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Special Insert:
CLE AT-A-GLANCE
Dear Fellow Members of the Bar:

Extended oral argument was held before the New Mexico Supreme Court on August 24, 2005 concerning my 90 day suspension recommended by the Disciplinary Board. As pointed out in previous reports, the Hearing Committee Chair denied the ability to propound interrogatories, requests to produce or requests for admissions. My attorneys consistently claimed that this unprecedented denial of basic due process required a full dismissal of the case.

On September 23, 2005 the Supreme Court issued its Order eliminating entirely the 90 day suspension. This is the good news. You will read the public reprimand in the Bulletin. The Order requires the payment of costs and sitting for the national ethics examination. It is important to note that disciplinary counsel requested a one year suspension to the Hearing Committee for transgressions for which the Court determined that the appropriate sanction was a reprimand. This is further proof that discipline counsel has lost their sense of perspective concerning ethical violations and suitable sanctions. This is a continuing threat to the fabric of our legal system. New Mexico attorneys should not have to second-guess legal representation of clients in fear of what discipline counsel may do when a competitor attorney or adverse lay party complains about something that is no more than a legal judgment call or trial/negotiation tactics.

The bad news is that the Supreme Court Order was silent on the due process discovery violations. This means that onus to change the Disciplinary System is on us to assure that essential discovery rights are guaranteed to all parties in disciplinary proceedings. This can be done with a simple change of Rule 17-311 to state that the rules of discovery contained in Article 5 of the Rules of Civil Procedure - Rules 1-026 to Rule 1-037 - are applicable in discipline matters and can be used by the parties without a "written showing of need". The rules also need to be changed to have judges hear these cases and allow a direct appeal from such judicial determination to the Supreme Court.

Thanks for your continuing help and encouragement. Keep those suggestions coming in. Our next report will outline the steps that we can do together to bring our attorney disciplinary system into full constitutional compliance resulting in the improvement of the quality of legal services delivered in New Mexico.

With Best Regards,

The Stein Law Firm
A Professional Law Corporation
City Place ~ Suite 2200 ~ 2155 Louisiana Blvd. NE
Albuquerque, NM 87110
(505) 889-0100 or 800-889-4433

This ad is paid for by the Stein Law Firm to inform the Bar.
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State Bar Center, Albuquerque
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Join the Laflin Law Firm as they present this popular annual update on current tax issues and advanced planning techniques. Extensive tax materials are provided to include over 400 pages of text with the overall program geared primarily for the attorney who is experienced with estate planning and taxation. ☐ $219

The Impact of Domestic Violence on Children and the Growing Incidence of Juvenile Domestic Violence
Tuesday, November 1, 2005 • 9 a.m.-3:30 p.m.
6.2 General and 1.0 Ethics CLE Credits
In this full-day seminar, two troubling topics of domestic violence are covered: the effect of domestic violence on children who witness it and the growing incidence of juvenile domestic violence in which children are the offender. Featured are attorney Sarah Buel who shares her twenty-eight years of experience in working with battered women, abused children and juveniles. She has written extensively on family violence issues and remains committed to improving the court and community response to abuse victims. Dr. Victor LaCerva, current Medical Director of the Family Health Bureau, NM Department of Health will also be featured in this program. He was the co-creator of the award-winning video Stolen Childhood, exploring the adverse impact on children of exposure to domestic violence. He has spent the past fourteen years actively working in violence prevention. ☐ $189

Workplace Dynamics and the Practice of Law
Tuesday, November 1, 2005 • 9 a.m.-3 p.m.
3.2 General, 2.0 Professionalism & 1.2 Ethics CLE Credits
This full-day seminar begins by examining ways in which attendees can potentially enrich their practice by focusing upon the law practice management principles of two successful solo practitioners. Also offered are a panel discussion on discrimination and the law as moderated by New Mexico Supreme Court Justice Pamela B. Minzner, and sessions by featured speaker Vince M. Cramer, author of Cramer’s Cube and the founder of Winchester Consulting Group. Cramer discusses how “being diverse” versus “practicing diversity” potentially impacts legal organizations (professionalism) and the potential ramifications of insights over ideas in the practice of law (ethics). ☐ $179

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*Professionalism Tip*

With respect to parties, lawyers, jurors and witnesses:

I will be considerate of the time constraints and pressures imposed on lawyers by the demands of trial practice.

Meetings

October

17 Public Legal Education Committee, noon, State Bar Center

18 Children’s Law Section Board of Directors, noon, Juvenile Justice Center

19 Membership Services Committee, noon, via teleconference

19 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court

19 Board of Editors, noon, State Bar Center

21 Commercial Litigation Section Board of Directors, 3 p.m., State Bar Center

28 Board of Bar Commissioners, TBA, State Bar Center

State Bar Workshops

October

19 Nursing Home Workshop

6 p.m., State Bar Center

20 Estate Planning Workshop

5:30 p.m., Branigan Library, Las Cruces

26 Consumer Debt/Bankruptcy Workshop

6 p.m., State Bar Center

26 Family Law Workshop

5:30 p.m., Branigan Library, Las Cruces

27 Consumer Debt/Bankruptcy Workshop

5:30 p.m., Branigan Library, Las Cruces

*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.
Court News
NM Supreme Court
Announcement of Committee Vacancies

The New Mexico Supreme Court announces the following committee vacancies. Submit letters of interest to Kathleen Jo Gibson, PO Box 848, Santa Fe, New Mexico 87504-0848 by Oct. 28.

Courts of Limited Jurisdiction Rules
1 lawyer vacancy
Uniform Jury Instructions-Civil
1 lawyer vacancy
Uniform Jury Instructions - Criminal
1 vacancy
Rules of Criminal Procedure for District Courts
3 lawyer vacancies
Children’s Court Rules
2 lawyer vacancies
Board of Bar Examiners
3 lawyer vacancies
Disciplinary Board
3 lawyer vacancies
Minimum Continuing Legal Education
1 lawyer vacancy
Board of Legal Specialization
1 lawyer vacancy
Code of Professional Conduct
3 lawyer vacancies
Code of Judicial Conduct
2 lawyer vacancies
Judicial Continuing Legal Education Committee
1 lawyer vacancy
Judicial Education and Training Advisory Committee
2 lawyer vacancies
1 Magistrate Court judge vacancy
1 Metro Court judge vacancy

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 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 conducted 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.

Michael E. Calligan

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., Oct. 28 at the State Bar Center in Albuquerque. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

First Judicial District Court

Destruction of Exhibits: Criminal, Civil, Children’s Court, Domestic and Probate Cases

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the First Judicial District Court will destroy exhibits filed with the court in criminal, civil, children’s court, domestic, incompetency/mental health, adoption and probate cases for years 1972 to 1986, 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)476-0196, from 8:00 am. to 5:00 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Nov. 2 by Order of the Court.

Family Law Brownbag

The First Judicial Court is hosting a special family law brownbag meeting at noon, Oct. 25, in the Grand Jury Room, second floor of the Steve Herrera Judicial Complex in Santa Fe. The purpose of this meeting is to discuss the Pilot Project Alimony Guidelines, commentary, worksheet and survey and the final report of the 1994 Child Support Guidelines Review Commission. Recommendations regarding the guidelines are going to be made to the Supreme Court at the end of the year, and this is a great opportunity for attorneys to give input. For more information, contact Elle Simons, (505) 982-3610 or esimons@rubinkatzlaw.com.

Nominating Commission

Fifteen applications have been received in the Judicial Selection Office as of 5:00 p.m., Sept. 12, for the judicial vacancy in the First Judicial District, due to the retirement of the Honorable Carol Vigil.

The First Judicial Court will hold its first Nominating Commission meeting at 9 a.m., Oct. 19, at the First Judicial District Courthouse in Santa Fe to evaluate the applicants for the judicial position. The Commission meeting is open to the public.

The names of the applicants in alphabetical order are:

Bryan P. Biedscheid
Margaret Kegel
Albert J. Lama
Dennis Manzanares
Andrew J. O’Connor
Raymond Z. Ortiz  
Linda Martinez-Palmer  
Angela Rosalina Pacheco  
Yvonne K. Quintana  
Sheri A. Raphaelson  
Patrick T. Simpson  
Sarah M. Singleton  
David K. Thomson  
Frank D. Weissbarth  
Ann Yalman

Second Judicial District Court
Notice To Attorneys

Effective Oct. 3 all cases currently assigned to Judge Robert L. Thompson, Division XVI, will be transferred to Judge Richard J. Knowles. Judge Knowles will continue to preside over criminal cases currently assigned to him until the vacant criminal judgeship is filled; therefore, most non-emergency settings will not be heard until the beginning of December 2005. Emergency matters may be heard by any judge in the Civil Division.

For information or questions regarding settings please call Brenda Archuleta, (505) 841-7562.

Parties who have not previously exercised their right to challenge or excuse will have ten (10) days from Oct. 3 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

Twelfth Judicial District
Destruction of Tapes: Civil

Pursuant to the Judicial Records Retention and Disposition Schedules, the Twelfth Judicial District Court (Otero County) will destroy tapes filed with the court in the civil cases for years 1991 to 1995, 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 Judicial Manager Karen Duprey, (505) 437-7310, ext. 122, from 8 a.m. to noon and from 1 p.m. to 5 p.m. Monday through Friday. Aforementioned tapes will be destroyed Oct. 28.

Thirteenth Judicial District
Rule 1-099 NMRA Certificates

Effective immediately, the Thirteenth Judicial District is requiring that any party filing a pleading, motion or other paper in a domestic relations case or a post-judgment civil case, which they believe is exempt from a filing fee, pursuant to 1-099(B) NMRA, must complete a Rule 1-099 NMRA Certificate. Copies of the Certificate form are available on the internet at www.nmcourts.com, in the clerk’s office for each county, or can be requested via e-mail at berdcah@nmcourts.com. All cases now pending or hereinafter filed are subject to this requirement.

Bernalillo County Metropolitan Court
Judges Nominating Commission

Ten applications have been received in the Judicial Selection Office as of 5 p.m., Oct. 10, for the judicial vacancy in the Bernalillo County Metropolitan Court due to the resignation of Judge Charles Barnhart.

The Bernalillo County Metro Court Judges Nominating Commission will meet at 9 a.m., Oct. 24, at the Metropolitan Courthouse, northwest corner of Lomas and Fourth Street, Albuquerque, to evaluate the applicants for the judicial position. The meeting is open to the public. Those wishing to make public comment to the Commission should present by the start of the meeting.

The names of the applicants in alphabetical order are:

Julie N. Altwies  
Rachel W. Al-Yasi  
Edward L. Benavidez  
Sandra K. W. Engel  
Christopher M. Harrington  
Dennica L. Padilla  
Linda S. Rogers  
Warren A. Sigal  
Denise Soto-Hall  
Chris Sturgess

Swearing in Ceremony

Bernalillo County Metropolitan Court Judge Clyde DeMersseman will officially take the oath of office in the rotunda of the Bernalillo County Metropolitan Courthouse at 5:15 p.m., Oct. 25. Judge DeMersseman was appointed in August by Governor Bill Richardson to fill the position in the newly-created Civil Division XVII. Judge DeMersseman will be sworn in by Judge Roderick T. Kennedy, New Mexico Court Appeals. His keynote speaker will be his father-in-law, Turner Branch, Esq., of the Branch Law Firm. A reception will follow at La Posada at Central and 2nd. Please RSVP Sue Rhodes, (505) 841-9802.

Judge DeMersseman is one of two new judges appointed to the Metro Court bench. Judge Rosie Allred was invested Oct. 11.

U.S. District Court for the District of New Mexico
Proposed Amendments to Local Civil Rules

Proposed amendments to the Local Civil Rules of the United States District Court for the District of New Mexico are being considered. The proposed amendments are to D.N.M.L.R-Civ 83.1(a) Prohibition Against Cameras, Transmitters, Receivers, and Recording Equipment; D.N.M.L.R-Civ 83.2(f) Committee on Admissions and Grievances; and D.N.M.L.R-Civ 83.10(c) Procedure for Readmission. A “red lined” version (with proposed additions underlined and proposed deletions stricken out) is posted on the court’s Web site at www.nmcourts.fed.us. Members of the Bar may submit comments by e-mail to lrciv@nmcourts.fed.us or by mail to U.S. District Court, Clerk’s Office, Suite 270, 333 Lomas Blvd. NW, Albuquerque, NM 87102, Attn: LRCiv, no later than Oct. 28.

U.S. Bankruptcy Court
Chapter 13 Brownbag on BAPCPA

The office of the chapter 13 trustee will hold weekly brownbag sessions covering the NACTT’s consumer bankruptcy practice under BAPCPA. Attendees should bring lunch and a copy of the Bankruptcy Code with BAPCPA changes highlighted. Weekly sessions will be held on Mondays at noon on the tenth floor training room, U.S. Bankruptcy Court, Albuquerque. Presenters on the DVD include Judge Keith Lundin, Judge Ray Mullins, Judge William Brown, Judge Tom Waldron, Chapter 13 Trustee Henry Hildebrand and Attorney Richard Kilpatrick. Topics covered will include: notice—getting information where it goes; case filing issues—‘getting in;’ automatic stay/refiling issues; attorney responsibilities—DRAs; chapter 13—the “new” chapter 13; exemptions; court and clerk responsibilities; discharge and dischargeability; and reaffirmation. Call Kelley Skehen, (505) 243-1335 ext. 3013, for additional information.
STATE BAR NEWS
2005 Section Election

The report of the section's nominating committee consisting of the names and biographies of candidates selected by the section nominating committees was published on the State Bar Web site (www.nmbar.org) and in the Oct. 10th issue of the Bar Bulletin. The report continues below.

In addition to those candidates, nominations may also be made in the form of a petition signed by at least 10 attorneys who have been members of the section for 30 days or more. (See nomination petition form on page 13. A nomination petition form is also available on the State Bar Web site.) The petition must identify the position and term sought, and state that the member has agreed to the nomination. Nomination petitions for this year's section elections must be received at the State Bar of New Mexico's office no later than 5 p.m., Oct. 31.

If additional nominations are made, a notice of the contested section election will be published in the Bar Bulletin and on the section's Web page; ballots will be mailed to all members of the section no later than Nov. 10.

If no additional nominations are made, the nominees identified by the nominating committee are elected by acclamation and take office on Jan. 1, 2006.

Business Law Section Nominating Committee Report:

Position 1: Three-Year Term
Sara Berger (biography unavailable)

Position 2: Two-Year Term
James Bozarth (biography unavailable)

Position 3: Three-Year Term
Dana Kyle received her B.A. from Wichita State University in 1992, cum laude, and a J.D. from the University of Missouri-Kansas City in 1995. She was admitted to practice in New Mexico in 1995 and has since worked in the Las Cruces office of Miller Stratvert PA where she is currently a director. Her practice focuses on estate and business planning and real property and land-use law. She was admitted to practice in Texas in 2005. Kyle is the vice president and board member for the Southern New Mexico Estate Planning Council and a Member of the National Academy of Elder Law Attorneys, Inc.

Commercial Litigation Section Nominating Committee Report:

Position 1: One-Year Term
Gary J. Van Luchene (biography unavailable)

Position 2: Two-Year Term
Stuart R. Butzier (biography unavailable)

Position 3: Two-Year Term
Victor P. Montoya received his bachelor's degree from the University of Texas, J.D. from the University of California, Davis School of Law (1998), and a mediator certification from the UNM School of Law in 1999. He has served as a shareholder at Sutin, Thayer & Browne, PC since 2001 and was formerly an associate with Civerolo, Gralow & Hill, PA. His legal practice is primarily in the area of commercial, employment and construction litigation including mortgage, bankruptcy, commercial lease, and civil rights issues under state and federal law.

Position 4: Three-Year Term
Eric R. Burris (biography unavailable)

Position 5: Three-Year Term
Amy J. Diaz (biography unavailable)

Position 6: Three-Year Term
Robert M. St. John (biography unavailable)

Criminal Law Section Nominating Committee Report:

Position 1: Three-Year Term
Peter M. Ossorio (biography unavailable)

Position 2: Three-Year Term
Cynthia M. Payne was a former trial supervisor at the New Mexico Public Defender's Office. She is currently in private practice with the law firm of David G. Crum & Associates, PC. Ms. Payne is a graduate of the UNM Law School.

Position 3: Three-Year Term
Ousama M. Rasheed (biography unavailable)

Employment and Labor Law Section Nominating Committee Report:

Position 1: One-Year Term
Rita G. Siegel received her bachelor's degree from Cornell University and J.D. from the UNM School of Law. Siegel has over 25 years' experience in private and public sector employee and labor management relations, is a board-recognized specialist in employment and labor law, and has an AV rating in the Martindale-Hubbell Legal Directory. Siegel is a member of the American Arbitration Association, TVI Labor Relations Board, NMSU Labor Relations Board, WNMU Labor Relations Board, chair of the Bernalillo Labor Relations Board, administrative law judge for PELRB and a mediator for the Administrative Office of the Courts and the Center for Employment Dispute Resolution.

Position 2: Two-Year Term
Charles Archuleta received his bachelor's degree from UNM in 1986, his J.D. from Boston University Law School in 1989 and is a Patricia Roberts-Harris Fellow. Archuleta has been at the Keleher & McLeod Firm for 16 years. He is a shareholder, serves on the firm's executive committee and is head of their employment law section. He represents public and private employers in administrative charges and litigation of Title VII, State Human Rights Act, civil rights and other discrimination claims, wrongful terminations, breach of employment contracts and common law disputes. He prepares and implements employment policies and manuals, including drug and alcohol policies, and advises both large and small employers regarding hiring, promotion, discipline and termination issues. He investigates harassment and is a frequent speaker and trainer. He litigates general commercial matters and advises employers on statutory and regulatory compliance issues including the Americans with Disabilities Act and Office of Federal Contract Compliance Program Affirmative Action. Archuleta was admitted to the State Bar of New Mexico and the Federal Bar, including the Tenth Circuit Court of Appeals, in 1989. He is a past board member and current active member of the Employment and Labor Law Section. He is also a member of the National Hispanic Bar Association, the New Mexico Hispanic Bar, Commercial Litigation Section and New Mexico's Defense Lawyers Association.

Position 3: Two-Year Term
J. Edward Hollington is a certified civil trial specialist with the New Mexico Board of Legal Specialization. Much of his practice focuses on employment law including civil rights claims, wrongful termination, breach of contract, retaliatory discharge, and other areas of employment law. He primarily represents employees in his litigation practice, and he also maintains an active commercial practice in which he advises employers about employment-related matters. He received his J.D. degree from the University of Alabama School of Law and has been a member of the State Bar of New Mexico since 1976. He is admitted to practice in all state and federal courts including the Tenth Circuit Court of Appeals.
for nearly 13 years. In 1997, he joined several of his former Modrall partners and has since been a partner at Foster, Johnson, McDonald, Lucero & Koinis, LLP. For the past 17 to 18 years, Koinis has represented a variety of health care providers, primarily in a transactional context, with an emphasis on regulatory compliance under Stark and HIPAA and the Medicare anti-kickback rules. He is a member of the American Health Lawyers Association and the Health Law Section of the ABA.

Position 2: Two-Year Term
David M. Kaufman (biography unavailable)

Position 3: Three-Year Term
Jeffrey C. Gilmore (biography unavailable)

Position 4: Three-Year Term
Barbara C. Quissell (biography unavailable)

Position 5: Three-Year Term
Jennifer L. Stone (biography unavailable)

Public Law Section Nominating Committee Report:

Position 1: Three-Year Term
Deborah A. Moll has served as general counsel for the New Mexico General Services Department since 1993. She provides legal representation to the state purchasing agent, Property Control Division, Risk Management Division, Information Services Division, Communications Division, Transportation Services Division, and Building Services Division. Moll has also served as a staff attorney, New Mexico Taxation and Revenue Department, assistant appellate defender, New Mexico Public Defender Department, and assistant attorney general, Civil Division, New Mexico Attorney General's Office. She served as law clerk to the Honorable Oliver Seth, U.S. Court of Appeals for the Tenth Circuit, and the Texas Court of Criminal Appeals. She received her J.D. degree and her M.S. degree in English from the University of Texas, Austin. Moll received her B.A. degree from St. John’s College, Annapolis, Maryland. She is on the board of directors of the Public Law Section and has served on the board of directors of the Bankruptcy Law Section and the Employment and Labor Law Section of the State Bar of New Mexico.

Position 2: Three-Year Term
Robert M. White is the Albuquerque city attorney. In both business and private practice, his primary focus has been on land use law, redevelopment law, zoning law, eminent domain law and administrative law. White has been president of the New Mexico Municipal Attorneys Association.

He is currently third vice president of the International Municipal Lawyers Association and is a member of the board of directors of the Public Law Section of the State Bar of New Mexico. He received his B.A. degree from UNM and his J.D. degree from the University of Houston School of Law. He is a member of the State Bar of New Mexico and is admitted to the federal courts for the U.S. District of New Mexico, the Tenth Circuit, the District of Columbia Circuit and the United States Supreme Court.

Real Property, Probate and Trust Section Nominating Committee Report

Position 1: One-Year Term
Stephen J. Rhoades (biography unavailable)

Position 2: Three-Year Term
Frank K. Bateman (biography unavailable)

Position 3: Three-Year Term
Scotty A. Holloman (biography unavailable)

Position 4: Three-Year Term
Dana M. Kyle (biography unavailable)

Trial Practice Section Nominating Committee Report:

Position 1: Two-Year Term
Michael R. Jones graduated from Miami University with a bachelor's degree in political science in 1993 and a law degree from the University of Toledo in 1996. He was admitted to the State Bar of New Mexico in 1996 and the Ohio Bar in 1997. He is licensed to practice in the New Mexico State Courts, the Federal District Courts of New Mexico and the Circuit Court of Appeals. He has worked for the 1st and 11th district attorney’s office as a trial prosecutor and an assistant attorney general. He is a partner in the law firm of Clark, Grubesic and Jones, Attorneys at Law, LLC. He practices primarily in the areas of criminal defense, general civil practice and family law.

Position 2: Three-Year Term
Patrick J. Rogers (biography unavailable)

Position 3: Three-Year Term
Raúl P. Sedillo is an associate attorney at the law firm of Butt, Thornton, & Baehr, PC, where his practice focuses on civil litigation in the areas of employment law, civil rights, insurance bad faith and personal injury defense. Sedillo is a current member of the Trial Practice Section board of directors. He is a 2002 graduate of the UNM School of Law and he is a member of the State Bar of New Mexico, the New Mexico Defense Lawyers Association and the New Mexico Hispanic Bar Association.
Position 4: Three-Year Term
Christina Calderwood Vigil (biography unavailable)

Attorney Support Group
The next Attorney Support Group meeting will be held at 5:30 p.m., Nov. 7, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

Board of Bar Commissioners Election Notice
Notice is hereby given that the 2005 election of eight commissioners for the State Bar of New Mexico will be held Nov. 30, 2005, as provided for in Supreme Court Rule 24-101, Rules Governing the New Mexico Bar and the State Bar of New Mexico Bylaws, Article IV, Section 6. Four positions are three-year terms; two positions are one-year terms.

Nominations to the Office of the Board Commissioner shall be by the written petition of any ten or more members of the State Bar who are in good standing and whose principal place of practice is in the respective district. Members of the State Bar may nominate and sign for more than one candidate. [See the Sept. 26 issue of the Bar Bulletin for expiration terms (Page 11) and the nomination petition (Page 12).]

Nominations are to be mailed to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860, and must be received by 5 p.m., Oct. 24, 2005, to allow for the reproduction of the ballots.

Children’s Law Section Poster and Writing Contest Reception
A reception and awards ceremony for the Children’s Law Section's third annual poster and writing contest will take place from 3 to 5 p.m., Nov. 18, at the Juvenile Justice Center, 5100 2nd St. NW, Albuquerque. All members of the State Bar are invited to attend. Contestants have been asked to create a work based on the theme, “My Hero, My Heroine.” The contest is for children who are either currently detained or involved in such programs as the Youth Reporting Center, Drug Court and anti-domestic violence programs. This event is a great way for attorneys and their firms or organization to assist in changing the lives of New Mexico’s troubled youths by supporting children's artistic talent. The event will also provide an opportunity to mentor children in the delinquency system. Dates for receptions to be held in Sandoval, Valencia and Santa Fe counties will be determined in the near future.

The section thanks the following sponsors for their generous donations: Sandy Barnhart Y Chavez, Sarah Bennett, Beth Collard, Jean Conner, Robert Cooper, Robert Desiderio, A.J. Ferrara, Fine Law Firm, Judy Flynn-O’Brien, Whitney Johnson, Joan Kozon, Susan Page, Dan Pedrick, Janet Schoepnner and Kathleen Wright.

Donations are still being accepted and may be sent to the Childrens Law Section, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860. Call Linda Yen, (505) 841-5164, or Lorette Enochs, (505) 841-5001, for more information.

Senior Lawyers Division 2005 Election
I. Procedure:
The Senior Lawyers Division is governed by a board of directors whose eighteen at-large members are elected by the membership of the Division. The terms are three years, with one-third of the members elected each year. The bylaws require the division chair to appoint a nominating committee of at least three members of the division and to provide notice of the election so that any division member may indicate to the committee his or her interest in serving on the board of directors.

All members of the State Bar of New Mexico in good standing who are 55 years of age or older and who have practiced law for 25 years or more are members of the Senior Lawyers Division and eligible for office. Any division member who wishes to be considered for nomination to the division board of directors should contact a member of the nominating committee before Nov. 11.

The report of the nominating committee will be published in the Bar Bulletin. After publication, additional nominations may be made in the form of a petition signed by at least thirty members of the division. The petition must identify the position sought and state that the individual nominated has agreed to the nomination. The deadline for submission of nominating petitions to the State Bar office is Dec. 9.

If additional nominations are made, a notice of the contested election will be published and ballots will be mailed to all division members by Dec. 16. If no additional nominations are made, the nominees identified by the nominating committee are elected by acclamation.

II. Positions to be filled:
Position 1 2006-2008
Position 2 2006-2008
Position 3 2006-2008
Position 4 2006-2008
Position 5 2006-2008

III. Nominating Committee:
Daniel J. Behles, Chair
226 Cynthia Loop NW #A
Albuquerque, NM 87114-2417
Tel: 217-3606
Fax: 217-3625
E-mail: dan@behles.com

Ms. Linda S. Bloom
PO Box 218
817 Gold SW #3800 87102
Albuquerque, NM 87103-0218
Tel: 764-9600
Fax: 243-2332
E-mail: lbloom@spinn.net

Ms. Elizabeth E. Whitefield
PO Box AA
201 Third St. NW, 12th Floor 87102
Albuquerque, NM 87103-1626
Tel: 346-6464
Fax: 346-1370
E-mail: eew@keleher-law.com

Technology Utilization Committee
Access Basics for Smarties!
Database Design and Use in Law Practice
The Technology Utilization Committee will be holding a free workshop from 5 to 6 p.m., Oct. 20, at the State Bar Center,
Albuquerque. In this one-hour session, participants will learn basic Access, the concept of databases, fields and records, input masks, and views and reports. Paralegals, attorneys and support staff are all invited to attend. The class is limited to 11 attendees. Reservations should be made by Oct. 18 with Mary Patrick, CLE program coordinator, mpatrick@nmbar.org or (505) 797-6059. CLE credit will not be provided.

Other Bars
Albuquerque Bar Association
Outstanding Attorney and Judge Nominations Request

The Albuquerque Bar Association is entertaining nominations for the annual outstanding attorney and outstanding judge of 2005. Criteria the Association will consider are as follows:
• Personal integrity.
• Legal skills and professional competence.
• Contribution to the Bar.
• Contributions outside the profession, such as service to the community or a civic organization.
• A legal achievement particularly noteworthy or courageous.
• Any other accomplishment that improves the image of the legal profession.
Submit nominations with supporting information to abqbar@abqbar.com or lortega@rodey.com. The presentation will be made Dec. 6 at the membership luncheon. Nominations close Nov. 8.

American Immigration Lawyer’s Association
CLE Program

The American Immigration Lawyer’s Texas Chapter will hold its regional CLE program Nov. 3–5 in Dallas, Texas, at the Adams Mark Hotel. For program information and registration details go to http://www.aiatlx.org/. The early-bird registration is extended to Oct. 14. Contact Diana Morales at morales@laborcounsel.net with any questions.

New Mexico Criminal Defense Lawyers Association
Discussion Forum

A discussion forum for criminal justice professionals with wide-ranging opinions on the use of capital punishment will feature former Florida Supreme Court Chief Justice Gerald Kogan. Death, Dollars and Justice: Capital Punishment in an Age of Scarcely Resources will be held 6:30 p.m. to 8:00 p.m., Oct. 20, at the UNM School of Law, Room 2402. Other special guests include the Honorable Richard Bosson, the Honorable Lynn Pickard, District Attorney Henry Valdez, Deputy District Attorney Stacey Ward, Governor Richardson’s Criminal Justice Advisor Robert Schwartz, and Attorney Randi McGinn. Refreshments will be served from 5:30 to 6:30 p.m., and 1.0 ethics CLE credit will be offered ($15 at the door). For more information or to R.S.V.P., call (505) 986-9536.

New Mexico Defense Lawyers Association
Annual Meeting Notice

The New Mexico Defense Lawyers Association is proud to announce that the organization’s 2005 Outstanding Civil Defense Lawyer of the Year Award will be given to Charlie Pharris. The award will be presented at the 2005 Annual Meeting on Oct. 27 at the Hyatt Regency in Albuquerque. The featured presenters will be professor Jim McElhaney and a panel of local judges. Call Rhonda Dahl Hawkins, (505) 797-6021, for more information.

UNM School of Law
Law Library

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

Other News
Center for Civic Values
IOLTA Applications

The Center for Civic Values is accepting IOLTA applications for 2006 funding. The application is available online at www.civicvalues.org. New Mexico nonprofit organizations that provide legal services to the poor, law-related education to the public, and improvements in the administration of justice are eligible to apply. Call (505) 764-947 ext. 13 for further information.

Attorney Coach Needed

An attorney coach is needed for the Sandia High School mock trial team. Attorneys who are interested in serving should contact the mock trial program, mocktrial@civicvalues.org or (505) 764-9417 ext 13.

New Mexico Students’ and Lawyers’ Chapters of the Federalist Society for Law and Public Policy Studies

The New Mexico Students’ and Lawyers’ Chapters of The Federalist Society for Law and Public Policy Studies will present a debate on The Citation of Foreign Law by American Courts in Constitutional Interpretation. Participants will be Dr. John Eastman, professor of law, Chapman University, and director of the Claremont Institute Center for Constitutional Jurisprudence; and Prof. Norman Bay, professor of law, UNM School of Law, and former U.S. attorney, District of New Mexico. Judge Tim Tymkovich, U.S. Court of Appeals for the Tenth Circuit, will be the moderator. The debate will take place at noon, Oct. 28, UNM School of Law, Room 2402.

Workers’ Compensation Administration
Notice of Public Hearing

Notice is hereby given that at 1:30 p.m., Oct. 19, the New Mexico Workers’ Compensation Administration will conduct a public hearing on amendments to Part 12 of the WCA rules pertaining to the Uninsured Employers’ Fund (UEF). The hearing will consider a cap of $25,000 on workers’ compensation benefits paid by the UEF; the posting of a bond by an employer against any benefits paid by the

Notice of Public Hearing

Notice is hereby given that at 1:30 p.m., Oct. 19, the New Mexico Workers’ Compensation Administration will conduct a public hearing on amendments to Part 12 of the WCA rules pertaining to the Uninsured Employers’ Fund (UEF). The hearing will consider a cap of $25,000 on workers’ compensation benefits paid by the UEF; the posting of a bond by an employer against any benefits paid by the
UEF up to $25,000. The hearing will be conducted at the Workers’ Compensation Administration, 2410 Centre Avenue SE, Albuquerque. Videoconferencing may also be made available in the WCA Field offices. Contact Renee Blechner, (505) 841-6083, by Oct. 17 to reserve videoconferencing. Proposed rule changes will be available on Sept. 30.

Comments made in writing and at the public hearing will be taken into consideration. Written comments pertaining to these issues will be accepted until the close of business Oct. 26.

For further information, call (505) 841-6000. Inquire at the WCA clerk’s office, 2410 Centre Avenue SE, Albuquerque, NM, 87106, (505) 841-6000, for copies of the proposed rules. To request a copy by mail, inquire at the WCA clerk’s office about the postage cost and envelope size needed to accommodate the request. Plan on including a postpaid, self-addressed envelope with the request.

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

We Want to Hear from You

The Bar Bulletin is now accepting Letters to the Editor. Submit letters to notices@nmbar.org.

The editorial policy of the State Bar of New Mexico may be found on the Web at www.nmbar.org under Publications/Media, Bar Bulletin.

COURT REGULATED PROGRAMS

MCLE - mcle@nmbar.org or (505) 797-6015

Have you remembered...

• to check your credits earned online at www.nmmcle.org?
• to register for a cle seminar if you have not completed your 2005 credits?
• to submit credits earned out of state to MCLE for review?
• to complete the one credit ethics requirement?
• to complete the two credit professionalism requirement?

Plan today for 2005 compliance...

MCLE COMPLIANCE DEADLINE: 12/31/05

LEGAL SPECIALIZATION
– ls@nmbar.org or (505) 797-6057

Attorneys whose specialty status expires December 31, 2005 are encouraged to submit their recertification applications as soon as possible before the end of the year. The processing of recertification applications could extend into 2006. The Board of Legal Specialization has determined that as long as a specialist has applied for recertification in a timely manner, is current in their specialist dues, and has a recertification application pending, the specialist status is maintained while the Specialty Committee and/or Board of Legal Specialization makes their final determination.

PLEASE NOTE: Specialty area compliance requirements for continuing legal education must be met on a yearly basis. Refer to the standards for requirements or contact the Legal Specialization office.

Access www.nmbar.org> Other Bars/Legal Groups for information regarding the Legal Specialization program including a list of Board Certified Specialists.

Look for the Court Regulated Programs table at upcoming seminars

Information about MCLE Compliance and the Legal Specialization program will be available.
NOMINATION PETITION
STATE BAR OF NEW MEXICO - 2005 SECTION ELECTION

Section Name: _________________________________________________________________________________________________

Position Number: ________________________________________________________________________________________________

We, the undersigned members of the above-named Section, nominate ______________________________ of ____________________________, New Mexico, for the position specified above.

Petition Deadline: October 31, 2005

Date Submitted: __________________________________________

1. _________________________________________ ______________________________________________
   Signature
   (Print or type name) Address
   _________________________________________ ______________________________________________
   (Print or type name) City

2. _________________________________________ ______________________________________________
   Signature
   (Print or type name) Address
   _________________________________________ ______________________________________________
   (Print or type name) City

3. _________________________________________ ______________________________________________
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   (Print or type name) Address
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   (Print or type name) City

4. _________________________________________ ______________________________________________
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   (Print or type name) City

5. _________________________________________ ______________________________________________
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   (Print or type name) City

9. _________________________________________ ______________________________________________
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   (Print or type name) City

10. _________________________________________ ______________________________________________
    Signature
    (Print or type name) Address
    _________________________________________ ______________________________________________
    (Print or type name) City
At 10 a.m. on Sept. 26, State Bar President Charles J. Vigil told applicants to the State Bar of New Mexico that they have entered a profession that has a calling “to leadership, public service, and honor.”

So began the traditional and dignified ceremony admitting 157 men and women into the profession of law in New Mexico.

Chair of the Board of Bar Examiners Presiliano Torrez read the roll of applicants, beginning with the names of those with special movants. Applicant after applicant stood with a member of the bar, a parent, a brother or sister, grandfather, uncle or friend. Applicants came from all over the U.S.—California, Texas, Ohio, Colorado, New York, and on and on, seasoned lawyers and new lawyers, all coming to make New Mexico their home.

Families with generations of attorneys welcomed their newest colleague, often in emotional and touching sentiments. Of particular poignancy were those introductions that revealed the pride of families, the struggles to reach goals, and the sacrifices made not only by the students but by their families as well. Chair Torrez introduced his own son, calling him one of the “native sons with ancestors who were here before New Mexico was part of the United States.”

One elderly gentleman, with a crack in his voice, presented his godson as both were surrounded by a small legion of family members.

Academic credentials and honors, special achievements, community service, and personal qualities were repeated with such frequency, one felt both admiration for each individual and pride that the legal profession was gaining such outstanding individuals.

Kiva Auditorium was filled with children and infants. The back of the room looked like a small nursery as babies were soothed, walked and quieted. A new lawyer in his “going-to-court” suit walking the aisle with a sleeping infant in his arms spoke of the effort and hard work it must have taken for him to study for his degree while at the same time taking care of the needs of his family. That father was also a testament to the fact that many managed both very well. Speaker after speaker spoke of those sacrifices and recognized the valuable support and help of the hundreds of friends and family members gathered for the ceremony.

After all names were called, Torrez moved their admission, and Chief Justice Richard C. Bosson asked Chief Clerk Kathleen Jo Gibson to administer the oath. The long road was finally ending as each applicant stood, amid an explosion of flashing cameras, and repeated the oath.

The final honors were the closing remarks of each of the five justices of the New Mexico Supreme Court.

First, Justice Edward L. Chávez told the newest members of the Bar that they were at the beginning of “a wonderful opportunity to make a difference in the lives of people.” He said the key is “effective communication,” which begins with listening—“swift to listen, slow to speak.”

“Be objective and honest with your advice,” he said.

Justice Chávez also reported that 95 percent of UNM law students passed the exam.

Next, Justice Petra Jimenez Maes pointed out that “you need to decide what kind of lawyer you want to be.” She urged them to be aware of how they conduct themselves and to emphasize the professionalism required of lawyers.

“You have a responsibility to family, community, and God,” she said.

Justice Patricio M. Serna made perhaps the most poignant remarks. Sounding every bit the father figure as well as the sage justice, his remarks spoke to everyone in the room.

“Today your dreams and aspirations have become a reality. Today you are a real live lawyer. Today a new world opens...”, he softly said. “You now have considerable power to be used with wisdom and compassion... The oath you took binds you for life. ... Use your law degree in a way that will make a difference,” he urged in closing.

Next, Justice Pamela B. Minzner called the ceremony a “celebration as a community.” She urged the new lawyers to be aware of the avenues of service open to them as a

NEW ADMITTEES ATTEND RECEPTION AT THE STATE BAR CENTER
Julie Gallardo picks up Bar membership information from Membership Coordinator Tony Horvat at a reception honoring new admittees held Sept 30 at the State Bar Center.

As a member of the Bar, where “you can make a difference with others as part of something bigger.”

Finally, Chief Justice Bosson offered his “heartiest congratulations” to both the new lawyers and to family and friends who lent support through “the long ordeal of law school.” He identified the “words of character” that each will want to be known by: “principal, respect, justice, honor, and reputation.” He then invited each lawyer to sign the “Roll of Attorneys” in order to be certified and receive his or her license to practice law in New Mexico.

Outside, cameras again flashed as the new admittees lined up to add their names to the historic Roll of Attorneys, the final step into their “new world.”

On Sept. 30, the State Bar of New Mexico hosted a reception to honor new members and to share important Bar information. One guest, Jenica Jacobi, perhaps summed it up for all.

“I went to law school because I love the power of knowledge,” she said. “I know I can make a difference.”

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**Depression, Alcohol or Drug Problems? Help is as close as your phone.**

The Lawyers Assistance Program is a statewide network of recovering lawyers and substance abuse professionals dedicated to helping others within the profession get the help they need. Discuss your concerns with professional staff who will answer your questions, provide information, give support and offer a plan of action. At your request, you may be put in touch with an attorney in recovery who can share his or her experience with you.

**Free Confidential* 24-Hour Hotline**

Albuquerque (505) 228-1948

(800) 860-4914

*The NM Rules of Professional Conduct (Rule 16-803) and the NM Code of Judicial Conduct (Rule 21-300) provide for strict confidentiality.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
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</table>
| 17   | Justice in the Jury Room  
Teleconference  
TRT, Inc.  
2.4 E  
(800) 672-6253  
www.trtcle.com |
| 18   | The ABC’s of Immigration Law  
VR - State Bar Center, Albuquerque  
Center for Legal Education of NMSBF  
4.2 G  
(505) 797-6020  
www.nmbar.org |
| 18   | Current Developments in Handling Charges at the EEOC and the NM Human Rights Division  
VR - State Bar Center, Albuquerque  
Center for Legal Education of NMSBF  
2.7 G  
(505) 797-6020  
www.nmbar.org |
| 18-19 | Fundamentals of Licensing or Transferring Technology, Part 1 & 2  
Teleseminar  
Center for Legal Education of NMSBF  
2.4 G  
(505) 797-6020  
www.nmbar.org |
TRT, Inc.  
2.4 E  
(800) 672-6253  
www.trtcle.com |
| 19   | Annual New Mexico Water Conference  
Las Cruces  
New Mexico Water Resources Research Institute  
12.4 G  
(505) 646-1195 |
| 19   | Change Orders, Alternative Dispute Resolution and Other Ways to Keep Yourself Out of Court  
Albuquerque  
Lorman Education Services  
7.2 G  
(715) 833-3940  
www.lorman.com |
| 19   | Major Issues in Mediation  
Teleconference  
TRT, Inc.  
2.4 G  
(800) 672-6253  
www.trtcle.com |
| 19   | Death, Dollars and Justice: Capital Punishment in an Age of Scarcе Resources  
UNM School of Law  
1.0 E  
(505) 992-0050 |
| 21   | Adoption Law: The Basics and Beyond  
State Bar Center  
Center for Legal Education of NMSBF  
7.2 G, 1.2 E  
(505) 797-6020  
www.nmbar.org |
| 21   | Annual ERISA Workshop  
Albuquerque  
Sungard Corbel  
7.2 G  
(800) 326-7235  
www.sungardcorbel.com |
| 21   | The Changing Law Regarding Church-State Issues  
State Bar Center, Albuquerque  
Center for Legal Education of NMSBF  
4.8 G  
(505) 797-6020  
www.nmbar.org |
| 21   | Crossroads of Navajo Law: Tradition and Innovations  
Albuquerque  
Sutin, Thayer, Brown  
5.4 G, 2.4 E  
(505) 883-3388 |
| 24   | How to Handle Challenging Section 1031 Exchanges in New Mexico  
Albuquerque  
National Business Institute  
3.6 G  
(715) 835-8525  
www.nbi-sems.com |
| 24   | What Puts Government Lawyers in a Class by Themselves  
Teleconference  
TRT, Inc.  
2.4 E  
(800) 672-6253  
www.trtcle.com |
| 25   | Expanding Equal Access to Credit Through Civil Rights and Consumer Protection Laws  
VR - State Bar Center, Albuquerque  
Center for Legal Education of NMSBF  
4.2 G  
(505) 797-6020  
www.nmbar.org |

G = General  
E = Ethics  
P = Professionalism  
VR = Video Replay  
Programs have various sponsors; contact appropriate sponsor for more information.
<table>
<thead>
<tr>
<th>Number</th>
<th>Event</th>
<th>Location</th>
<th>Date</th>
<th>Time</th>
<th>Website</th>
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<tbody>
<tr>
<td>25</td>
<td>Lawyering with Emotional Intelligence</td>
<td>VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>October 25</td>
<td>2.0 P 1.2 E</td>
<td>(505) 797-6020</td>
</tr>
<tr>
<td>25</td>
<td>Personal Injury Case Evaluation and Intake - Make Your Accountant and Malpractice Insurer Happy</td>
<td>Teleconference TRT, Inc.</td>
<td>October 25</td>
<td>2.4 G</td>
<td>(800) 672-6253</td>
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<tr>
<td>25</td>
<td>Phase II Storm Water Regulation and Compliance</td>
<td>Albuquerque Lorman Education Services</td>
<td>October 25</td>
<td>7.2 G</td>
<td>(715) 833-3940</td>
</tr>
<tr>
<td>26</td>
<td>2005 Professionalism: Lawyers Concerned for Lawyers</td>
<td>State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>October 26</td>
<td>2.0 P</td>
<td>(505) 797-6020</td>
</tr>
<tr>
<td>26</td>
<td>Fundamentals of Arbitration</td>
<td>Teleconference TRT, Inc.</td>
<td>October 26</td>
<td>2.4 G</td>
<td>(800) 672-6253</td>
</tr>
<tr>
<td>26</td>
<td>Obtaining the Best Settlement for Personal Injury Clients in New Mexico</td>
<td>Albuquerque National Business Institute</td>
<td>October 26</td>
<td>6.7 G .5 E</td>
<td>(715) 835-8525</td>
</tr>
<tr>
<td>26</td>
<td>Title 7 of the Civil Rights Act of 1964</td>
<td>Roswell Paralegal Division of NM</td>
<td>October 26</td>
<td>1.0 G</td>
<td>(505) 622-6510</td>
</tr>
<tr>
<td>26</td>
<td>Heart of the Trial</td>
<td>By Jim McElhaney Hyatt Regency Albuquerque NMDLA</td>
<td>October 26</td>
<td>3.0 G</td>
<td>(505) 797-6021 or <a href="http://www.nmdla.org">www.nmdla.org</a></td>
</tr>
<tr>
<td>27</td>
<td>They Took My Stuff! How Do I Get it Back?</td>
<td>Teleconference TRT, Inc.</td>
<td>October 27</td>
<td>2.4 G</td>
<td>(800) 672-6253</td>
</tr>
<tr>
<td>27</td>
<td>21st Annual Family Law Institute</td>
<td>State Bar Center, Albuquerque Family Law Section and Center for Legal Education of NMSBF</td>
<td>November 27-29</td>
<td>10.5 G 1.2 E 2.0 P</td>
<td>(505)797-6020</td>
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<tr>
<td>27</td>
<td>21st Annual Family Law Institute</td>
<td>State Bar Center, Albuquerque Family Law Section and Center for Legal Education of NMSBF</td>
<td>November 27-29</td>
<td>10.5 G 1.2 E 2.0 P</td>
<td>(505)797-6020</td>
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<tr>
<td>27</td>
<td>Famous 1040 Workshop</td>
<td>Albuquerque National Association of Tax Professionals</td>
<td>November 28</td>
<td>8.0 G</td>
<td>(800) 558-3402</td>
</tr>
<tr>
<td>28</td>
<td>Police Misconduct</td>
<td>Albuquerque Lorman Education Services</td>
<td>November 28</td>
<td>6.0 G 1.2 E</td>
<td>(715)833-3940</td>
</tr>
<tr>
<td>28</td>
<td>The Tangled Webs of Impaired Lawyers</td>
<td>Albuquerque National Association of Tax Professionals</td>
<td>November 28</td>
<td>6.0 G 1.2 E</td>
<td>(505) 797-6020</td>
</tr>
<tr>
<td>29</td>
<td>1040 Extra Workshop</td>
<td>Albuquerque National Association of Tax Professionals</td>
<td>November 29</td>
<td>6.0 G 2.0 E</td>
<td>(800) 558-3402</td>
</tr>
<tr>
<td>31</td>
<td>Common Sense Ethics - Histories and Mysteries</td>
<td>Teleconference TRT, Inc.</td>
<td>November 31</td>
<td>2.4 E</td>
<td>(800) 672-6253</td>
</tr>
<tr>
<td>1</td>
<td>Workplace Dynamics and the Practice of Law</td>
<td>VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>November 1</td>
<td>3.2 G 1.2 E 2.0 P</td>
<td>(505) 797-6020</td>
</tr>
<tr>
<td>1</td>
<td>2005 Update: Tax Considerations in Estate Planning</td>
<td>VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>November 1</td>
<td>8.1 G</td>
<td>(505) 797-6020</td>
</tr>
<tr>
<td>1</td>
<td>The Impact of Domestic Violence on Children and the Growing Incidence of Juvenile Domestic Violence</td>
<td>VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>November 1</td>
<td>6.2 G 1.0 E</td>
<td>(505) 797-6020</td>
</tr>
<tr>
<td>1</td>
<td>Justice in the Jury Room</td>
<td>Teleconference TRT, Inc.</td>
<td>November 1</td>
<td>2.4 E</td>
<td>(800) 672-6253</td>
</tr>
</tbody>
</table>
# 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 October 7, 2005**

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## PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

**DATE PETITION FILED**

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<th>No.</th>
<th>Petitioner(s)</th>
<th>Cause(s) of Action</th>
<th>Date Filed</th>
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<td></td>
<td>10/3/05</td>
</tr>
<tr>
<td>29,476</td>
<td>Salazar v. Torres (COA 23,841)</td>
<td></td>
<td>10/3/05</td>
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<tr>
<td>29,475</td>
<td>State v. Romero (COA 25,715)</td>
<td></td>
<td>9/30/05</td>
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<tr>
<td>29,474</td>
<td>State v. Carrasco (COA 25,796)</td>
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<td>9/29/05</td>
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<td>29,473</td>
<td>State v. Garcia (COA 25,601)</td>
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<td>9/28/05</td>
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<td>29,472</td>
<td>Tovar v. Bravo (12-501)</td>
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<td>29,437</td>
<td>City of Sunland Park v. Harris (COA 23,593)</td>
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## CERTIORARI GRANTED BUT NOT YET SUBMITTED TO THE COURT: (PARTIES PREPARING BRIEFS)

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WRIT 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 OCTOBER 7, 2005

WRITS OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI DENIED:

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## Clerk’s Certificate of Admission

### From the New Mexico Supreme Court

**Effective September 26, 2005**

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<td>Evelyn Anne Peyton</td>
<td>2423 Sundance Street Santa Fe, NM 87507-4043</td>
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<td>Kristin K. Potter</td>
<td>PO Box 1083 Ranchos de Taos, NM 87557-1083</td>
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<td>Rose Eileen Provan</td>
<td>2905 Vista Bonita Santa Fe, NM 87505-6501</td>
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<td>Elizabeth K. Radosевич</td>
<td>NM Supreme Court PO Box 848 237 Don Gaspar Avenue (87501) Santa Fe, NM 87504-0848 (505) 827-4935 (505) 827-4837 (telecopier) <a href="mailto:supemcr@nmcourts.com">supemcr@nmcourts.com</a></td>
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<tr>
<td>Luke W. Ragsdale</td>
<td>701 West Country Club Road Roswell, NM 88201-5212</td>
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EFFECTIVE SEPTEMBER 26, 2005
Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by 5 p.m., Monday the week prior to publication.
After a jury trial, Defendant Scott Reed was convicted of first-degree depraved mind murder, in violation of NMSA 1978, Section 30-2-1(A)(3) (1994), and sentenced to life in prison. In addition to two other charges not relevant to this appeal, Defendant was also convicted of negligent child abuse resulting in death contrary to NMSA 1978, Section 30-6-1 (2001, prior to 2004 amendment). Finding insufficient evidence, we reverse the conviction for first-degree depraved mind murder, but we affirm the conviction for child abuse resulting in death. Accordingly, we remand to the district court to vacate the conviction for depraved mind murder and adjust Defendant’s sentence accordingly.

BACKGROUND

1. After a jury trial, Defendant Scott Reed was convicted of first-degree depraved mind murder, in violation of NMSA 1978, Section 30-2-1(A)(3) (1994), and sentenced to life in prison. In addition to two other charges not relevant to this appeal, Defendant was also convicted of negligent child abuse resulting in death contrary to NMSA 1978, Section 30-6-1 (2001, prior to 2004 amendment). Finding insufficient evidence, we reverse the conviction for first-degree depraved mind murder, but we affirm the conviction for child abuse resulting in death. Accordingly, we remand to the district court to vacate the conviction for depraved mind murder and adjust Defendant’s sentence accordingly.

OPINION

RICHARD C. BOSSON, Chief Justice

1. After a jury trial, Defendant Scott Reed was convicted of first-degree depraved mind murder, in violation of NMSA 1978, Section 30-2-1(A)(3) (1994), and sentenced to life in prison. In addition to two other charges not relevant to this appeal, Defendant was also convicted of negligent child abuse resulting in death contrary to NMSA 1978, Section 30-6-1 (2001, prior to 2004 amendment). Finding insufficient evidence, we reverse the conviction for first-degree depraved mind murder, but we affirm the conviction for child abuse resulting in death. Accordingly, we remand to the district court to vacate the conviction for depraved mind murder and adjust Defendant’s sentence accordingly.

BACKGROUND

2. By all accounts, Defendant, who was 18 years old at the time, was good friends with David O’Brien, who was four years younger. Even though David’s parents did not approve of Defendant or his 16-year-old brother, Jeff, David continued to spend time with them.

3. On the morning of December 24, 2001, David went shopping with the two Reed brothers and their mother. After returning to the Reed residence, Jeff went to his bedroom to take a nap, while Defendant and David drove to the video store. Around 1 p.m., David called his mother and asked her not to come home because he was studying. She testified that she thought David was home when he called. When the two friends returned to the Reed residence, Defendant’s parents were gone. Besides the three teenagers, the only other person home at the time was Defendant’s grandmother, who was in a far corner bedroom. Suffering from dementia, the grandmother was unaware of the events that followed.

4. Defendant testified that when he realized that his parents were not home, he retrieved a .38-caliber revolver from the trunk of his car and brought it into the house. He had purchased the revolver a couple of weeks earlier from a friend, but kept it hidden from his parents because guns were forbidden in the Reed residence. Defendant said that even though David knew he should be returning home, he decided to stay to watch a video in the living room. After the movie started, Defendant placed the unloaded revolver on the coffee table in front of the sofa.

5. Jeff testified that he saw the gun on the coffee table when he joined David and his brother to watch the movie. Defendant was sitting in the middle of the sofa, with David sitting to his right in a recliner. Jeff lay down on the love seat to Defendant’s left. Defendant testified that while watching the video he began playing with the unloaded revolver. He told the jury he pulled the trigger once and the hammer once. Jeff testified that he saw Defendant click the hammer back and let it go once or twice and heard the revolver click once or twice. Then he did not hear any clicking for a few minutes.

6. According to Defendant, David got up to go into the kitchen for a snack. Meanwhile, Defendant removed a single bullet from his pocket and placed it in the revolver. Defendant testified that he looked down the barrel of the gun to make sure the bullet was not in the chamber. Viewed from the back of the gun, the bullet was immediately to the right of the top cylinder in line with the firing pin, at a one o’clock position. Defendant told the jury he thought the gun was safe, and would not fire. He pointed the gun off to his side and pulled the trigger once. Defendant testified that he only meant to click the gun, and did not think it could fire. He claimed that because he was watching the television, he was not looking in the direction the gun was pointed, and did not know David had returned to the room. The gun discharged. As it turned out, the bullet had been placed in the exact position from which it would rotate into a firing position upon pulling the trigger. According to the autopsy, the bullet passed at a slight upward trajectory underneath David’s left arm and struck him in the left side of his chest just below his nipple. It traveled through his body and lodged beneath his right arm without exiting.

7. Jeff testified that he did not see Defen-
dant shoot David, but was surprised when he heard the gunshot and covered himself with his arms. When Jeff looked up, he saw David crouching by the recliner before falling to the floor. Defendant testified that he was shocked that the gun went off, and that he panicked when he realized David had been shot. Defendant said he and Jeff tried to help David, and immediately called 911. Both spoke to the operator, but lied about what happened. Jeff claimed David was the victim of a drive-by shooting. Defendant said, “Somebody shot my friend.” After hearing sirens, Defendant fled to his older brother’s house with the gun. Crying and distraught, Defendant told his brother he accidentally shot David. Defendant then drove around trying to figure out what to do. He called his father on David’s cell phone, which was in his jacket pocket, and told him the shooting was an accident. He also spoke on the phone with a police detective and admitted shooting David, but said it was an accident. Defendant drove to Springer, then returned to Albuquerque to go to the police. Even after the police told Jeff that Defendant had admitted shooting David, Jeff was hostile and continued to lie about the drive-by shooting. Meanwhile, David died from the gunshot wound.

{8} The State charged Defendant with an open count of murder. A jury trial began in October 2002. According to the State’s main theory at trial, Defendant intentionally shot David after some sort of struggle. The State introduced evidence that David was shot one time in the chest, but that the shirt David was wearing had three holes at the back shoulder that did not line up with where the bullet entered his body. The State’s attorney speculated that the shirt was bunched up because someone was holding David against his will. The State also pointed out that the recliner in which David had been sitting was found on its side in front of the television about ten feet from its original position, as if thrown in a fight.

{9} To contradict Defendant’s claim that the shooting was an accident, the State introduced evidence to indicate Defendant was familiar with the revolver, and with guns in general. According to Defendant’s own testimony, he had tested the revolver a couple of days earlier at a shooting range. Despite Defendant’s claim that the revolver was sticking, and would not fire when a bullet was in the top chamber, the gun did discharge a couple of times. The State’s tests revealed the revolver was working properly. Detective Zamora, the lead investigator, testified that the trigger on the revolver required a lot of pressure, making it difficult to pull unintentionally. In addition, Defendant’s mother told police officers after the shooting that her sons liked guns. Cartridges from two different caliber weapons, not matching the revolver, were found in Jeff’s bedroom.

{10} Much of the State’s evidence, presented to support its theory of an intentional shooting, was ambiguous. Tests conducted on David’s shirt indicated the shooting took place from four to ten feet away, and not at close range. Thus, if the shirt was bunched up, it was not from Defendant grabbing it. Detective Zamora testified that rescue personnel may have moved the recliner in order to attend to David. Testimony by the State’s own witnesses tended to support Defendant’s claim that he did not intend to shoot David. A detective testified that a lay person is easily confused about the direction a particular revolver rotates. The detective said he had investigated a lot of accidental shootings in which individuals mistakenly believed a revolver would not fire unless a cartridge was in the top position. On cross-examination, Detective Zamora said that he did not believe Defendant meant to shoot David, and that he had no evidence that the shooting was a willful and deliberate murder. He did testify, however, that he believed Defendant pointed the gun at David.

{11} At the close of the State’s case, defense counsel asked for a directed verdict dismissing the first-degree murder charge because there was no evidence of deliberation. The State countered that it was for the jury to decide if the shooting was accidental. Then the State turned to the alternative theory of first-degree depraved mind murder.1 The State argued that deprived mind murder was clear because loading a firearm and pointing it inside a room where others are present is an act greatly dangerous to the lives of others indicating a depraved mind without regard for others. The prosecutor said common sense dictates that even an eighteen-year-old should know how greatly dangerous it was to load a gun, click it, and point it in the house. The district court refused to direct a verdict on the first-degree murder charge. In closing remarks to the jury, the prosecutor argued “that whenever you add an idiot and a loaded firearm, what you have is deprived mind murder.”

{12} The jury convicted Defendant on all counts, including first-degree murder and negligent child abuse resulting in death. The jury was told to consider both alternative theories of first-degree murder, but only returned a guilty verdict on deprived mind murder. Defendant was sentenced to life in prison.

DISCUSSION

{13} On appeal, Defendant challenges his conviction for deprived mind murder based on insufficient evidence and fundamental error in the jury instructions. In addition, Defendant challenges his conviction for negligent child abuse resulting in death, arguing that the Legislature only intended the crime to apply to persons in a position of authority over a child, and not to a child’s friend. He argues in the alternative that the jury instructions for child abuse caused fundamental error. Finally, Defendant contends, and the State concedes, that if we affirm his first-degree deprived mind murder conviction, his conviction for child abuse would constitute double jeopardy and must be vacated.

Sufficiency of the Evidence

{14} We first address Defendant’s claim that there was insufficient evidence to support his conviction for deprived mind murder. Under a sufficiency of evidence analysis, we must determine “whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction.” State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). We must view the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences in favor of the verdict. Id. It is this Court’s duty on review to determine whether any rational jury could have found the essential facts to establish each element of the crime beyond a reasonable doubt. State v. Garcia, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992).

Elements of Depraved Mind Murder

{15} In New Mexico, first-degree murder

1 The State charged Defendant with an open count of murder. A few weeks later, the grand jury indicted Defendant for first-degree murder (willful and deliberate), contrary to Section 30-2-1(A)(1), as well as the lesser included offenses, which were second-degree murder, contrary to Section 30-2-1(B), and manslaughter, contrary to Section 30-2-3. According to the record, Defendant was never indicted for deprived mind murder, but did not object to the jury being instructed on deprived mind murder.
is defined in three ways: (1) as a “willful, deliberate and premeditated killing”; (2) as a death caused “in the commission of or attempt to commit any felony”; and (3) as depraved mind murder. Section 30-2-1(A). Defendant was charged with an open count of murder and indicted for deliberate murder. The court submitted jury instructions on deliberate murder, and in the alternative, depraved mind murder. The court also submitted second-degree murder and involuntary manslaughter instructions as lesser included offenses. The jury did not convict Defendant of deliberate murder, but found him guilty of depraved mind murder. We focus, therefore, on whether the evidence is sufficient to establish that conviction.

{16} New Mexico is one of only a handful of states to classify depraved mind murder as first-degree murder. 2 Wayne R. LaFave, Substantive Criminal Law § 14.7, at 486 & n. 71 (2d ed. 2003). First-degree murder is a capital felony, punished by life imprisonment or death, our most severe criminal penalty. See NMSA 1978, § 31-18-14(A) (1993). In contrast, second-degree murder carries a basic sentence of fifteen years imprisonment, and involuntary manslaughter only eighteen months. See NMSA 1978, § 31-18-15(A)(2) to -(6) (2003). In this case, Defendant was sentenced to life imprisonment.

{17} Given the extreme differences in punishment, this Court has previously underscored the importance of distinguishing first-degree depraved mind murder from second-degree murder in New Mexico. State v. Brown, 1996-NMSC-073, ¶ 13, 122 N.M. 724, 931 P.2d 69. Not only are clear distinctions necessary for the administration of our criminal justice system, they are vital to an accused facing an open charge of murder. See Garcia, 114 N.M. at 272, 837 P.2d at 865. First-degree murder is reserved for those killings that are the most heinous, and which deserve the most serious punishment, as opposed to those which, intentional or not, “lack the gravity associated with first degree murders.” Id.

{18} Despite the importance of construing the first-degree murder statute to punish only the most reprehensible homicides, our courts continue to struggle with making clear distinctions concerning depraved mind murder. See Brown, 122 N.M. at 734, 931 P.2d at 79 (Minzner, J., dissenting) (observing that this Court has produced “the thinnest of distinctions between depraved mind murder and second-degree murder”); cf. Garcia, 114 N.M. at 272, 837 P.2d at 865 (acknowledging that the appellate courts “have not been especially helpful in distinguishing first degree murder from second degree murder”). See generally Leo M. Romero, Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico, 20 N.M. L. Rev. 55, 60 (1990) (stating that our courts and jury instructions have not been particularly helpful in clarifying the distinctions between different degrees of unintentional homicide).

{19} A comparison of the jury instructions in Defendant’s case illustrates those “thinnest of distinctions” between depraved mind murder and second-degree murder. To convict Defendant of depraved mind murder, the State was required to show, either through direct or circumstantial evidence, that Defendant killed David without justification or excuse “by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life.” See § 30-2-1(A)(3). The statute itself does not define the mens rea, or state of mind, required for depraved mind murder. See § 30-2-1(A). However, the jury instruction for depraved mind murder required the jury to find:

1. The defendant shot and killed David O’Brien;
2. The defendant’s act caused the death of David O’Brien;
3. The act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;
4. The defendant knew that defendant’s act was greatly dangerous to the lives of others;
5. This happened in New Mexico on or about the 24th day of December 2001.

See UJI 14-203 NMRA 2005 (emphasis added).

{20} In contrast, a person who kills another commits murder in the second degree, “if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another.” See § 30-2-1(B). The second-degree murder instruction directed the jury to find:

1. The defendant killed David O’Brien;
2. The defendant knew that his acts created a strong probability of death or great bodily harm to David O’Brien or any other human being;
3. This happened in New Mexico on or about the 24th day of December 2001.

See UJI 14-210 NMRA 2005 (emphasis added).

{21} As can readily be seen by comparing the two instructions, the elements describing knowledge and degree of risk are almost indistinguishable. Both require “an intent to kill or an intent to do an act greatly dangerous to the lives of others or with knowledge that the act creates a strong probability of death or great bodily harm.” State v. Ortega, 112 N.M. 554, 565, 817 P.2d 1196, 1207 (1991). The sole difference rests with the requirement in the depraved mind murder instruction that the jury find Defendant’s act indicated a depraved mind without regard for human life, for which the jury receives no further definition or guidance.

{22} The lack of clear-cut distinctions between varying degrees of homicide has been problematic. Section 30-2-1(A)(3) requires “an act greatly dangerous to the lives of others.” Without more specific guidance from the Legislature, one way our courts have distinguished depraved mind murder is by the number of persons exposed to danger by a defendant’s extremely reckless behavior. See Brown, 1996-NMSC-073, ¶ 14 (observing that the number of persons

subjected to the risk of death provides a factor in assessing the degree of risk disregarded). In general, our depraved mind murder convictions have been limited to acts that are dangerous to more than one person. See State v. Sena, 99 N.M. 272, 274, 657 P.2d 128, 130 (1983); State v. DeSantos, 89 N.M. 458, 461, 553 P.2d 1265, 1268 (1976); see also UJI 14-203 Committee Commentary. Quintessential examples include shooting into a crowd, placing a bomb in a public place, or similar acts of terrorism. See State v. Johnson, 103 N.M. 364, 368, 707 P.2d 1174, 1178 (Ct. App. 1985).

23) In addition to the number of people endangered, this Court has construed depraved mind murder as requiring proof that the defendant had “subjective knowledge” that his act was greatly dangerous to the lives of others. See State v. McCrary, 100 N.M. 671, 673, 675 P.2d 120, 122 (1984). The requirement of subjective knowledge serves as proof that the accused “acted with ‘a depraved mind’ or ‘wicked or malignant heart’ and with utter disregard for human life.” Brown, 1996-NMSC-073, ¶ 16. Obviously, mere negligence or recklessness will not do.

24) To further narrow the class of killings eligible for depraved mind murder, this Court has concluded “that the legislature intended the offense of depraved mind murder to encompass an intensified malice or evil intent.” Brown, 1996-NMSC-073, ¶ 15. In describing that intensified malice, we have defined the phrase “depraved mind” used in the statute and uniform jury instructions as “[a] corrupt, perverted, or immoral state of mind constituting the highest grade of malice [that equates] with malice in the commonly understood sense of ill will, hatred, spite or evil intent.” Id. ¶ 16 (internal quotations omitted); cf. Rollin M. Perkins & Ronald N. Boyce, Criminal Law, 60 (3d ed. 1982) (suggesting that one way to distinguish depraved mind murder from manslaughter when an underlying act involves extremely reckless conduct is by identifying an element of viciousness—an extreme indifference to the value of human life—in “the intent to do an act in wanton and wilful disregard of the obvious likelihood of causing death”). Depraved mind murder, therefore, requires outrageously reckless conduct performed with a depraved kind of wantonness or total indifference for the value of human life. See State v. Ibn Omar-Muhammad, 102 N.M. 274, 278, 694 P.2d 922, 926 (1985); Johnson, 103 N.M. at 368, 707 P.2d at 1178.

In Light of these Qualifiers the Evidence Does Not Support Conviction for Depraved Mind Murder

25) We now inquire whether the State produced sufficient evidence to enable a rational juror to find the facts necessary to support Defendant’s conviction for depraved mind murder. Before doing so, we observe that depraved mind murder is not a substitute for deliberate intent murder; it is not a fallback position available whenever the State fails to prove deliberation. People v. Roe, 542 N.E.2d 610, 619 (N.Y. 1989) (Bellacosa, J., dissenting) (warning that depraved indifference murder should not provide prosecutors with an unjust double opportunity for a top count murder conviction). A person is guilty of deliberate murder when that person has a specific intent to kill another person that was “arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action.” UJI 14-201 NMRA 2005.

In contrast, a person guilty of depraved mind murder may not intend the specific result of death, but is equally culpable because that person intentionally commits “an act imminently dangerous to others” or does so “with the subjective knowledge that the act creates a very high degree of risk to the lives of others, indicating a depraved mind regardless of human life.” Brown, 1996-NMSC-073, ¶ 25. Rather than subjectively intend to commit murder, the accused must subjectively intend to commit an act that has a great likelihood of resulting in death. Thus, depraved mind murder involves an intentional act without regard for consequences.

26) The jury did not find Defendant guilty of deliberate murder but found Defendant guilty of depraved mind murder. We may conclude from the verdict that the jury determined Defendant did not act deliberately but rather acted recklessly. To affirm the first-degree murder conviction, we must be assured that the jury understood that depraved mind murder was not a default charge requiring less evidence. Depraved mind murder carries a heavy but different evidentiary burden. The State must prove beyond a reasonable doubt that Defendant knew his act was greatly dangerous to the lives of others, and that Defendant’s act was greatly dangerous to the lives of others indicating a depraved mind without regard for human life. See UJI 14-203.

27) Defendant argues that he did not have the requisite knowledge for either depraved mind murder or second-degree murder because he did not think the gun would fire when he pulled the trigger. Defendant testified that when he put a bullet in the revolver, he checked to make sure it was not in the firing position. He claims he did not think the gun would fire without a bullet in the top chamber and was absent-mindedly playing with the gun when he pulled the trigger. He further contends that he was not looking in David’s direction, and did not know David or anyone else was in the line of fire. If Defendant’s story is to be believed, he did not know his act was greatly dangerous to the lives of others, and he did not act under circumstances indicating a deprived mind.3

28) However, the State introduced evidence that Defendant was familiar with firearms in general, and with this one in particular, because he had recently tested it. Even though Defendant claimed that he did not understand the way the gun worked, and that he only thought it could fire with a bullet in the top chamber, at the very least he knew the gun could fire. Thus, in the State’s view, Defendant took an extremely dangerous risk putting a bullet in a revolver, which Defendant thought was misfiring, and pointing that revolver at David and pulling the trigger.

29) We do not disagree with the State that putting a bullet in a gun and pulling the trigger is extremely, even outrageously, reckless when other people are in the vicinity. If recklessness were all the State had to prove, though, to obtain a conviction for first-degree murder, there would be little principled distinction between depraved mind murder and second-degree murder. See Brown, 1996-NMSC-073, ¶ 14 (observing that the “major distinction between the two degrees of murder is based upon the culpable mental state required by the two offenses”).

30) In fact, the State argued a theory of depraved mind murder before the jury that was inadequate as a matter of law. At the close of the case, the prosecutor argued that any idiot and a loaded gun was deprived mind murder and that “stupidity is reckless disregard per se.” Thus, the State improperly argued that reckless disregard would be sufficient to prove depraved mind murder. As we have seen, depraved mind murder requires proof beyond a reasonable doubt of additional elements, that Defendant knew his act was greatly dangerous to the lives of others, and that he performed
his act under circumstances indicating a depraved mind.  

{31} In most depraved mind murder cases, the facts make it obvious that those accused knew their acts were greatly dangerous to the lives of others, and that they consciously disregarded that risk in a way that manifested extreme indifference. See LaFave, supra, § 14.4(b), at 443. Acts of terrorism and drive-by shootings provide clear examples of the type of gravity and depravity required. Planting a bomb in an airport, for example, is murder when death results, even if the intention is only to destroy property. See Perkins & Boyce, supra, at 60.  

{32} Unlike these paradigms of depraved mind murder, the circumstances in which Defendant fired a bullet and killed David do not lend themselves to one obvious conclusion, that Defendant knew he was taking a grave risk with respect to everyone in the living room and therefore committed a depraved act. As we have noted, discharging a firearm in an occupied room is certainly reckless behavior. But an unintentional killing that results from such behavior has the potential to be any one of first-degree murder, second-degree murder, or involuntary manslaughter.  

{33} In the few New Mexico cases in which we have affirmed depraved mind murder convictions involving the discharge of firearms, the defendant either admitted, or witnesses testified, that the defendant intentionally fired a weapon under circumstances showing an extreme degree of recklessness. See, e.g., State v. Trujillo, 2002-NMSC-005, ¶ 3, 131 N.M. 709, 42 P.3d 814 (shooting several times from a balcony of an apartment building into a crowd, killing a rival gang member); McCrary, 100 N.M. at 672, 675 P.2d at 121 (moving slowly around tractor-trailers parked overnight at a fairground with multiple firearms, shooting twenty-five times into the cabs, and killing a woman in a sleeping compartment); Sena, 99 N.M. at 273, 657 P.2d at 129 (firing four or five times into a crowded bar, killing a bystander). In each instance, there was no question that the defendant acted intentionally in firing the weapon. In each instance, the shooting was prolonged and repetitive.  

In each instance, therefore, the defendant clearly exhibited the type of extreme recklessness from which a jury could infer the defendant acted with a depraved mind without regard for the lives of others. {34} In addition, the defendants in these cases acted with a degree of animosity, which gave the jury additional facts to support findings that the defendants’ actions indicated a depraved mind and that the defendants knew that their acts were greatly dangerous to the lives of others. In Trujillo, the killing took place during an argument with rival gang members. 2002-NMSC-005, ¶ 3. In McCrary, the defendant and his friends felt cheated by carnival operators and sought revenge. 100 N.M. at 672, 675 P.2d at 121. In Sena, the defendant tried to shoot the doorman after being maced and thrown out of a bar, but instead hit someone else. 99 N.M. at 273, 657 P.2d at 129. Thus, the jury could determine from the evidence that the defendant in fact knew he was engaging in extremely reckless conduct aimed at human life in general with a depraved kind of wantonness.  

{35} In these previous cases, even when a defendant claimed to have been unaware that his outrageous conduct exposed others to the extreme risk of death, substantial evidence existed to contradict that claim. In McCrary, for example, the defendant said that he did not know anyone was in the sleeper compartments of the trucks, and thus he was not subjectively aware that his conduct was greatly dangerous to the lives of others. 100 N.M. at 672, 675 P.2d at 121. He claimed he did not intend to hurt anyone because he only meant to shoot the tires of the truck. However, the evidence gave the jury a strong reason to reject the defendant’s story. Not one single tire was shot, and there were twenty-five bullet holes in the upper parts of the trucks. Id. at 673, 675 P.2d at 122. In addition, testimony indicated that the defendant chose to use firearms instead of slashing the tires for fear of being caught, which indicated he knew that people were in the area. Id. As a result, in McCrary, there was reasonable support in the evidence for the jury to find the defendant knew his act was greatly dangerous to the lives of others.  

{36} The case before us stands in contrast. The State contended at trial that Defendant loaded his revolver and intentionally pointed it at David from a distance of a few feet away. Even if we accept that the jury could infer from the evidence that Defendant intentionally pointed his gun at David with the knowledge that the gun could fire, these circumstances without other evidence could only support a charge that Defendant intended to kill David (deliberate intent murder) or intended to commit an act that created a strong probability of death or great bodily harm to David (second-degree murder) but not to others as well. We know that the jury did not find an express intent to kill. But if Defendant’s actions were intentionally directed at David alone, then absent good reason for departing from our previous interpretation of the statute, he cannot be convicted of depraved mind murder. Thus far, we have limited depraved mind murder convictions to acts that are dangerous to more than one person. See DeSantos, 89 N.M. at 461, 553 P.2d at 1268 (holding that killing an individual with a cement block certainly is the work of a depraved mind, but would not be depraved mind murder because our statute “has been limited to reckless acts in disregard of human life in general”). This interpretation seems consistent with the language of the statute and the jury instructions. See § 30-2-1(A)(3) (requiring “any act greatly dangerous to the lives of others”; UJI 14-203 (requiring defendant’s act to be greatly dangerous “to the lives of others” indicating a depraved mind without regard for human life and knowledge that the act was greatly dangerous “to the lives of others”).  

{37} We acknowledge, as the dissent

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3 We note in this case that the jury instruction describing the act required for depraved mind murder was flawed. The instruction simply required the jury to find “defendant shot and killed David O’Brien.” Not much distinguishes this phrase from the act described in the jury instruction for second-degree murder: “defendant killed David O’Brien.” In other attempts to convict a defendant for depraved mind murder in New Mexico, the act was described in more detail. See, e.g., State v. Hernandez, 117 N.M. 497, 498, 873 P.2d 243, 244 (1994) (describing the act as “defendant fired a rifle at a group of people”); State v. Ibn Omar-Muhammad, 102 N.M. 274, 276, 694 P.2d 922, 924 (1985) (describing the act as “defendant intentionally drove a motor vehicle at a high rate of speed into a police roadblock”). Because the act was described so generally in Defendant’s case, the instruction fails to indicate the circumstances the jury found that evinced a depraved mind. Thus, we have no way of knowing on what facts the jury based its findings that Defendant’s conduct indicated a deprived mind. While this error could be considered fundamental, despite the failure to object, we need not reach that analysis if we find there is insufficient evidence to support a verdict of depraved mind murder under any view of the evidence.
points out, that other jurisdictions allow convictions for depraved mind murder when only one individual is put at risk. See 2 LaFave, supra, § 14.4(a), at 440. In some of those jurisdictions, we note, the legislature clearly indicated the statute applies to individuals. See, e.g., Colo. Rev. Stat. Ann. § 18-3-102(1)(d) (requiring defendant to knowingly engage “in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another”) (emphasis added); Wash. Rev. Code Ann. § 9A.32.030(1)(b) (requiring “conduct which creates a grave risk of death to any person, and thereby causes the death of a person” (emphasis added)). Absent a specific indication from the Legislature, we will not broaden our construction of the statute to expand the crime of depraved mind murder and further blur the lines between first- and second-degree murder.4

{38} The State argues that the presence of Defendant’s brother and grandmother make Defendant’s conduct eligible for depraved mind murder because more than one person was placed in peril. However, if we accept the State’s position that Defendant intentionally pointed the revolver at David, no evidence supports the contention that more than one person was placed in danger. No facts support the inference that Defendant loaded his revolver with more than one bullet or pulled the trigger more than once while the bullet was in the revolver. Neither is there evidence that Defendant pointed the gun around the room with reckless abandon, in a threatening manner, or as part of some game of chance with the occupants of the room. Defendant’s brother was lying 180 degrees from where the gun was pointed. There is no dispute in the evidence on this point. Defendant’s grandmother was in a bedroom on the other side of the house, some distance behind Defendant, and not in the direction the gun was pointed. The evidence is undisputed on this point as well. As a result, Defendant’s conviction lacks the evidence needed to establish extreme indifference to human life in general.

{39} Notably, the circumstances of this case differ from the situation in Sena, in which the defendant’s actions of firing several times into a crowded bar, though directed at one individual, placed everyone in the bar directly in danger. 99 N.M. at 273, 657 P.2d at 129. As previously noted, firing a bullet into a room the defendant knows to be occupied is often cited as an example of depraved mind murder. See LaFave, supra, § 14.4, at 440. But it is not simply the presence of others that elevates a death caused by a firearm to the level of depraved mind murder. In addition to requiring that other people be in the line of fire, Sena is consistent with courts in other jurisdictions that have required particularly egregious facts to sustain convictions, such as repeated and indiscriminate firing of a weapon despite knowing that others are in harm’s way. It is those types of facts that indicate a depraved mind without regard for human life.

{40} For example, in People v. Jernatowski, 144 N.E. 497 (N.Y. 1924), which LaFave cites, the court affirmed a jury verdict finding the defendant guilty of depraved mind murder for firing several shots into a house at night and killing a woman standing near the window. Beyond showing an extremely reckless act, the evidence showed the defendant was aware of the risk his conduct posed to others, yet callously disregarded that risk. There were lights on in the house, and the victim yelled at defendant to go away. The evidence also demonstrated that the defendant was part of a threatening gang, and bore a vicious animosity toward the victim’s husband. Id.5

{41} As cases like Jernatowski indicate, in most convictions for depraved mind murder, the jury can account for the high level of culpability required for first-degree murder by looking at a defendant’s conduct in light of the external facts known to the defendant. If a defendant’s conduct is egregious enough, the jury can infer an element of wantonness and a subjective awareness of a high degree of risk. See Perkins & Boyce, supra, at 60.

{42} Under the right circumstances, a jury might reasonably find that firing a bullet into a room the defendant knows to be occupied would be depraved mind murder. In this case, however, the facts do not speak of these elements. In Defendant’s case, pointing a gun at David without justification and discharging it from four to ten feet away might permit a jury to conclude Defendant committed a “depraved” act; this is virtually a knowing homicide. But without expanding our statutory construction of depraved mind murder, this act directed at David alone can only be deliberate murder or second-degree murder according to Section 30-2-1(A)(3) and our case law. See DeSantis, 89 N.M. at 461, 553 P.2d at 1268. The State did not present evidence that would allow the jury to conclude that Defendant’s actions indicated a depraved mind with respect to human life in general. If we affirmed a conviction on these facts, then any time a person recklessly mishandles a firearm in the presence of another and shoots someone by accident, the accused can be charged with depraved mind murder.

{43} In a case like this, in which the circumstances alone do not manifest a depraved indifference to human life, there must be some circumstances showing malevolence or indifference other than

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4 Even if we ignored the general rule in New Mexico that depraved mind murder involves an act endangering more than one person, we do not agree with the dissent that the jury could properly infer from the evidence that Defendant was playing some form of Russian roulette. While playing a macabre game of chance with a firearm may be a classic example of an act indicating a depraved mind, other jurisdictions have required more evidence in affirming murder convictions where it appeared the defendants were playing Russian roulette. See, e.g., State v. Boyce, 718 A.2d 1097 (Me. 1998) (affirming depraved indifference murder after defendant shot victim in the head at point blank range during a drunken approximation of Russian roulette in which he impulsively and carelessly fired a pistol thirty times inside his house in the presence of many other people); State v. Tanguay, 574 A.2d 1359, 1361 (Me. 1990) (affirming second-degree murder depraved indifference murder based on testimony that the defendant and victim pushed a gun back and forth before defendant picked it up, rolled the cylinder, which defendant knew contained two bullets, laughed, and fired the gun at the victim); People v. Roe, 542 N.E.2d 610 (N.Y. 1989) (affirming second-degree depraved indifference murder where 15-year-old defendant loaded a mix of live and dummy shells at random into a 12-gauge shotgun, pumped a shell into the firing chamber, pointed it directly at a 13-year-old victim, exclaimed, “Let’s play Polish roulette,” and pulled the trigger); Commonwealth v. Malone, 47 A.2d 445 (Pa. 1946) (affirming conviction for second-degree murder where 17-year-old defendant placed a cartridge in the chamber of a .32-caliber revolver, suggested they play Russian poker, placed the gun against his 13-year-old friend’s side, and pulled the trigger three times). Unlike these cases, the jury had no testimony or evidence that Defendant was either playing a game or trying to scare David by pointing the gun at him.
the doing of a wrongful act. See People v. Goecke, 579 N.W.2d 868, 885 (Mich. 1998) (Kelly, J., concurring in part and dissenting in part). A proper understanding of depraved mind as used in our murder statute is that a “conscious endangering of human life springing from such total indifference is a more blameworthy choice than ‘mere recklessness alone which has had an incidental tragic result.’” See Bernard E. Gegen, More Cases of Depraved Mind Murder: The Problem of Mens Rea, 64 St. John’s L. Rev. 429, 436 (1990) (quoted authority omitted).

{44} We are not persuaded that the State carried its evidentiary burden beyond a reasonable doubt that Defendant’s conduct rose to the extreme level of depravity reserved for first-degree murder. We hold, therefore, that there is insufficient evidence to support the verdict that Defendant committed an act greatly dangerous to the lives of others, indicating a depraved mind in disregard of human life.

Jury Instructions

{45} Even though it is unnecessary to the disposition of his case, Defendant raises a valid concern with respect to the uniform jury instructions. Defendant argues that “depraved mind” needs to be defined for the jury. The State responds that the term requires further definition. Cf. State v. Magby, 1998-NMSC-042, ¶ 22, 126 N.M. 361, 969 P.2d 965 (directing the committee to modify the uniform jury instructions for child abuse resulting in death to include a definition of “reckless disregard” in order to adequately define the requirement of criminal negligence) overruled on other grounds by State v. Mascareñas, 2000-NMSC-017, ¶ 27, 129 N.M. 230, 4 P.3d 1221.

Child Abuse

{47} Having reversed the conviction for first-degree depraved mind murder, we could remand this case to the district court for a new trial on the lesser included offenses of second-degree murder and involuntary manslaughter. However, in order to determine whether retrial is legally possible, we must first consider the viability of the child abuse conviction.

5 See also State v. Michaud, 513 A.2d 842 (Me. 1986) (affirming depraved indifference murder conviction for killing a child when defendant, after fighting all evening with his girlfriend and threatening to kill her, purposefully fired two shots from a shotgun into a house while aware that seven people were inside); People v. Register, 457 N.E.2d 704 (N.Y. 1983) (affirming depraved indifference murder conviction for defendant who arrived at a crowded bar with a loaded handgun, drank continuously for several hours, announced several times that he was going to kill someone that night, then fired three times at various patrons, killing one and injuring two).

6 We agree with the dissent that changes to our jury instructions should be more sweeping in order to clarify the distinctions between the various degrees of murder. Adopting the language of the Model Penal Code may offer a promising start, but we decline to suggest such a change primarily because we are constrained by the language of the statute. In addition, replacing “depraved mind” with the phrase “indicating an extreme indifference to the value of human life” would fail to clarify the differences between first-degree murder and manslaughter, for example, unless the jury instructions for manslaughter were changed. See Romero, supra, at 80-86 (suggesting comprehensive changes to the statutes and uniform jury instructions for all degrees of unintentional homicide). As the drafters of the Model Penal Code made clear in refusing to further define the extreme indifference required for murder: “It must be left directly to the trial courts to determine, under which instructions it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.” Model Penal Code § 210.2 cmt. 4, at 21-22 (1980). Without changes throughout our jury instructions, the distinction between murder and manslaughter would remain unclear.

48} Defendant contends that our child abuse statute only applies to situations in which an adult, such as a parent or guardian, has a special relationship with a child. Because Defendant and the victim were only friends and contemporaries, Defendant argues that there is insufficient evidence to support his conviction for child abuse.

49} Defendant is correct that three subsections of the child abuse statute include the specific language of parent, guardian or custodian. See § 30-6-1(A), -1(B), and -1(C). However, the Legislature does not use those terms in Subsection D, which states that child abuse “consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be: (1) placed in a situation that may endanger the child’s life or health.” Section 30-6-1(D) (emphasis added). “[W]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.” State v. Rivera, 2004-NMSC-001, ¶ 10, 134 N.M. 768, 82 P.3d 939 (quoted authority omitted).

[50] The Legislature has not indicated that the statute for negligent child abuse resulting in death is restricted to persons having a special relationship with the child, such as a parent or guardian. See § 30-6-1(D). Our courts have held that the statute applies to any person who causes or permits a child to be placed in a situation that endangers the child’s life. See State v. Lujan, 103 N.M. 667, 669, 712 P.2d 13, 15 (Ct. App. 1985) (affirming conviction for child abuse after defendant chased a family in a pickup truck while his friends threw beer bottles and cans, one of which struck an infant’s head). Reading the statutory...
language to apply to all adults, regardless of the relationship, appears consistent with the legislative intent to protect children from abuse. See State v. Santillanes, 2001-NMSC-018, ¶ 24, 130 N.M. 464, 27 P.3d 456 (stating that purpose of statute is to expand protection for children who are more vulnerable than adults).

{51} Defendant was an 18-year-old adult who shot a 14-year-old child. Unless the Legislature expressly states otherwise, Defendant’s friendship with the victim does not excuse his conduct. We acknowledge Defendant’s argument that a strict application of this statute can lead to absurd results, such as when two friends are separated in age by only a couple of days. However, those facts are not before us. Therefore, we reject Defendant’s argument that the child abuse statute does not apply to him.

Child Abuse Jury Instructions

{52} Defendant also challenges the jury instructions for child abuse. Even though an outdated instruction was given, Defendant did not object or tender different instructions. Therefore, we review for fundamental error. See Rule 12-216(B)(2) NMRA 2005; State v. Sosa, 1997-NMSC-032, ¶ 23, 123 N.M. 564, 943 P.2d 1017. The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice. State v. Jett, 111 N.M. 309, 314, 805 P.2d 78, 83 (1991). Error that is fundamental “must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.” State v. Garcia, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942).

{53} Defendant argues and the State concedes that the district court gave the jury the former elements instruction for child abuse, rather than the new one. Under the old instruction, the jury was required to find that Defendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child. See UJI 14-602 NMRA 1999. Under the new instruction, the jury is required to find that Defendant acted with reckless disregard, which means the jury must find that Defendant knew or should have known his actions created a substantial and foreseeable risk, that Defendant disregarded that risk and was wholly indifferent to the consequences and to the welfare and safety of the child. See UJI 14-602 NMRA 2005.

{54} In Mascareñas, this Court was concerned that the jury could have applied an ordinary negligence standard rather than a criminal negligence standard because the terms “negligence” and “reckless disregard” were used in the same element without clarifying the difference. 2000-NMSC-017, ¶¶ 12-13. A similar mistake occurred in Defendant’s case. The jury was instructed, “To find that [Defendant] negligently caused child abuse to occur, you must find that [Defendant] knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of David O’Brien.” As in Mascareñas, we acknowledge the potential for juror confusion.

{55} Under a fundamental error analysis, however, we consider any possible confusion in the context of jury instructions as a whole. See State v. Cunningham, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176. The State argues that this situation differs from Mascareñas because the jury here was given a definitional instruction of “reckless disregard” stating that “[f]or you to find the defendant acted with reckless disregard in this case, you must find that the defendant acted with willful disregard of the rights or safety of[f] others and in a manner which endangered any person or property.” The State contends that this definitional instruction adequately corrected the omission of the definition of “reckless disregard” in the elements instruction.

{56} Ordinarily, we would agree with the State and conclude that the definition corrected any potential for juror confusion. Only the child abuse instruction referred to “reckless disregard,” and we would presume that the jury would understand the connection regardless of the order in which the jury instructions were read. However, because the possibility exists that the jury read the reckless disregard instruction in the context of the other instructions for homicide, we cannot assume that the misplaced definition corrected any potential for juror confusion. Thus, we conclude that the existence of the jury instruction for reckless disregard did not correct any shortcomings in the child abuse instruction.

{57} However, even assuming that the reckless disregard instruction did not correct the improper child abuse instruction, and that juror confusion persisted due to the order the instructions were given, any error in the child abuse instruction was harmless and not fundamental error. A definitional instruction is not necessary if, as matter of law, no rational juror could find that a defendant acted with less than criminal negligence. See Magby, 1998-NMSC-042, ¶ 11. Without acquitting Defendant, no rational juror could have found that Defendant shot David under the circumstances presented in this case without meeting the standard of criminal negligence. At the very least, Defendant was guilty of criminal negligence under the facts presented. We therefore affirm the conviction for child abuse resulting in death.

Double Jeopardy

{58} Having reversed the depraved mind murder conviction, and affirmed the child abuse resulting in death conviction, we now consider whether it would be in the interests of justice to remand for a new trial on the lesser-included offenses of first-degree murder, for which the jury received instructions, or to remand for entry of judgment on a lesser-included offense. See State v. Villa, 2004-NMSC-031, ¶ 9, 136 N.M. 367, 98 P.3d 1017.

{59} Defendant can only be convicted of one crime for David’s death. See Santillanes, 2001-NMSC-018, ¶ 5 (“[T]he generally accepted notion that one death should result in only one homicide conviction’ overcomes the presumption of multiple punishment.”). Because we are affirming the child abuse resulting in death conviction, a conviction for second-degree murder or involuntary manslaughter would violate fundamental principles of double jeopardy. See id. (holding convictions for both child abuse and vehicular homicide resulting in death constitute a double jeopardy violation); State v. Mann, 2000-NMCA-088, ¶ 14, 129 N.M. 600, 11 P.3d 564 (concluding that convictions of both child abuse resulting in death and second-degree murder violate the general rule that one homicide by the acts of one defendant should result in one homicide conviction), aff’d, 2002-NMSC-001, 131 N.M. 459, 39 P.3d 124.

{60} Because we affirm the conviction for child abuse resulting in death, Defendant cannot be convicted twice for the lesser includes offenses of depraved mind murder. Thus, it would not be in the interests of justice to remand for a new trial or for entry of judgment on the lesser included offenses.

CONCLUSION

{61} We reverse Defendant’s conviction for depraved mind murder, and affirm the conviction for child abuse resulting in death. On remand, we instruct the district court to vacate Defendant’s conviction for depraved mind murder and adjust Defendant’s sentence accordingly.
excuse . . . by any act greatly dangerous to
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by another without lawful justification or
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agree with the majority’s conclusion that, because we
In my view, these facts satisfy
of depraved mind murder set
Blames for the depraved heart type...the required
risk may be risk only to a single person.”
2 Wayne R. LaFave, Substantive Criminal
Law § 14.4(a), at 441 (2d ed. 2003). In
three of the paradigmatic instances
murder, cited in jurisdic-
whereas to our own as well as in
jurisdictions where it is a lesser crime, are a
game of Russian roulette between
and throwing a full beer mug at a person carrying a lighted oil lamp.

WE CONCUR:
PAMELA B. MINZNER, Justice
PETRA JIMINEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
PATRICIO M. SERNA, Justice
(concurring in part and dissenting in part)

SERNA, JUSTICE (concurring in part and dissenting in part)

{63} I concur in the majority’s affirmation of the child abuse resulting in death conviction, but I respectfully dissent from the majority’s reversal of the depraved mind murder conviction. I
would affirm Defendant’s conviction of first degree murder.

{64} Regarding the child abuse conviction, I agree with the majority that the Legislature has not restricted child abuse in Section 30-6-1(D) to persons having a custodial relationship with the child, and I agree that the jury instructions did not create fundamental error. The jury was
given an instruction defining “reckless disregard,” and child abuse resulting in death was the only crime requiring this mental state. “The jury is presumed to follow the court’s instructions.” State v. Gonzales, 113 N.M. 221, 230, 824 P.2d 1023, 1032 (1992). I also agree with the majority’s conclusion that, because we are affirming
the child abuse resulting in death conviction and a conviction of second degree murder would violate the
double jeopardy principle articulated in State v. Santillanes, 2001-NMSC-018, ¶ 5, 130 N.M. 464, 27 P.3d 456, it is unnecessary to decide whether to remand for a new trial or remand for entry of judgment on second degree murder. In either event, a conviction of the lesser offense of second degree murder would have to be vacated in favor of the greater offense of child abuse resulting in death. See id. ¶¶ 29-30; State v. Pierce, 110 N.M. 76, 86-87, 792 P.2d 408, 418-19 (1990).

{65} With respect to the majority’s reversal of the depraved mind murder conviction, I believe that application of the appropriate standard of review shows that there was sufficient evidence to support this crime as it has been defined by the Legislature. Section 30-2-1(A) defines as first degree murder “the killing of one human being by another without lawful justification or excuse...by any act greatly dangerous to
the lives of others, indicating a depraved mind regardless of human life.” We have interpreted this provision to require subjective knowledge on the part of the defendant. State v. Ibn Omar-Muhammad, 102 N.M. 274, 277, 694 P.2d 922, 925 (1985). The defendant must have actual knowledge that his or her act is greatly dangerous to the lives of others. See State v. Brown, 1996-NMSC-073, ¶ 25, 122 N.M. 724, 931 P.2d 69 (“The malice required for depraved mind murder is an intent to commit an act imminently dangerous to others or with the subjective knowledge that the act creates a very high degree of risk to the lives of others, indicating a depraved mind regardless of human life.”). We have further explained that “sufficient subjective knowledge exists if [the defendant’s] conduct was very risky, and under the circumstances known to [the defendant] [he or she] should have realized this very high degree of risk.” State v. McCrary, 100 N.M. 671, 673, 675 P.2d 120, 122 (1984). We apply this standard because “the element of intent is seldom susceptible to direct proof and accordingly may be proved by circumstantial evidence. Seldom will an accused admit at trial that he [or she] actually knew that his or her acts placed another’s life in great danger.” Id. (citation omitted).

{66} The majority recognizes that the evidence in this case, viewed in a light most favorable to the verdict, supports an inference that Defendant’s conduct of pulling the trigger of a loaded gun with others in the vicinity was outrageously reckless and supports a finding that the circumstances known to Defendant included the following: (1) the gun was functioning properly; (2) Defendant was aware of how the gun operated; (3) multiple people were in close proximity; and (4) Defendant loaded the gun himself. The majority also views Defendant’s actions as a knowing homicide. In my view, these facts satisfy the definition of depraved mind murder set out by the Legislature and clarified by this Court in Brown, McCrary, and Ibn Omar-Muhammad. From these facts, I believe a rational trier fact could find beyond a reasonable doubt that Defendant’s conduct was very risky, that is, greatly dangerous to the lives of others, and that, based on the circumstances known to him, Defendant knew of the very high degree of risk to the lives of others from his actions. By holding this evidence insufficient, I believe that the majority alters the crime of depraved mind murder from how it was conceived by the Legislature.

{67} It seems that the primary reason that the majority believes the evidence in this case to be insufficient is because Defendant’s actions did not place more than one person at risk. However, I respectfully disagree with the majority on this point both factually and legally. From a factual standpoint, the majority assesses the risk to others based on the State’s argument that Defendant intentionally pointed a loaded gun at the victim with knowledge that it could fire. I believe that this overlooks Defendant’s testimony that he pointed the gun at himself and to his side and pulled the trigger of a gun he knew he had loaded without paying any attention to what the other two individuals in the room were doing or where they were located. Under this testimony, a rational jury could conclude that Defendant’s outrageously reckless conduct placed more than one life in danger. Again, the jury was not required to find that Defendant actually knew that the victim or Defendant’s brother was in the line of fire. See McCrary, 100 N.M. at 673, 675 P.2d at 122. It would be sufficient for the jury to infer from the fact that Defendant knew that two other people were in the room that Defendant should have realized the very high degree of risk from absent-mindedly playing with a loaded gun and intentionally pulling the trigger. See id.

{68} Even under the factual scenario of Defendant pointing the gun at the victim, I respectfully disagree with the majority’s legal conclusion that Defendant was required to place more than one life in danger. I do not believe this conclusion is supported by Section 30-2-1(A) or compelled by our case law. The majority relies on the committee commentary to UJI 14-203. However, this commentary says only that “[i]t is generally believed that this murder occurs when the accused does an act which is dangerous to more than one person.” UJI 14-203 committee cmt. On the contrary, however, it is generally understood that “[f]or murder of the depraved heart type...the required risk may be risk to a group of persons... or it may be risk only to a single person.” 2 Wayne R. LaFave, Substantive Criminal Law § 14.4(a), at 441 (2d ed. 2003).
Examples of the kinds of conduct which would demonstrate ‘depraved heart’ murder at common law include: the firing of a loaded gun, without provocation, into a moving train and the resultant death of an innocent bystander; the discharge of a firearm into a crowd of people; operating a vehicle at high speed; placing obstructions on a railroad track; throwing a heavy piece of timber from a roof onto a crowded street; pointing a revolver loaded with a single cartridge and firing it on the third pull of the trigger during a game of Russian Roulette; firing several shots into a home known to be occupied; intending to shoot over a victim’s head in order to scare the victim, but hitting the victim by ‘mistake’; and throwing a heavy beer glass at a woman carrying a lighted oil lamp.” (citations omitted). All three of these situations involve a risk to only one person, but the act that results in the killing is so extremely reckless, and indicates such indifference to human life, that legislatures have designated it as depraved mind murder. See, e.g., Neitzel v. State, 655 P.2d 325, 338 (Alaska Ct. App. 1982) (stating that a game of Russian roulette is “so dangerous and so lacking in social utility that it demonstrates extreme indifference to human life and serves to distinguish murder from manslaughter”).

Committee commentary to a uniform jury instruction can be persuasive only to the extent that it is not inconsistent with existing law. See State v. Johnson, 2001-NMSC-001, ¶ 16, 130 N.M. 6, 15 P.3d 1233. Although the majority also relies on Section 30-2-1(A) as authority for requiring that multiple people be placed at risk, apparently deferring to the word “lives” rather than “life” in the statutory phrase “greatly dangerous to the lives of others,” I do not believe that the language in the statute supports this interpretation, particularly given its historical origin. The above examples involving risk to a single person represent the common law view of the crime of depraved mind murder. We have previously said that it is this common law view of the crime of murder that our Legislature intended to adopt in 1907 when it set out depraved mind murder in exactly the same terms as the current statute, including the use of the word “lives.” See Territory v. Montoya, 17 N.M. 122, 127, 125 P. 622, 623 (1912) (“[O]ur statute does not attempt to change the definition of the crime of murder as known to the common law.”); see also 1907 N.M. Laws ch. 36, § 1. Our Legislature certainly would have been aware of the famous 1883 example of the beer glass and the oil lamp, and its application to a single person being put at risk, but the Legislature did not indicate any intent to depart from this common-law understanding of the crime. See Sims v. Sims, 1996-NMSC-078, ¶ 22, 122 N.M. 618, 930 P.2d 153 (“[N]o innovation upon the common law that is not clearly expressed by the legislature will be presumed.”). While some jurisdictions have explicitly applied depraved mind murder to conduct that places only a single person at risk, other jurisdictions and the Model Penal Code have contemplated the application of the crime of depraved mind murder to such conduct even with a definition of the crime that includes a plural term substantially similar to our statute’s use of the word “lives.” E.g., Model Penal Code §210.2 cmt. 4, at 22-23 (1962). In addition, it is a basic rule of statutory construction that, absent any indication to the contrary, “[u]se of the singular number includes the plural, and use of the plural number includes the singular.” NMSA 1978, § 12-2A-5(A) (1997). Therefore, I believe that, consistent with the common law view of the crime, the Legislature did not intend to restrict depraved mind murder to conduct placing multiple individuals at risk.

In McCrory, for example, in which the defendants fired at tractor-trailers and cabs, the individual who was killed was in a sleeping compartment in one of the cabs. 100 N.M. at 672, 675 P.2d at 121. However, there is no indication that anyone else was in the trucks at the time of the shooting, and the defendants “waited until they thought all people had left the carnival [and] circled two or three times to make sure no one would get hurt.” Id. at 673, 675 P.2d at 122. Our holding in that case was not based on multiple people having been put at risk; instead, we stated that, “[i]n light of the surrounding circumstances, Defendants should have realized the risk of someone sleeping in the sleeper compartment.” Id. (emphasis added).

Under our current statutory scheme, I would agree that when an intent to kill exists, then there should be a requirement that multiple people be put at risk in order to constitute depraved mind murder. The Legislature has indicated that an intentional killing unaccompanied by deliberation and not committed in the course of a felony, such as a rash or impulsive killing, should be second degree murder. See State v. Gar-
of whether [the defendant] fired at [the victim] to discipline her for drinking vodka which belonged to him, to frighten her, to demonstrate his marksmanship by seeing how close he could come without hitting her, or to just have fun with his rifle.” Id. Whatever the defendant’s purpose, conduct of this nature, even though directed at one person, evidences such total indifference to the value of human life that it satisfies the definition of depraved mind murder. Id. at 338 (describing the conduct as “closely approximating the examples frequently used in the common law and in the Model Penal Code to differentiate reckless murder from manslaughter”). I believe that the Legislature’s adoption of the common law form of depraved mind murder indicates an intent to encompass this type of egregious conduct. Further, by categorizing the common law form of depraved mind murder as first degree murder, the Legislature has deemed conduct of this nature so heinous and reprehensible that it is the functional equivalent of deliberate intent murder and receives greater punishment than a rash, albeit intentional, killing due to the increased culpability from the defendant’s extreme indifference to the value of human life. See Salazar, 1997-NMSC-044, ¶ 42 (“Depraved mind murder involves blameworthiness and culpability comparable to deliberate premeditated murder.”); Brown, 1996-NMSC-073, ¶ 27 (“In fact, the depraved mind or extreme indifference aspect required for first-degree depraved mind murder brings it more in line with the ‘specific intent’ or cool deliberation aspect required for first-degree depraved heart murder [is] when a defendant unintentionally killed a friend through the game of Russian roulette. In such a case, the defendant demonstrated extreme indifference to the value of only one specific human life, the friend with which he [or she] was playing Russian roulette, but the defendant’s conduct still qualified as depraved heart murder . . . .”).

While the cases cited by the majority may have been based on “particularly egregious facts,” such as “repeated and indiscriminate firing of a weapon,” e.g., People v. Jernatowski, 144 N.E. 497 (N.Y. 1924), these cases did not purport to limit depraved mind murder to such facts. In fact, cases have upheld depraved mind murder convictions under facts remarkably similar to the present case. See State v. Tanguay, 574 A.2d 1359, 1361 (Me. 1990) (reviewing evidence that the defendant and the victim handed a gun back and forth and that the defendant rolled the cylinder in a gun that he knew could contain two bullets and observing, based on the defendant’s comments and actions having demonstrated that he was playing a type of Russian roulette immediately prior to the shooting, that the jury “made a discriminating assessment of the evidence by acquitting defendant of intentionally killing the victim” but convicting of depraved indifference murder); People v. Sanchez, 777 N.E.2d 204, 206 (N.Y. 2002) (stating in the context of a defendant recklessly firing a single bullet at his friend from twelve to eighteen inches away that the “defendant’s shooting into the victim’s torso at point-blank range presented such a transcendent risk of causing his death that it readily meets the level of manifested depravity needed to establish” depraved mind murder); People v. Roe, 542 N.E.2d 610, 613 (N.Y. 1989) (affirming a depraved mind murder conviction for a killing caused by pulling the trigger a single time, and consequently firing a single bullet, from ten feet away from the victim when evidence indicated that it occurred during a game of Polish roulette, despite the defendant’s testimony that the gun slipped and discharged accidentally); see also State v. Baker, No. COA01-710, 2002 WL 1312670, at *2-4 (N.C. Ct. App. 2002) (unpublished) (upholding a depraved mind murder conviction based on the defendant’s

7 These facts, coupled with the location of the wound, make the likelihood of a game of chance or similar outrageously reckless conduct far more likely than a mere accidental shooting and is not, in my view, evidence equally consistent with two inferences. The fact that there was no eyewitness testimony or other direct evidence supporting an inference of this nature is not determinative in a review for sufficient evidence. See State v. Bell, 90 N.M. 134, 137, 560 P.2d 925, 928 (1977). “[T]he test to determine the sufficiency of evidence in New Mexico . . . is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every essential element to a conviction.” State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988) (emphasis added).

8 In fact, if the jury believed that Defendant was trying to scare the victim or play a practical joke on him, then the jury might reasonably have inferred from the brother’s lies and the multiple bullet holes in the victim’s shirt, combined with the forensic testimony that the bullet was fired from four to ten feet away, that Defendant’s brother could have been holding the victim as part of the prank. If the jury made this inference, then Defendant’s act of pointing the gun at the victim would have been greatly dangerous to the life of his brother in addition to the life of the victim.
conduct of pointing a gun believed to be unloaded at a friend after playing video games and pulling the trigger once while “‘just playing around’” with the gun and stating that “[w]hether or not defendant realized that the gun was loaded, his conduct was extremely reckless and utterly without regard for [the victim’s] life”). Of particular note, the jurisdiction relied upon by the majority, New York, has indicated that the more times a defendant fires a gun, the more likely it is that the shooting was intentional and not depraved mind murder. People v. Payne, 819 N.E.2d 634, 637 (N.Y. 2004). In any event, there is nothing in Section 30-2-1(A) that would suggest that the Legislature intended to require the repeated and indiscriminate firing of a weapon.

{74} The majority states that the facts in this case “do not lend themselves to one obvious conclusion” and that in our other cases “there was no question that the defendant acted intentionally in firing the weapon.” In my view, these statements overlook the appropriate standard of review. The question in this case is not whether this Court agrees with the jury’s verdict or whether the verdict reached by the jury was inescapable; it is whether, after viewing the evidence in a light most favorable to the verdict and indulging all reasonable inferences in support thereof, any rational jury could have found the elements of the crime beyond a reasonable doubt. See State v. Sanders, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994). The State is not required “to rule out every hypothesis except that of guilt beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 326 (1979). “An appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence.” Surphin, 107 N.M. at 130-31, 753 P.2d at 1318-19. Although I agree with the majority that this would be a close and difficult case for a fact-finder, I believe that there is ample evidence to support the verdict reached by the jury. I would not second-guess the jury’s verdict or substitute my view for that of the jury.

{75} The majority also contends that affirming Defendant’s conviction would transform all accidental shootings into depraved mind murder. I respectfully disagree. The facts in this case, viewed in a light most favorable to the verdict, do not support an “accidental” shooting. A rational jury could have found beyond a reasonable doubt that Defendant intentionally loaded the gun, intentionally pointed the gun at the victim, and intentionally pulled the trigger. These facts demonstrate outrageous recklessness on the part of Defendant and unquestionably distinguish this case from one involving mere negligence, or even recklessness, with a tragic result.

{76} The majority believes that only the “thinnest of distinctions” can be made between depraved mind murder and second degree murder. However, as we explained in Brown, depraved mind murder consists of two significant distinguishing elements. First, depraved mind murder requires outrageous recklessness, which serves as evidence of a depraved mind regardless of human life. See Brown, 1996-NMSC-073, ¶ 15. Second, in order to further assure that the defendant acted with a depraved mind, we require subjective knowledge that the act was extremely dangerous to the lives of others. Id. ¶ 16 (“The required mens rea element of ‘subjective knowledge’ serves as proof that the defendant acted with a ‘depraved mind’ or ‘wicked or malignant heart’ and with utter disregard for human life.”); see State v. Primeaux, 328 N.W.2d 256, 258 (S.D. 1982) (“[T]he ‘depraved mind’ requirement is a genuine additional element . . . .”). Neither of these elements are required for second degree murder. A strong probability of death or great bodily harm, which is required for second degree murder, is a lesser standard than extreme danger to the lives of others. See Neitzel, 655 P.2d at 337 (“[T]he significant distinction in the likelihood that a death will result from the defendant’s act.”); People v. Register, 457 N.E.2d 704, 707 (N.Y. 1983) (distinguishing between the required “grave risk of death” for depraved mind murder and the “lesser” standard of substantial risk of death); see also Ibn Omar-Muhammad, 102 N.M. at 278, 694 P.2d at 926 (stating that the difference between the extreme recklessness requirement of depraved mind murder and ordinary recklessness “is one of degree, not of kind”). In addition, “[s]econd-degree murder . . . contains a component involving an ‘objective knowledge’ of the risk, without the required showing that the risk-creating act was performed with a wicked and malignant heart.” Brown, 1996-NMSC-073, ¶ 16. “Unlike second-degree murder, the new ‘subjective knowledge element’ of depraved mind murder does not include the imputed knowledge that an ordinary person would be expected to have.” Id. ¶ 26. In fact, to emphasize the importance of this distinction in Brown, we overruled precedent that had held that second degree murder contains a subjective knowledge standard similar to deprived mind murder. Id. These two important and substantial distinguishing elements create a meaningful difference between depraved mind murder and second degree murder.

{77} Although I believe that we sufficiently distinguished deprived mind murder from second degree murder in Brown, I agree with the majority that our jury instructions should be clarified. The deprived mind murder instruction the jury received in this case reproduces the Legislature’s definition of the crime practically verbatim and is, I believe, a correct statement of the law. If Defendant wanted any further definition of depraved mind, it was incumbent upon him to request it. See State v. Carmes, 97 N.M. 76, 78, 636 P.2d 895, 897 (Ct. App. 1981) (“The failure to instruct the jury on the definition or the amplification of the elements of an offense is not error when there has been a failure to request such an instruction.”). Nonetheless, as shown by the closing argument of both parties, as well as by the committee commentary to our UJIs, a misunderstanding of the crime of deprived mind murder persists. Defense counsel incorrectly argued reckless disregard as the mens rea for deprived mind murder, and the prosecutor inaccurately told the jury that an idiot combined with a loaded firearm equals deprived mind murder. As the majority indicates, a clearer definition of “depraved mind” could help juries better understand the crime of deprived mind murder. However, I believe that the changes to our UJIs must be more sweeping to fully communicate to juries the difference between deprived mind murder and second degree murder.

{78} Initially, I am concerned that a definition of “depraved mind” might still leave the element unclear. For example, many of the descriptions of “depraved mind” in our cases contain arcane language, such as “depraved kind of wantonness” and “wicked and malignant heart,” that may not assist juries in truly understanding the Legislature’s intent any more than the statutory phrase itself. In fact, the drafters of the Model Penal Code addressed this very problem and concluded that definitional instructions or expansive descriptions of the requisite mental state may actually impede jury deliberations. Instead, Model Penal Code replaced the common law language of deprived mind or deprived heart with the phrase “extreme indifference to the value of human life.” Model Penal Code §210.2. The commentary explains as follows:
It seems undesirable to suggest a more specific formulation. The variations in terminology used in different jurisdictions retain in some instances greater fidelity to the common-law phrasing but they do so at great cost in clarity. Equally obscure are the several attempts to depart from the common law . . . . The result of these formulations is that the method of defining reckless murder is impaired in its primary purpose of communicating to jurors in ordinary language the task expected of them. The virtue of the Model Penal Code language is that it is a simpler and more direct method by which this function can be performed.


(79) Instead of defining the term “depraved mind,” the committee might find it more appropriate to change the phrasing of the element itself to make it “simpler and more direct.” As noted previously, the language in the present UJI follows the language of the statute, but perhaps the incorporation of the language in the Model Penal Code, with the phrase “indicating an extreme indifference to the value of human life,” would be clearer to juries than “indicating a depraved mind without regard for human life.” An instruction of this nature would not require further amplification and would effectively communicate the meaning of the crime intended by the Legislature. See State v. Barstad, 970 P.2d 324, 331 (Wash. Ct. App. 1999) (“[T]he courts have not attempted to further define ‘extreme indifference’; rather, the particular facts of each case are what illustrate its meaning. There is no need for further definition.”); see also Neitzel, 655 P.2d at 338.

(80) I also believe it would be useful to explain to the jury, as we explained in Brown, that it is both the outrageously reckless conduct and the defendant’s subjective knowledge of the extreme danger to the lives of others that demonstrates a depraved mind. See Brown, 1996-NMSC-073, ¶ 16 (“‘Subjective knowledge’ serves as proof that the defendant acted with a ‘depraved mind’ . . . .”); Ibn Omar-Muhammad, 102 N.M. at 278-79, 694 P.2d at 926-27 (explaining that extremely reckless conduct serves as evidence of an extreme indifference to the value of human life). Our current instructions refer to the “depraved mind” aspect of the crime only in element three, describing the required act, and not in element four, describing the requirement of subjective knowledge. Cf. Barstad, 970 P.2d at 330 (discussing a jury instruction containing three separate elements requiring that the defendant “engage[] in conduct creating a grave risk of death to others,” that the defendant “know[] of and disregard[] the grave risk of death to others,” and that the “conduct and disregard of such grave risk occur[] under circumstances which manifest the defendant’s extreme indifference to human life”) (emphasis added).

To me, however, the primary lack of clarity in our jury instructions does not come from the elements of depraved mind murder in UJI 14-203. This instruction follows the language of the statute and, while certainly subject to improvement, correctly states the law. Instead, the primary problem lies in the elements of second degree murder in UJI 14-210 and UJI 14-211. As explained above, we have held that depraved mind murder differs from second degree murder because it requires a “subjective knowledge” on the part of the defendant, whereas second degree murder requires only “objective knowledge.” Brown, 1996-NMSC-073, ¶ 16. However, our UJIs do not implement this critical distinction. The jury instructions for both crimes, first degree depraved mind murder and second degree murder, contain an element of subjective knowledge. It does not seem unlikely that it is this oversight in our UJIs that has caused the majority so much difficulty in trying to distinguish the two crimes as described in the instructions given to the jury in this case. In fact, the commentary to UJI 14-203, while correctly stating that the instruction contains “a subjective test for ‘depraved mind murder,’” goes on to say that “[s]econd-degree murder provides an objective test for depraved mind murder.” (Emphasis added.) The commentary to UJI 14-211 further obscures the distinction between the two crimes by stating that “[s]econd degree murder is committed when death results from acts which the defendant knew created a strong probability of death or great bodily harm. This was formerly known as ‘depraved heart murder, which is also murder in the first degree.’” (Emphasis added.) Contrary to this view, there are not two forms of deprived mind murder in New Mexico; there is only one form of deprived mind murder, and the Legislature has classified it as first degree murder. The combination of the commentary and the incomplete description of the mens rea for second degree murder in the UJIs has resulted in the elements for depraved mind murder and second degree murder being far more similar than they should be under our cases. The current UJIs completely omit the “major distinction between the two degrees of murder” that we articulated in Brown, 1996-NMSC-073, ¶ 14. Based on the objective knowledge standard for second degree murder articulated in Brown and our other cases, the instruction for second degree murder should require that the defendant knew or should have known that his or her acts created a strong probability of death or great bodily harm. See id. ¶ 26 (“Unlike second-degree murder, the new ‘subjective knowledge element’ of deprived mind murder does not include the imputed knowledge that an ordinary person would be expected to have.”); see also Ibn Omar-Muhammad, 102 N.M. at 277, 694 P.2d at 925 (describing the “objective standard of knowledge of the risk” with the phrase “should have known” and rejecting this standard for deprived mind murder because “[t]he requisite knowledge is a subjective one”).

Because I believe that there is sufficient evidence to support the jury’s verdict under the appropriate standard of review, I would affirm Defendant’s deprived mind murder conviction. The majority holding otherwise, I respectfully dissent from this portion of the majority opinion.

PATRICIO M. Serna, Justice
OPINION

A. JOSEPH ALARID, Judge

BACKGROUND

{1} Plaintiff, Bank of New York (the Bank), is a New York banking corporation. Defendant, Regional Housing Authority for Region Three, New Mexico (the Authority), is an entity organized under New Mexico law for the purpose of providing low income housing.

{2} The Bank is the successor trustee for Plaintiff, Villa Hermosa Affordable Housing Corporation (VHAH), a New York banking corporation. VHAH issued the bonds to fund a low income housing project in Bernalillo County. Pursuant to the trust indenture, VHAH is entitled to an issuer’s fee equal to one eighth of one percent of the value of outstanding bonds, payable in monthly installments.

{3} VHAH’s articles of incorporation provide that:

The corporation will not afford pecuniary gain, incidentally or otherwise, to its members, directors or officers. No part of the income, profit, or net earnings of the corporation will inure to the benefit of, or be distributable to, the directors, or officers of the corporation, or other private persons, except that the corporation may pay reasonable compensation for services rendered, and may make distributions in furtherance of its corporate purposes.

{4} On September 16, 1997, Garcia, Solomon Montano and Thomas Simmons, three of the five members of the board of directors of VHAH, signed an “Agreement of Directors in Lieu of Special Meeting” authorizing an irrevocable assignment of the issuer’s fee to Garcia. The “Agreement of Directors” recited that Garcia was owed $90,000 in unpaid back salary and that the assignment would be accepted by Garcia in full satisfaction of any claims by Garcia for “pay or other reimbursement.” Montano, signing in his capacity as Vice Chairman of the board of VHAH, executed an “Assignment” “irrevocably assign[ing] all of its right title and interest in and to the [issuer] fee.” Simmons, signing in his capacity as chairman of the Authority, executed a “Shareholder Consent” to the assignment of the issuer’s fee to Garcia. Lastly, Garcia executed an “Acceptance of Assignment,” acknowledging her acceptance of the assignment of the issuer’s fee “in full satisfaction of any and all claims for salary and any other items for either [VHAH or the Authority].” Garcia began receiving the monthly issuer’s fee.

{5} On February 27, 2002, counsel for the Authority wrote the Bank, advising the Bank that:

This will . . . confirm that Ms. Garcia is no longer employed by the Authority or any entity affiliated with the Authority. The Authority has designated the Corporation [Region III] as its exclusive bond issuer and to receive all issuer fees on its behalf. The Authority will be taking official action to replace the board of directors of [VHAH] with the board members of the Authority. Please cease all distributions to [VHAH] or Ms. Garcia and retain all issuer’s fees so that we may submit documentation to prove that the Authority and the Corporation are entitled to receive those fees and not [VHAH] or Ms. Garcia.

{6} On March 7, 2002, counsel for VHAH and Garcia wrote the Bank and counsel for the Authority advising them that:

I do have original documents in my possession, including an Assignment reflecting the notarized signature of Solomon Montano, Vice Chairman, Villa Hermosa Affordable Housing Corporation, an Acceptance of Assignment reflecting the notarized signature of JoAnn [sic] Garcia, a Shareholder Consent reflecting the notarized signature of Thomas Simmons, Chairman, RHA Region III, and an Agreement of Directors in Lieu of Special Meeting reflecting the signatures of Solomon Montano, Thoma Simmons and JoAnn [sic] Garcia. Copies of those documents are enclosed herewith.

The substance of the above-referenced documents is that, on or about September 16, 1997, each of the Authority,
Corporation, Villa Hermosa and Ms. Garcia agreed that Ms. Garcia should receive the issuer fees generated by bonds issued on behalf of the Villa Hermosa Apartments as compensation for salary not previously paid to Ms. Garcia and in consideration of her agreement not to sue. Therefore, the documents establish that each of the Authority, the Corporation and Villa Hermosa have entered into a contract with Ms. Garcia, based on good and valuable consideration, which contract assigns to Ms. Garcia the issuer fees generated by bonds issued on behalf of the Villa Hermosa Apartments. Based on the foregoing, this letter constitutes Ms. Garcia’s demand to [counsel for the Authority] and his clients to cease and desist from further efforts to deprive Ms. Garcia of the benefit of her bargain with the Authority, the Corporation and Villa Hermosa. In addition, this letter constitutes Ms. Garcia’s demand that [counsel for the Authority] and his clients cease and desist from further efforts to induce any breach of fiduciary duty on behalf of the Bank to Ms. Garcia. Finally, this letter constitutes Ms. Garcia’s instruction to the Bank to disregard any further communications from [counsel for the Authority] or his clients, which communications are not in the form of a lawful court order, instructing the Bank to breach its fiduciary duties to Ms. Garcia.

On March 14, 2002, the Bank wrote counsel for the Authority and counsel for Garcia, advising them that the Bank as Trustee, will deposit the issuer fees in an escrow account and hold said funds until [the purported dispute . . . ] is resolved.” The Bank has placed its interests above those of the beneficiary, Ms. Garcia. Specifically, in an apparent attempt to evade its duty to provide the beneficiary with timely receipt of the issuer fees, and [the Bank’s] duty to defend the beneficiary’s interest in timely receipt of the issuer fees, [the Bank] has voluntarily stipulated to an injunction, enjoining [the Bank] from discharging its fiduciary duty to the beneficiary to make timely disbursements of the issuer fees due to the beneficiary. As a consequence of [the Bank’s] breach of [its] fiduciary duty to Ms. Garcia, [the Bank] is a trustee, [the Bank] has disbursed those issuer fees to Ms. Joanne [sic] Garcia as beneficiary of those funds. It is also undisputed that, as a trustee, [the Bank] owes a fiduciary duty to Ms. Garcia. A fiduciary duty is a duty of loyalty. Since a fiduciary is obliged to act primarily for another’s benefit in matters connected with its undertaking, a fiduciary breaches this duty by placing his interests above those of the beneficiary. Moody v. Stribling, [1999-NMCA-094, ¶27.] 127 N.M. 630, [985 P.2d 1210]. In deciding to “deposit the Issuer Fee in an escrow account and hold said funds until [the purported dispute . . . ] is resolved,” the Bank has placed its interests above those of the beneficiary, Ms. Garcia. Specifically, in an apparent attempt to evade its duty to provide the beneficiary with timely receipt of the issuer fees, and [the Bank’s] duty to defend the beneficiary’s interest in timely receipt of the issuer fees, [the Bank] has voluntarily stipulated to an injunction, enjoining [the Bank] from discharging its fiduciary duty to the beneficiary to make timely disbursements of the issuer fees due to the beneficiary.

On May 7, 2002, the district court entered an “Order for Interpleader of Money into the Registry of the Court.” In its order, the district court found that the Bank had funds in its possession and would receive funds in the future; that a dispute over the funds has arisen among Defendants; and that the Bank was subject to “claims of multiple litigation and double liability.” The order directed the Bank to pay to the court clerk the sum in its possession and any further sums subsequently received by the Bank and directed the clerk to hold them subject to further order of the court. The order directed each of the Defendants, within twenty days from the date the order is served, to “interplead, settle and adjust between themselves their claims or rights in and to any such fund, payable as issuer’s fee under the terms of the Trust Indenture described in the Complaint.” Lastly, the order recited that the Bank should recover costs and reasonable attorney’s fees, to be assessed against the fund paid into court.

On April 29, 2002, the Bank filed a “Complaint in Interpleader” in the district court. The Complaint named as defendants, the Authority, Region III, VHAH, and Garcia. The Complaint alleged the Bank’s status as trustee under the 1997 indenture; the history of prior payments of the issuer’s fee to VHAH e/o Garcia; the Authority’s demand that the Bank cease payments to Garcia; and VHAH and Garcia’s demand that the Bank continue payments and their threat of litigation if the payments were discontinued. The Bank further alleged that the issuers’s fee was claimed by the Authority, Region III, and by Garcia; that the Bank was “not advised as to the validity of the claims of either of these parties and cannot safely recognize either of them”; that the Bank has “no interest whatsoever in the issuer[s]’ fee”; that the Bank was prepared to pay over the issuer’s fee to the person rightfully entitled to them; that Bank was bringing the action “to avoid multiplicity of lawsuits and to prevent threatened suits and double liability.” The Bank requested the following relief: (1) an order requiring the defendants “to interplead in this case and to settle their respective rights to the sums now in the possession of [the Bank] and hereafter to come into the possession of [the Bank]”; (2) an order authorizing the Bank to pay the issuer’s fee into the registry of the district court; (3) an order restraining Defendants from “commencing in any court” litigation “to recover the sum that is now in possession of [the Bank] or will hereafter come into the possession of [the Bank], or to recover of [the Bank] any damages for failure of [the Bank] to deliver the sum of money to the Defendants, or either of them”; and (4) an award of costs and attorney’s fees.
of determination,” “Shareholder Consent,” “Agreement of Directors in Lieu of Special Meeting,” “Assignment,” the “Acceptance of Assignment,” and the “Shareholder Consent.” Photocopies of these documents were attached to her affidavit.

{15} On March 13, 2003, the district court, the District Judge Robert Scott presiding, heard oral argument on the Bank’s motion for summary judgment. No evidence other than the affidavits and documents attached to the parties’ papers were received into evidence during the hearing. At the close of the hearing, the district court notified the parties that it would take the matter under advisement. On March 13, 2003, the district court issued a letter decision granting the Bank’s motion for summary judgment. The district court directed counsel for the Bank to prepare a form of order reflecting the court’s rulings.

{16} On March 24, 2003, the Bank requested a presentment hearing. Subsequently, the case was reassigned to District Judge Geraldine Rivera. On April 4, 2003, Judge Rivera set a presentment hearing for April 24, 2003. On April 21, 2003, Garcia and VHAH filed a “Motion for Stay of Presentment.” In their motion, Garcia and VHAH argued that Judge Scott’s rulings in his letter of March 13, 2003, were “contrary to law.” Garcia and VHAH requested that the district court vacate the April 24, 2003, presentment hearing “until such time as Judge Rivera has had the opportunity to consider the merits of the motion for summary judgment, form an independent opinion as to the advisability of entering summary judgment for [the Bank], and issue her own ruling on the motion.”

{17} On April 24, 2003, the district court heard the Bank’s motion for presentment, and Garcia and VHAH’s motion for stay of presentment. Garcia and VHAH argued that the Bank had breached a fiduciary duty to Garcia by withholding payment of the issuer’s fee in the absence of a court order. Judge Rivera responded that “I am assuming that you argued all this to Judge Scott, and that Judge Scott considered the matter after hearing the evidence and then came up with his letter decision . . . . So I’m not going to rehear what Judge Scott has already done.” Judge Rivera then signed the summary judgment prepared by counsel.

1 VHAH and Garcia also filed an answer to the Authority and Region III’s cross-claim, a cross-claim against the Authority and Region III, and a third-party claim against individual officers and directors of the Authority. Familiarity with the contents of these pleadings and the responsive pleading filed by the Authority, Region III and the individual third-party defendants is not essential to understanding the issues in this appeal.
for the Bank. Consistent with Judge Scott’s rulings, the summary judgment signed by Judge Rivera: (1) released the Bank from all liability with respect to the interpleaded funds; (2) dismissed VHAH and Garcia’s counterclaim; (3) denied the Bank’s request for attorney’s fees; and (4) directed the Bank to submit a cost bill. The summary judgment was filed with the district court immediately after the hearing.

{18} On May 8, 2003, Garcia and VHAH filed a motion for reconsideration. The motion for reconsideration largely repeated the arguments set out in Garcia and VHAH’s motion to stay presentment. On May 13, 2003, the Bank filed a response arguing that the motion for reconsideration was untimely and that the Bank had not breached a fiduciary duty by filing the interpleader action. On May 16, 2003, Garcia and VHAH filed a reply. They pointed out that if intermediates Saturdays and Sundays were excluded as required by Rule 1-006(A) NMRA, their motion for reconsideration was filed within ten days of the entry as required by Rule 1-059(E) NMRA. Garcia and VHAH also argued that, because Judge Rivera had not heard the case, she was required to independently consider the merits of Judge Scott’s rulings. Judge Rivera did not rule on Garcia and VHAH’s motion for reconsideration, and therefore it was deemed denied by operation of law. NMSA 1978, § 39-1-1 (1897).

{19} Garcia and VHAH appeal from the summary judgment. The Bank cross-appeals from the denial of its request for attorney’s fees.

DISCUSSION

{20} Interpleader is governed by Rule 1-022 NMRA. A leading authority, discussing interpleader under federal law, describes interpleader as a procedural device used to resolve conflicting claims to money or property. It enables a person or entity in possession of a tangible res or fund of money (the “stakeholder”) to join in a single suit two or more “claimants” asserting mutually exclusive claims to the stake.


Interpleader litigation . . . usually proceeds in two “stages.” In the “first stage,” the court determines whether interpleader is appropriate on the facts of the case. If so, in the “second stage,” the court adjudicates the adverse claims and distributes the stake.

Moore’s Federal Practice, § 22.03[1][a].

{21} To justify interpleader, the stakeholder must demonstrate that it “is or may be exposed to double or multiple liability.” Rule 1-022(A). “[I]t is not difficult for the stakeholder to meet the requirement of a reasonable or good faith fear of multiple litigation, and courts appear to require merely that the stakeholder’s concern in this regard be more than conjectural.” Moore’s Federal Practice, § 22.03[1][c]. According to another authority:

The right to interpleader depends upon whether the stakeholder has a good faith fear of adverse claims, regardless of [the] merits of those claims or even whether the stakeholder himself believes them to be meritorious. Manifi estly frivolous claims will not support an interpleader, but the fact that one of the claims is tenuous does not justify denying interpleader, so long as [the] claim is not so utterly baseless that the stakeholder’s assertion of multiple claims is not made in good faith.[3] Indeed, the discretion which a court has in passing on an application for interpleader is in ascertaining whether the dispute of fact upon which the right to interpleader turns is real and substantial or only feigned and colorable; if the dispute is real and substantial, the court has no power to dismiss the interpleader petition.


There is no set procedure for conducting the first stage of interpleader. The issues typically are formulated by motion. In some cases courts have determined whether interpleader should lie as part of a summary-judgment motion or have treated their inquiry into the matter as if it had been presented on a formal motion for summary judgment.

7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1714, at 626 (3d ed. 2001) (footnote omitted). The second stage of interpleader involves the adjudication of the respective rights of the claimants to the stake and proceeds like any other civil action. Id. at 628. Where appropriate, the second stage may be adjudicated on a motion for summary judgment. Id. at 629. The second stage may be employed to adjudicate counterclaims against the shareholder asserting that the stakeholder is independently liable to one of the claimants. Id. at 630; Johnston v. Sunwest Bank, 116 N.M. 422, 426, 863 P.2d 1043, 1047 (1993).

{22} In the present case, the district court was confronted with the cross-claims of the Authority and Region III on the one hand, and VHAH and Garcia on the other, each asserting a mutually-exclusive claim to the issuer’s fee. These cross-claims are a classic example of adverse claims justifying interpleader:

Interpleader is proper only if claims against the stake are adverse to each other and adverse to the stake itself. Clearly, claims are adverse to each other if each claimant asserts sole rights to the fund.

Moore’s Federal Practice, § 22.03[1][d] (emphasis added); see also Restatement (Second) of Contracts § 339 cmt. e (1981) (recognizing interpleader as appropriate where obligee is on notice that the assignment of its obligation may be voidable).

In the present case, the cross-claims by themselves were sufficient to establish a prima facie case entitling the Bank to interpleader.

{23} Citing Mayfield Smithson Enterprises v. Com-Quip, Inc., 120 N.M. 9, 896 P.2d 1156 (1995), VHAH and Garcia argue that even if the Bank was confronted with mutually exclusive, adverse claims to the issuer’s fee, the Bank, as an element of its prima facie case of entitlement to summary judgment, was required to negate its affirmative equitable defense of unclean hands. VHAH and Garcia argue that the Bank’s hands were unclean because the Bank withheld payment of the issuer’s fee and brought this interpleader action in response to the Authority and Region III’s claim to the issuer’s fee. According to VHAH and Garcia, instead of bringing this interpleader action, the Bank should have continued to pay the issuer’s fee to VHAH c/o Garcia and should have aligned itself with VHAH and Garcia in affirmatively resisting the Authority and Region III’s claim to the issuer’s fee.

{24} VHAH and Garcia have not cited a single case in which a trustee was held to have breached a fiduciary duty to a beneficiary by the mere act of bringing an interpleader action to resolve conflicting claims of entitlement to trust benefits, nor have they cited a single case holding that a trustee has an obligation to take sides in a dispute between competing parties, each claiming to be the true beneficiary of the trust. Although there do not appear to be New Mexico cases on point, the Bank has referred us to cases from other jurisdictions in which trustees have resorted to interpleader without any suggestion by the court that such action by a trustee is in any way improper. E.g., Home

25 As previously noted, the Bank set out, as undisputed material facts, its status as successor trustee; the execution of an original and supplemental indentures in connection with the sale of revenue bonds to finance a low-income housing project; the Authority’s creation of VHAH; the Bank’s responsibility under the indentures to distribute the issuer’s fee to VHAH; the Bank’s payment of the issuer’s fee to VHAH c/o Garcia until February 2002; the Bank’s receipt of the Authority’s February 27, 2002, letter requesting that the Bank cease all distributions of the issuer’s fee to VHAH or Garcia; and, the Bank’s subsequent receipt of correspondence from counsel for VHAH and Garcia demanding that the Bank continue to distribute the issuer’s fee to Garcia and threatening litigation if the Bank ceased payments. These facts were not “specifically controverted” by VHAH and Garcia’s response as required by Rule 1-056(D) NMRA, and therefore were deemed admitted. These admissions were sufficient to make out a prima facie case that the Bank acted lawfully by withholding payment of the issuer’s fee and filing an interpleader action in the face of apparently non-frivolous, adverse claims to the issuer’s fee. Comtrade, Inc. v. First Nat’l Bank, 497 N.E.2d 527, 529 (Ill. App. Ct. 1986) (observing that “when there are conflicting claims to the deposited funds, a trustee is not required to make a determination as to the rights of the prospective claimants but should file an interpleader action”). The burden of production therefore shifted to VHAH and Garcia to respond to the Bank’s prima facie showing of entitlement to summary judgment on the Bank’s Complaint for interpleader by demonstrating the existence of a genuine issue of material fact as to the improperity of the Bank’s actions. See id. (affirming grant of summary judgment to former successor; rejecting claimant’s assertion that the record established a genuine issue of fact as to stakeholder’s improper motivation in bringing interpleader).

26 In reviewing the record, we view the evidence tendered by VHAH and Garcia in the light most favorable to support a trial on the merits. Blauwkamp v. Univ. of N.M. Hosp., 114 N.M. 228, 231, 836 P.2d 1249, 1252 ( Ct. App. 1992). We conclude that VHAH and Garcia failed to demonstrate a genuine issue of material fact as to the improperity of the Bank’s conduct. We are persuaded that it is proper for a trustee faced with competing claims to invoke the remedy of interpleader as a neutral stakeholder, and this is so even though the trustee’s resort to interpleader interrupts payment of trust benefits during the pendency of the interpleader action.

27 We recognize the possibility of scenarios in which a stakeholder and one or more claimants have unlawfully colluded to bring an interpleader. Here, however, any such theory is unsubstantiated and based entirely on speculation. VHAH and Garcia failed to come forward with any evidence suggesting that the Bank acted with an illegitimate motive. Because VHAH and Garcia failed to demonstrate a genuine issue of material fact as to the reasonableness of the Bank’s apprehension of multiple liability or the propriety of the Bank’s resort to interpleader, the district court properly granted summary judgment to the Bank on its Complaint for Interpleader.

28 Like their affirmative defense of uncleanness, VHAH and Garcia’s counterclaim is based on the theory that the Bank breached its fiduciary duties when it withheld payment of the issuer’s fee and filed an interpleader action in which it took the position of a neutral stakeholder. Our analysis of VHAH and Garcia’s counterclaim parallels our analysis of their affirmative defense of unclean hands. The facts set out in the Bank’s motion for summary judgment that were not specifically controverted by VHAH and Garcia were sufficient to make out a prima facie case that the Bank acted lawfully by withholding payment of the issuer’s fee and promptly filing an interpleader action in the face of competing claims to the issuer’s fee. Comtrade, Inc., 497 N.E.2d at 529. The burden of production then shifted to VHAH and Garcia, who were required to demonstrate a genuine issue of material fact as to the lawfulness of the Bank’s conduct. As we noted in our discussion of the issue of unclean hands, VHAH and Garcia failed to demonstrate a genuine issue of material fact as to the lawfulness of the Bank’s conduct.

29 Turning to VHAH and Garcia’s allegations of conspiracy to breach a fiduciary duty, we note that “[u]nlike a conspiracy in the criminal context, a civil conspiracy by itself is not actionable, nor does it provide an independent basis for liability . . . [a] civil conspiracy must actually involve an independent, unlawful act that causes harm—something that would give rise to a civil action on its own.” Ettenson v. Burke, 2001-NMCA-003, ¶ 12, 130 N.M. 67, 17 P.3d 440. Because summary judgment was proper as to VHAH and Garcia’s counterclaim for breach of fiduciary duty, their counterclaim for conspiracy to breach a fiduciary duty necessarily fails for want of an independent basis for liability.

30 Our analysis renders moot VHAH and Garcia’s attack on the sufficiency of the Mendillo affidavit attached to the Bank’s “Memorandum in Support of its Motion for Summary Judgment.” As we have explained above, the facts deemed admitted pursuant to Rule 1-056(D) were sufficient to establish a prima facie case of entitlement to summary judgment.

31 Our appellate review also renders moot VHAH and Garcia’s argument that Judge Rivera erred by failing to conduct an independent review of the record prior to entering summary judgment. Appellate review of a grant of summary judgment is de novo. Maralex Res., Inc. v. Gilbreath, 2003-NMSC-023, ¶ 8, 134 N.M. 308, 76 P.3d 626. In affirming the district court, we have afforded VHAH and Garcia an independent review of the record and have independently determined that the record establishes that “there is no genuine issue as to any material fact and that the [Bank] is entitled to a judgment as a matter of law.” See Rule 1-056(C).

32 As to the Bank’s cross-appeal, we decline to address the merits of the claim at this time. In the event that the Authority and Region III prevail on their cross-claim and establish their entitlement to the stake, the issue of the Bank’s entitlement to attorney’s fees may be rendered moot since, as noted above, the Authority and Region III have formally admitted that the Bank is entitled to recover a reasonable attorney’s fee. We remand this issue to the district court pending determination of the ownership of the issuer’s fee. On remand, the district court should revisit the issue of attorney’s fees, and if requested by the parties, enter findings of fact and conclusions of law explaining the basis for its grant or denial of attorney’s fees.

33 IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge
RODERICK T. KENNEDY, Judge
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IS PLEASED TO ANNOUNCE THAT

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

**Professional Office Space - Excellent Downtown Locations**
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**McCanna-Hubbell Building**
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**MISCELLANEOUS**
American Limousine
MEDICARE’S NEW DRUG COVERAGE: THE IMPACT ON YOUR CLIENTS

Wednesday, November 2, 2005
State Bar Center, Albuquerque
2.1 General CLE Credits

Co-Sponsors: Senior Citizens’ Law Office, Inc.
Lawyer Referral for the Elderly Program

On January 1, 2006, the Medicare health coverage program will add new, comprehensive coverage of prescription drugs, the largest expansion of its kind in the history of the Medicare program. Given the importance of this coverage for the elderly and persons with disabilities, these choices will be matters of great concern for both the clients and the legal, medical and social professionals who serve them. Join us as we explore the basics of this change.

9:30 a.m. Registration
10:00 a.m. Introductory Remarks
   Amanda Hartmann, Managing Attorney, Lawyer Referral for the Elderly Program
10:05 a.m. How the New Coverage Changes Medicare and Medicaid
   Michael C. Parks, Staff Attorney, Senior Citizens’ Law Office
   Buffie Saavedra, Manager, Benefits Counseling Bureau,
   New Mexico Aging & Long-Term Services Department
10:45 a.m. Break
11:00 a.m. Basics of the Coverage and Sources of Additional Information - Buffie Saavedra
11:45 a.m. Q & A Discussion - Amanda Hartmann, Michael C. Parks, and Buffie Saavedra
Noon Adjourn

REGISTRATION - MEDICARE’S NEW DRUG COVERAGE: THE IMPACT ON YOUR CLIENTS
Wednesday, November 2, 2005 • State Bar Center, Albuquerque
2.1 General CLE Credits
☐ Standard, Non-Attorney, Government and Paralegal $59 ☐ Elder Law Section Member $49

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Register Online at www.nmbar.org
BRIDGE THE GAP 2005:
DEVELOPING A WINNING COURTROOM STRATEGY

State Bar Center, Albuquerque
Friday, November 4, 2005
6.3 General, 1.2 Ethics and 2.0 Professionalism CLE Credits

Co-Sponsor: Young Lawyers Division

“Reliable research results tell us that between 75% and 80% of judges, jurors and arbitrators have determined subconsciously or consciously how they will vote in a case by the end of opening statement. Research also tells us that one third of jurors do not tell the full truth during voir dire.”
-- Richard Waites, JD, PhD

“...a whole course on how to develop the presentation skills you need to teach the judge and jury the facts that will win your case.”
- James W. McElhaney on The Lawyer’s Winning Edge

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<th>Time</th>
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<tr>
<td>7:30 a.m.</td>
<td>Registration</td>
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<td>8:00 a.m.</td>
<td>10 Common Mistakes that Lawyers Make at Trial &amp; How to Avoid Them (Ethics)</td>
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<td>9:00 a.m.</td>
<td>The Secrets of Persuading Courtroom Decision-Makers -- Judges, Jurors, and Arbitrators</td>
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<td>10:00 a.m.</td>
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<td>10:15 a.m.</td>
<td>Helping Reluctant Witnesses Give Effective and Persuasive Testimony</td>
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<tr>
<td>11:00 a.m.</td>
<td>Making the Most Out of Jury Selection Whether You Have 30 Minutes or a Whole Day</td>
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REGISTRATION – Bridge the Gap 2005: Developing a Winning Courtroom Strategy
Friday, November 4, 2005 • State Bar Center, Albuquerque
6.3 General, 1.2 Ethics and 2.0 Professionalism CLE Credits
☐ Standard and Non-Attorney - $229  ☐ Government & Paralegal - $219
☐ Young Lawyers Division Member $139

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Please Note: This is a CLE Special Event. No auditors permitted.

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