be inherently unjust to allow Wakeland to collect $30,000 from the Mannicks, while the Mannicks and Coppler & Mannick would have to endure another lengthy round of litigation in order to collect their $44,100 judgment from Wakeland. In the past, we have invoked the maxims of equity that enable and compel a court to do justice.

Equity is reluctant to permit a wrong to be suffered without remedy. It seeks to do justice and is not bound by strict common law rules or the absence of precedents. It looks to the substance rather than the form. It will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality. And once rightfully possessed of a
We therefore hold that no issues have been conceded. The case is reversed only with respect to the application of equitable estoppel. The case is remanded to the district court to enter a judgment in accordance with the same favorable view of the proceedings below.

As we did in Ontiveros Insulation Co. v. Sanchez, 2000-NMCA-051, ¶ 13, 129 N.M. 200, 3 P.3d 695 (internal quotations marks and citations omitted). As we did in Ontiveros, id., here the facts of the present case require us to examine the equities more closely.

This case began with the Mannicks obtaining a judgment against Wakeland for $87,895.08, which began accruing interest in October 1995. Attempting to collect that judgment, the Mannicks obtained a lien against Wakeland’s property and attempted to foreclose on it in a legal proceeding that began in 1996 and is still proceeding, which appears to have cost over $45,000 in legal fees. Even after receiving the proceeds from the foreclosure, there was still a significant deficiency between what the Mannicks had received and what Wakeland owed them. After the foreclosure, the Mannicks had to sell the property to Coppler & Mannick in order to be able to afford to do the necessary repairs to make the house habitable after Wakeland engaged in her destructive acts. Then Paul Mannick discovered that Wakeland had filed the Declaration, requiring him to undertake more legal work to undo that impermissible covenant, in addition to paying for repairs to the property at a cost of $13,500. As the Mannicks argue, and Wakeland does not refute, there was no motivation for Wakeland to damage the property and to attempt to encumber the property except to injure the Mannicks and Coppler & Mannick. Meanwhile, the equities weighing in on Wakeland’s side were minimal. The record does not indicate that she was harmed or mistreated by the Mannicks in any way. It is not difficult to perceive why the district court felt that Wakeland’s actions were malicious and unjust and to see why the district court was concerned about forcing the Mannicks to pay Wakeland while Wakeland continued to owe the Mannicks and Coppler & Mannick so much herself.

The well-established principle that equity must act in conformity with the law limits our ability to correct the injustice in this case. Springer Group, Inc. v. Wittelsohn, 1999-NMCA-120, ¶ 20, 128 N.M. 36, 988 P.2d 1260. When we awarded Wakeland the homestead exemption and held that it could not be the subject of an off-set in her earlier appeal, we noted that money claimed by a debtor as an exemption is generally not available for other purposes like garnishment or attachment. Section 42-10-9; see Laughlin v. Lumbert, 68 N.M. 351, 354, 362 P.2d 507, 509 (1961). Under New Mexico law, it appears that once an amount of money has been set aside as a homestead exemption in one case, it is not reachable for garnishment even as part of the execution of a judgment in a separate case. See id. at 354-55, 362 P.2d 510.

Other states limit the time that money from a homestead exemption can be withheld from creditors based on a fixed period or on the debtor’s intent to purchase a new homestead. See, e.g., Ortale v. Mulhern, 130 Cal. Rptr. 277, 279 (Ct. App. 1976) (recognizing California’s fixed six-month period during which homestead exemption monies are exempt from creditors’ claims); Harrell v. Bank of Wilson, 445 P.2d 266, 270 (Okla. 1968) (recognizing Oklahoma’s homestead exemption law requiring a good faith intent to purchase a new home within a reasonable time). However, New Mexico law does not contain any such limits, which, combined with the absence of any need to demonstrate that the person claiming the exemption is insolvent or otherwise destitute, makes our creditors especially vulnerable to the debtor who uses the homestead exemption as a perpetual shield of assets. In a case like this, where the debtor has also maliciously destroyed the property and continues to have judgments entered against her in favor of the creditor, the potential for misuse of the exemption is especially stark.

Although it cannot prevent Wakeland from collecting her sum, the district court may use its equitable powers to supervise the payments so that Wakeland receives her money and is required to pay the Mannicks their money contemporaneously. See Segal v. Goodman, 115 N.M. 349, 355-56, 851 P.2d 471, 477-78 (1993) (“[C]ourts have a general supervising control over the processes of execution, and for the purpose of preventing injustice, an execution is within the inherent equitable control of the court.” (internal quotation marks and citation omitted)). The district court may choose to do this through the appointment of a limited receiver or through an offset to the waste judgment. This would not be contrary to the Mannicks’ earlier orders, grounded as they were on the fact that the waste case had not yet been litigated. Thus, the Mannicks would be assured of at least collecting $30,000 of their judgment in a timely fashion, with other legal means available to collect the deficiency. See NMSA 1978, § 39-1-6 (1983) (judgment liens); NMSA 1978, § 39-4-3 (1901) (execution on chattel and garnishment). While this may appear similar to a garnishment, the extraordinary circumstances of this case require equitable intervention to assure that justice is done.

7. Appellee Procedure

Citing Hall v. Hall, 114 N.M. 378, 838 P.2d 995 (Ct. App. 1992), Wakeland argues at many places in her briefs that Appellees have conceded one issue or another by failing to brief it or by failing to cite authorities. The rule on which Wakeland relies, however, applies to appellants and not appellees. The rule is an outgrowth of the procedural posture of cases on appeal in which every reasonable presumption is indulged in favor of the proceedings below, and the burden is upon the appellant to clearly show error. See Clayton v. Trotter, 110 N.M. 369, 371, 796 P.2d 262, 264 (Ct. App. 1990). In contrast, an appellee does not even have to file a brief, and the appellate court will review the case in accordance with the same favorable view of the proceedings below. Compare Rule 12-312(A) NMRA (stating that appeal may be dismissed for an appellant’s failure to file a brief), with Rule 12-312(B) (stating that the case will be submitted on an appellant’s brief when an appellee fails to file a brief). We therefore hold that no issues have been conceded.

8. Costs on Appeal

Rule 12-403(A) NMRA allows prevailing parties to recover their costs on appeal unless the court determines otherwise. In this appeal, there are portions of each judgment that are affirmed and portions that are reversed, such that there is no clear “prevailing party.” In these situations, we have the authority to mandate that each party should bear its own costs on appeal. N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 33, 127 N.M. 654, 986 P.2d 450.

Wakeland also contends that costs we ordered in her favor from the prior appeal have not been paid. The $654.04 we previously ordered to be paid should be added to the $30,000 homestead exemption to which Wakeland is entitled.

CONCLUSION

The judgment of the district court in Coppler & Mannick, P.C. v. Wakeland, No. 24,280, is affirmed as to liability and damages and is reversed only with respect to the application of equitable estoppel. The case is remanded to the district court to enter a judgment in case
similarly uncertain future for parties who need to rely on the exemption statute in cases that will undoubtedly follow this one.

in the name of equity to the certainty of legislative enactments, and now do the same sort of sidestepping for the creditor. This creates a

expanded the homestead exemption, but did so stating that the exemption should be liberally construed in favor of the

designed to protect both debtors and creditors in mortgage foreclosure proceedings."

underlying exemptions. I share the chagrin that Judge Donnelly expressed in his dissent in

pendulum swings, carving an equitable exception to the exemption in favor of the creditor. This is contrary to our case law and the policy

not enough like a garnishment of the exemption to run afoul of existing law. In

We cannot adopt a remedy that will encourage arbitrary decisions down the road by trial courts that are allowed to use an idiosyncratic

measure like “the law is unfair.” Following statutes, as we have pointed out before, may beget an unfair result to parties on e ither side

of the case.

legislative intent is determined primarily by the language of the statute itself; words are given their ordinary meaning unless a different intent is clearly indicated. Further, courts must take the statute as they find it and construe it according to the plain meaning of the language employed.” Raybalid v. Segura, 107 N.M. 660, 666, 763 P.2d 369, 375 (Ct. App.1988) (internal citations omitted).

The majority concedes that a homestead exemption is not subject to either set-off or garnishment—owing to case law and our previous ruling between these parties. The opinion looks to California and Oklahoma to find limitations on the exemption but also acknowledges that while those two states may have done something, New Mexico’s legislature is silent on the subject. Our limitations on the exemption, contained in NMSA 1978, § 42-10-11 (1971), do not help the creditors here, but are entitled to the presumption that they are what the legislature intended to be the exceptions to the exemption in our state. See Chavez v. Am. Life & Cas. Ins. Co., 117 N.M. 393, 396, 872 P.2d 366, 369 (1994) (“The legislature is presumed to know the law, including the laws of statutory construction, when it passes legisla-

tion.”). We can go no further.

The majority pays lip service to Laughlin, 68 N.M. at 354, 362 P.2d at 509, but fails to distinguish why its proposed remedy—appointing a special master to take each dollar that Wakeland receives from her exemption out of Wakeland’s hand, and give that dollar to Plaintiffs—is not enough like a garnishment of the exemption to run afoul of existing law. In Morgan Keegan Mortgage Co., 1998-NMCA-008, ¶ 8, we expanded the homestead exemption, but did so stating that the exemption should be liberally construed in favor of the debtor. Now, the pendulum swings, carving an equitable exception to the exemption in favor of the creditor. This is contrary to our case law and the policy underlying exemptions. I share the charign that Judge Donnelly expressed in his dissent in Morgan Keegan Mortgage Co. when he noted that the majority there had created a remedy not contained in the statute, and “permit[t]ing the Debtor to side-step legislative procedures designed to protect both debtors and creditors in mortgage foreclosure proceedings.” Id. ¶ 20. Seven years hence, we again do damage in the name of equity to the certainty of legislative enactments, and now do the same sort of sidestepping for the creditor. This creates a similarly uncertain future for parties who need to rely on the exemption statute in cases that will undoubtedly follow this one.

For the results of our courts to be predictable, when we find a clear statute, we must follow the mandate the legislature gives us. We cannot adopt a remedy that will encourage arbitrary decisions down the road by trial courts that are allowed to use an idiosyncratic measure like “the law is unfair.” Following statutes, as we have pointed out before, may beget an unfair result to parties on either side of the case. See Williams v. Ashbaugh, 120 N.M. 731, 734, 906 P.2d 263, 266 (Ct. App. 1986) (indicating that if in that case assuming an unfairness existed in the statutory provisions, it “is a situation which calls for legislative therapy and not judicial therapy”). It is a task for legislative action to modify the homestead exemption in our state in a way that can be universally applied. We do not have to create a new remedy to handle this case. Another universally applied statute allows the creditor to keep its judgment alive for fourteen years to exact payment. NMSA 1978, § 37-1-2 (1983).

There well may come a case where the creditor’s actions in foreclosing on a judgment lien are as reprehensible as the debtor’s in frustrating them. In that instance, the protection of assets afforded debtors by the homestead exemption may well need to apply in full force in a case not very different from this one. The statute itself brooks no speculation about personality or motives of the parties. It only affords a debtor a homestead exemption. Judicially fashioned remedies in the face of a definite statute to abrogate that statute serve no goal of promoting predictable outcomes.

Therefore, though agreeing fully with the majority in this case that Wakeland’s actions were egregious and eminently worthy of the judgment against her for waste of the asset, I would determine that she is entitled to her homestead exemption without its being trammeled by our misguided  giting of the statute’s provisions. The Mannicks and their successors should be (albeit unfortunately) compelled to honor the exemption.

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**In loving memory of Attorney Ron M. Valencia from his wife, Rosa Q. Valencia**

Ron died from complications of Huntington’s Disease on June 22, 2005 after a long battle with the disease. During his legal career, Ron represented the poor and for many years was an attorney with Northern New Mexico Legal Services. He was also a member of the Board of Directors for a local theater group, “La Compania,” and a member of the New Mexico Huntington's Disease Support Group. Ron had a great sense of justice, a wonderful sense of humor, a contagious laughter and a love for adventure. More information about Huntington's Disease can be found at HDSA.org. Contributions towards medical research for a cure can be made to the Huntington’s Disease Society of America, 505 Eighth Avenue, Suite 902, New York, NY 10018; 1-800-345-HDSA (4372).

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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. Ritzma, General Counsel. Applications will be accepted until August 31, 2005. DOL Job Order #69600.

Associate to Senior Trial Attorney
3rd Judicial District
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. Resumes can be faxed to Kelly Kuenstler at (505) 524-6379, or mailed to 201 W. Picacho, Suite B, Las Cruces, NM 88005. Deadline for application is August 22, 2005.

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.

Senior Trial Attorney
The Eighth Judicial District Attorney’s Office is accepting applications for the position of Senior Trial Attorney in the Taos Office. This position requires a full felony caseload and at times some misdemeanor prosecutions. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Daniel L. Romero, Chief Deputy District Attorney, 920 Salazar Road, Suite A, Taos, New Mexico 87571. Deadline for submission of resumes: Immediately until filled.

Note
Submission Deadlines
All advertising must be submitted by e-mail or fax by 5 p.m. Wednesday, two weeks prior to publication (Bulletin publishes every Monday). Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by the editor and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The editor reserves the right to review and edit classified ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, two weeks prior to publication. For more advertising information, contact: Marcia C. Ulibarri at 505.797.6058 or e-mail ad to ads@nmbar.org or fax 505.797.6075.
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 theurton Transboundary Resources Center. Please see our website at lawschool.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.

Taxation and Revenue Department
Motor Vehicle Division
Refer to Job Order # NM 68983
The New Mexico Taxation and Revenue Department (TRD), Motor Vehicle Division, seeks a Lawyer – A to assist the Motor Vehicle Division in rewriting and maintaining the Motor Vehicle Code. The Motor Vehicle Division Deputy Director for Division Operations will supervise the successful candidate. This is a Term position, through June 30, 2006, Pay Band 80, hourly salary range $20,704 to $36,806. Some travel is required. This classified position in state service requires the following qualifications: graduation from an accredited law school; licensure in good standing before the Supreme Court of New Mexico and experience in the practice of law totaling three (3) years. As a Taxation and Revenue Department employee, the successful applicant must be current in meeting all tax obligations and motor vehicle licensure requirement. Applicants must apply through the New Mexico Department of Labor. (Applicants can register on-line at www.dol.state.nm.us). Please send duplicate résumé, application w/transcripts, and clear copy of the New Mexico State Bar card to Keith M. Perry, Deputy Director, NM MVD, P.O. Box 1028, Santa Fe, NM 87504-1028. Requested material must be received by close of business August 29, 2005.

Associate
Walsh, Anderson, Brown, Schulze & Aldridge, P.C., a Texas based law firm is seeking an associate 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 encouraged 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 plaintiffs sole practitioner seeks an experienced permanent half-time legal secretary/assistant/paralegal. Litigation experience a must. Confidentiality will be maintained. Please send resume to PO Box 92860, ABQ., NM 87199. ATTN: Box B.

Legal Secretaries -
Join The Team!
OfficeTeam, the leader in specialized administrative staffing is looking for qualified legal secretaries in the Albuquerque and Santa Fe areas. The ideal candidates must be self-starter with 1+ years legal experience. Experience putting together pleadings and litigations, and proficiency in Word or WordPerfect are required. OFFICETEAM, Specialized Administrative Staffing. Call Today. EOE. 505-888-4002; 6501 Americas Pkwy NE, Albuquerque, NM 87110. www.officeteam.com.

Paralegal/Legal Assistant
Albuquerque law firm seeks paralegal/legal assistant for established plaintiff’s lawyer. Must be experienced in obtaining, organizing, and summarizing 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.

Spanish Speaking Paralegal
Spanish speaking paralegal needed for small divorce/crim. def. practice. Experience in divorce and crim. preferred but not req. Fax resume to 244-8731.

Paralegal
Paralegal, experienced with PROLAW litigation software proficiency - sought by small Santa Fe civil law firm (5 attorneys). Competitive salary and excellent benefits. Send resume to Olga Lujan, P.O. Drawer 26110, Santa Fe, NM 87502-0110.


**CONSULTING**

**Forensic Psychiatrist**
Yale trained forensic psychiatrist, board certified. Available for consultation, psychiatric evaluations, expert witness testimony and record review. Experienced in both criminal and civil matters. Call Dr. Kelly at (505) 463-1228.

**OFFICE SPACE**

**Three Offices Available**
Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

**Law Office for Rent**
One small, inside law office for rent, lower level, $325. Office sharing negotiable with three other attorneys at 8010 Menaul NE, Albuquerque. Contact: Hal Simmons, 299-8999.

**Downtown**
Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $350 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145.

**Uptown Square Office Building**
Prestigious Uptown location, high visibility, convenient access to I-40, Bank of America, companion restaurants, shopping, two-story atrium, extensive landscaping, ample parking, full-service lease. Two different suite sizes, 3747SF and 3787SF. One suite divisible into ~ 2500SF and 1247SF spaces. Buildouts include reception counter/desk and separate kitchen area.6-7 windowed offices. Competitive Rates. Available Now! Call Ron Nelson or John Whisenant 883-9662.

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One, two or three attractive offices available in the downtown historic Hudson House. Rent includes telephone, equipment, access to fax, copier, conference rooms, parking, library and reference materials. Referrals and co-counsel opportunities. For more info., call the offices of Leonard DeLayo at 243-3300, ask for Jodi.

**Office Sharing**
Share offices in beautiful building at 1201 Lomas NW. Ample parking, walk to courthouses. Large office, paralegal office, conference room and library (all furnished), experienced legal secretary, kitchen/file/workroom, storage, copier, fax, DSL internet access, networked computers, phone equipment, security system, other amenities. Call Robert Gorman 243-5442.

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**Office Space Available**

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Close to Federal, State and Metropolitan courts. Includes separate secretarial space, phones and service, janitorial service, receptionist, conference room, etc. Please contact Christina Prudencio (505) 224-2883.

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

**Beautiful Office Space**
Beautiful office space, great location, downtown, 3 blocks from courthouses, professional atmosphere with available secretarial space, conference room, off-street parking, community printer, DSL and phone hookups. Northeast corner of Mountain and 5th Street. Call 247-3335.

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For tape/CD transcription, call Legal Beagle @ 883-1960.

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