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Clerk Certificates
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2005-NMCA-136: In the Matter of Philip M. Kleinsmith
2005-NMCA-137: Murken v. Solv-Ex Corporation

Special Insert

YLD...In Brief

The 2006 License and Dues Forms have been mailed. See page 8
Law School
Courses Open to Lawyers for CLE Credit Spring 2006!

**Spanish for Lawyers II**, Presiliano Torrez, J.D. Tuesday, 4:00–6:00pm (January 17 to April 25, 2006). 36 General CLE credits.

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

**Tribal Courts**, The Honorable Robert Yazzie, Chief Justice Emeritus of the Navajo Nation. Wednesday 5:00–7:00pm (January 11 to April 26, 2006). 38.4 General CLE credits.

The objectives of this course are to build student and practitioner proficiency in the areas of: The background and context of Navajo Nation law and practice; the institutional structures of Navajo Nation law; finding the law; Western versus traditional or customary law; the major substantive principles of Navajo Nation law; the major procedural provisions of Navajo Nation law; ethics and the practice culture; Navajo Nation Code of Judicial Conduct; NNBA Code of Ethics; Navajo Nation Governmental Code; Trial Diplomacy; and building upon class lessons in the application of principles in a brief based on sample cases and oral argument.

**Introduction to Mexican Law**, Professor William MacPherson, J.D. Tuesday, 5:00-7:00pm (January 17 to April 25, 2006). 36 General CLE credits.

This seminar will discuss the structure of the Mexican legal system, law and legal profession. The focus of the seminar will cover those legal topics of interest to a non-Mexican person interested in doing business in Mexico, such as contracts, commercial sales, security instruments, real estate transactions, business entities, labor law and tax law. If time permits we will briefly examine the criminal system of Mexico. Appropriate Mexican legal terminology will be discussed as it relates to the various legal topics. If there is sufficient interest a field trip to Juarez and Chihuahua will be arranged to meet with legal educators, law firms and judges.

1. To register, lawyers may contact Gloria Gomez: (505) 277-5265, gomez@law.unm.edu
2. Members of the UNM Clinical Law Program, Access to Justice Network may take the course for the $5.00 per credit. Members may attend NOT FOR CLE and pay $5.00 per session. For information about the Access to Justice Network visit http://lawschool.unm.edu/clinic/resources/access/index.php or call Associate Dean Antoinette Sedillo Lopez: (505) 277-5265.
3. Non-members may take the course for $30.00 per CLE credit. Non-members may take the course NOT FOR CLE and pay $10.00 per session or $100.00 per unlimited sessions.
4. Fees are paid in advance and are not refundable.
Bill Kitts Mentor Program
Creating Partnerships for Professional Development

Who was Bill Kitts?

Albuquerque lawyer Bill Kitts was a professional who loved and respected the law. He committed time and expertise in assisting young and new lawyers. A great loss to the community, Bill Kitts was killed in an automobile accident in 1982. The Bill Kitts Mentor Program was formed in the fall of 1992 to remember and honor this dedicated attorney.

Visit www.nmbar.org and select “Attorney Services/Practice Resources,” then “Mentorship Program” to obtain mentor practice area and contact information. For more assistance, or to become a mentor, contact the State Bar at membership@nmbar.org; or call (505) 797-6033.

Alamogordo
John R. Hakanson

Albuquerque
Nancy Jean Appleby
Jeffrey C. Brown
Sealy H. Cavin, Jr.
Peter C. Chestnut
Richard J. Crollett
John James D’Amato, Jr.
Philip B. Davis
Leonard J. DeLayo, Jr.
Peter V. Domenici, Jr.
Stephen G. Durkovich
Roger V. Eaton
Stephen P. Eaton
Paula I. Forney
Mike Gallegos
Robert D. Gorman
Michael F. Hacker
J. Edward Hollington
Tova Indritz
Stephen D. Ingram
Whitney Johnson
Tova Indritz
Stephen D. Ingram
Whitney Johnson
Pamela D. Kennedy
James P. Lyle
Alan M. Malott
Marshall G. Martin

Clavis
Richard F. Rowley, II

Corrales
Ray R. Regan

Deming
Frederick H. Sherman

Farmington
John C. Booth
Richard L. Gerding
Damon Weems

Gallup
The Hon. Robert W. Ionta

Hobbs
Craig J. La Bree
M. J. Collopy
William G. Shoobridge

Las Cruces
Marci E. Beyer
Francisco M. Ortiz
Kieran F. Ryan
Richard D. Watts

Los Lunas
Charles S. Aspinwall
H. Vern Payne

Rio Rancho
Dennis W. Montoya

Santa Fe
Eric R. Biggs
Douglas Booth
Patrick A. Casey
John R. Fox
Linda G. Hemphill
C. David Henderson
Edmund H. Kendrick
Gary R. Kilpatrick
Nancy M. King
Joe L. McClougherty
William Panagakos
Roger L. Prucino
James E. Snead, III
Bruce Thompson

Carlsbad
Jeffrey B. Diamond
Matthew T. Byers

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Roger L. Prucino
James E. Snead, III
Bruce Thompson

Carlsbad
Jeffrey B. Diamond
Matthew T. Byers

* Mentor volunteers acknowledge that they have been in practice for at least five years, have had no formal disciplinary sanctions during the past five years, maintain malpractice coverage, and are members in good standing of the State Bar of New Mexico.
THE FINAL STRETCH
TUES., DEC. 27 - FRI., DEC. 30 • STATE BAR CENTER

The Annual Review of Civil Procedure
7.5 General and 1.2 Ethics CLE Credits • $229
☐ Dec. 27, 9 a.m. - 4:30 p.m.
☐ Dec. 29, 9 a.m. - 4:30 p.m.

Bridge the Gap 2005: Developing Winning Courtroom Strategy
6.3 General, 2.0 Professionalism and 1.2 Ethics CLE Credits • $239
☐ Dec. 27, 9 a.m. - 5 p.m.
☐ Dec. 29, 9 a.m. - 5 p.m.

The Basics of Real Estate Transactions from Negotiation to Closing
5.6 General and 1.0 Ethics CLE Credits • $179
☐ Dec. 27, 9 a.m. - 3 p.m.

Dementia, Capacity and Undue Influence of the Elderly
4.2 General CLE Credits • $119
☐ Dec. 27, 9 a.m. - 12:30 p.m.
☐ Dec. 29, 9 a.m. - 12:30 p.m.

Current Legalities and Realities of the End - of - Life Debate
3.5 General and 1.0 Ethics CLE Credits • $129
☐ Dec. 27, 1 - 5 p.m.
☐ Dec. 29, 1 - 5 p.m.

How to Win Your Next Jury Trial Using the Power Trial Method
7.2 General CLE Credits • $219
☐ Dec. 28, 9 a.m. - 3:30 p.m.

Legislative Process: A 2005 Update
2.4 General CLE Credits • $79
☐ Dec. 28, 10 a.m. - Noon

Cashing Out: Six Ways Business Owner Clients Can Sell Their Businesses
1.8 General CLE Credits • $69
☐ Dec. 28, 1 - 2:30 p.m.

Recent Changes to the UCC in New Mexico
1.2 General CLE Credits • $49
☐ Dec. 28, 2:45 - 3:45 p.m.

Lawyering with Emotional Intelligence
2.0 Professionalism and 1.2 Ethics CLE Credits • $99
☐ Dec. 28, 9 - 11:45 a.m.

DUI in New Mexico
5.3 General CLE Credits • $149
☐ Dec. 28, 12:15 - 4:45 p.m.

Public Health Emergencies
4.5 General, 2.0 Professionalism and 1.2 Ethics CLE Credits • $199
☐ Dec. 29, 9 a.m. - 4 p.m.

2005 Professionalism: Lawyers Concerned for Lawyers Substance Abuse and Addiction Issues in the New Mexico Legal Community
2.0 Professionalism CLE Credits • $59
☐ Dec. 29, 8:30 - 10:30 a.m.
☐ Dec. 29, 12:30 - 2:30 p.m.
☐ Dec. 30, 8:30 - 10:30 a.m.

Ethics: Now What Are You Gonna Do?
1.2 Ethics CLE Credits • $39
☐ Dec. 29, 10:30 - 11:30 a.m.
☐ Dec. 29, 2:45 - 3:45 p.m.
☐ Dec. 30, 10:30 - 11:30 a.m.

REGISTRATION: VIDEO REPLAYS - THE FINAL STRETCH

Name: ___________________________ NM Bar#: ________________________
Firm: ________________________________________________________________
Address: _______________________________________________________________________________________________________
City/State/Zip: ________________________________________________________________________________________________
Phone: ____________________________________________________ Fax : ____________________________________________
E - mail address: ______________________________________________________________________________________________
Program Title: _____________________________________________ Program Date/Time: ________________________________
Program Cost: $__________ Payment Options: ☐ Enclosed is my check in the amount of $ ____________ (Make Checks Payable to: CLE)
☐ VISA ☐ Master Card ☐ American Express ☐ Discover ☐ Purchase Order (Must be attached to be registered)
Credit Card Acct. No. ____________________________ Exp. Date ____________
Signature ___________________________________________________________________________________________________

Mail this form to: CLE, PO Box 92860 Albuquerque, NM 87199 or Fax to (505) 797 - 6071. Register Online at www.nmbar.org
Meetings

January

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

9 Taxation Section Board of Directors
   noon, via teleconference

9 Attorney Support Group
   5:30 p.m., First United Methodist Church,
   Albuquerque

11 Law Office Management Committee
   noon, via teleconference

11 Membership Services Committee
   noon, via teleconference

12 Public Law Section Board of Directors
   noon, RMD Legal Bureau, Santa Fe

13 Natural Resources, Energy and
   Environmental Law Section Board of
   Directors
   noon, State Bar Center

17 Solo and Small Firm Practitioners
   Section Board of Directors
   11:30 a.m., State Bar Center

17 Public Legal Education Committee
   noon, State Bar Center

State Bar Workshops

January

18 Lawyer Referral for the Elderly Workshop
   10 a.m., Ena Mitchell Senior Center
   Lordsburg

19 Lawyer Referral for the Elderly Workshop
   10 a.m., Silver City Senior Center
   Silver City

19 Lawyer Referral for the Elderly Workshop
   1 p.m., San Felipe Pueblo

26 Lawyer Referral for the Elderly Workshop
   Credit/Debt Issues; New Bankruptcy Law
   1:15 p.m., Meadowlark Senior Center
   Rio Rancho

25 Consumer Debt/Bankruptcy Workshop
   6 p.m., State Bar

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

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

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

COURT NEWS
NM Supreme Court Judicial Performance Evaluation Commission

Improving The Performance of Judges

The Judicial Performance Evaluation Commission (JPEC), created by the New Mexico Supreme Court, evaluates the performance of appellate, district and metropolitan court judges standing for retention in New Mexico.

The commission’s work in 2005 focuses on conducting final evaluations of the 14 Bernalillo County Metropolitan Court judges standing for retention: Sandra Clinton, Kevin Fitzwater, Frank Gentry, Theresa Gomez, Victoria Grant, J. Wayne Griego, Cristina Jaramillo, Loretta Lopez, Anna Martinez, Judith Nakamura, Daniel Ramczyk, Frank Sedillo, Sharon Walton and Victor Valdez. At least 45 days before the November 2006 general election, JPEC will release the results of the evaluation to the media and the public.

Lawyers who have had direct experience with the above Bernalillo County Metropolitan Court judges between Aug. 1, 2004 and Sept. 26, 2005 will receive a questionnaire to complete in the beginning of January 2006. It is important to the project to get such feedback. The JPEC would like to see an increase in the response rates from attorneys with direct experience with the judges. Please take the time to complete and return the questionnaire.

The questionnaires are returned to Research and Polling, Inc., consultant to JPEC. Research and Polling puts together aggregate results by population group (lawyers, judges, court staff and resource staff). The JPEC does not see individual results. Comments are retyped and submitted to JPEC for review and not provided to the judges. Research and Polling destroys the individual responses; thus, JPEC does not know who completed the survey.

For additional information, contact Felix Briones, Jr., JPEC chair, (505) 325-0258.

Judicial Information Systems Council

Vacancy

A vacancy exists on the New Mexico Supreme Court Judicial Information Systems Council (JIFFY). Members wishing to serve on the council should send a letter of interest and brief resume to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax (505) 828-3765.

Law Library

December Hours

The New Mexico Supreme Court Law Library will be closed on the following dates and times.

December 26—Closed
December 30—Will close at 1 p.m.
December 31—Closed

New Mexico Board of Legal Specialization

Comments Solicited

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

Natural Resources – Water Law
Susan C. Kery

Trial Specialist – Civil Law
James A. Branch, Jr.

Legal Specialists Announced

The New Mexico Supreme Court Board of Legal Specialization is pleased to announce the following attorney as a board certified specialist:

Employment and Labor Law
Michael P. Schwarz

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

First Judicial District Court

Destruction of Exhibits

Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1978 to 1987

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st 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 1978 to 1987 included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through Jan. 13, 2006.

Lawyers who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Second Judicial District Court

Judicial Appointment

Governor Bill Richardson has announced his appointment of Carl J. Butkus to fill the vacancy of Division XVI at the 2nd Judicial District Court. Judge Butkus will assume Criminal Court cases assigned to Judge Richard J. Knowles effective Dec. 19.

Parties who have not previously exercised their right to challenge or excuse will have 10 days from Dec. 19 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

Governor Bill Richardson has announced his appointment of M. Monica Zamora to fill the vacancy of Division III at the 2nd Judicial District Court. Judge Zamora will
assume Children’s Court cases assigned to Division III effective Dec. 19.
Parties who have not previously exercised their right to challenge or excuse will have 10 days from Dec. 19 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

Sixth Judicial District Court Change of Physical Location of Public Auctions

Effective immediately, all public auctions relating to Grant County cases in the 6th Judicial District Court will be held in the foyer/lobby of the Grant County Courthouse, Silver City, New Mexico.

Thirteenth Judicial District Court New District Court Clerk

As of Dec. 5, the 13th Judicial District Court in Valencia County has a new district court clerk. All correspondence should be addressed to: Geri Lynn Sanchez, District Court Clerk. The address and telephone number remain the same.

Bernalillo County Metropolitan Court Holiday Closures

The Bernalillo County Metropolitan Court will close at noon, Dec. 30, as part of extended holiday weekend. The closure was approved by the New Mexico State Supreme Court in order to give judicial system employees more time with their families. The court will open for business as usual on Jan. 3.

U.S. District Court For The District of New Mexico Suspension of 2006 Annual Federal Bar Dues

With the concurrence of all active Article III judges in the District of New Mexico, it is ordered that as of Jan. 1 the annual attorney bar dues of $25 shall be suspended for the calendar year 2006. All delinquent dues are still required to be paid. The administrative order may be viewed on the court’s Web site: http://www.nmcourt.fed.us.

STATE BAR NEWS
Attorney Support Group Change in Meeting Date

Due to the holidays, the next Attorney Support Group meeting will be held at 5:30 p.m., Jan. 9, 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 Meeting Summary

The Board of Bar Commissioners met on Dec. 9 at the State Bar Center in Albuquerque. Action taken at the meeting follows:
- New commissioners Carla C. Lopez, Sandra E. Nemeth, Bonita Ortiz and S. Carolyn Ramos were sworn in by New Mexico Supreme Court Justice Pamela B. Minzner;
- Approved the Oct. 28th meeting minutes as submitted;
- Accepted the Oct. 2005 financials and executive summary and reported that revenues are over budget by 3 percent and expenses are under budget by 6 percent;
- Reviewed the accounts receivable aging report as well as the executive director's travel reimbursements and credit card file;
- Reviewed an amended 2006 State Bar budget to include the new mileage rate of $.485/mile and adjustments for out-of-town travel and reported that no budget challenges were received to date;
- Approved the 2006 NM State Bar Foundation budget;
- Approved a co-sponsorship in the amount of $1,000 for the 18th annual meeting of the National Consortium on Racial and Ethnic Fairness in the Courts to be held in Albuquerque in April;
- Approved a bylaw amendment to Article IV, Section 4.5f, “Quorum,” to enable agenda items to be voted upon after a quorum has been lost; referred a new proposed reserve policy to the Bylaws/Policies Committee to research further with the Bar’s auditors;
- Approved the Pro Hac Vice fund proposal guidelines and grant application and appointed a committee to make recommendations to the Board;
- Reported that David Thomson was appointed to the Disciplinary Board for a three-year term;
- Appointed a committee to review the proposed disciplinary rule change presented by Stuart Stein;
- Appointed Hans W. Voss of Silver City from the Seventh Bar Commissioner District to the Board of Bar Commissioners for a one-year term;
- Reappointed Kim A. Griffith to the Center for Civic Values IOLTA Grant Committee for a three-year term; no nominations were received for the public member appointment;
- Reappointed Stuart R. Buizer to the Rocky Mountain Mineral Law Foundation for a three-year term;
- Approved amendments to the International and Immigration Law Section's bylaws regarding members, terms, and the inclusion of an absenteeism clause;
- Received reports from Judge Alan Torgerson, State Bar delegate, and Mary Torres, state of New Mexico delegate, to the American Bar Association;
- Received reports from the Ethics Advisory and Law Office Management committees;
- Appointed liaisons to the Supreme Court committees and boards;
- Appointed the internal Board committees for 2006, including finance, annual awards, annual meeting planning, bylaws/policies and personnel;
- Approved the Board of Editors' recommendations to fill two attorney positions and one non-attorney position on its board;
- Received the 2006 Board of Bar Commissioners' meeting schedule as follows: Jan. 27, April 21, July 20, Sept. 15, Nov. 2, and Dec. 15; and
- Distributed outgoing commissioner plaques to B. Paul Briones, Roxanna M. Chacon, Linda A. Murphy, and Daniel J. O'Brien; and outgoing president Charles J. Vigil.
Note: The minutes in their entirety will be available on the Bar’s Web site following approval by the Board at the Jan. 27 meeting.

Employment and Labor Law Section Board Meetings Open to Section Members

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Jan. 4. (Lunch is not...
Mandatory Disclosure of Malpractice Insurance

Rule No. 05-8500, In the Matter of Mandatory Disclosure of Professional Liability Insurance Coverage (reprinted on page 23 from the Aug. 8, Vol 44, No. 31 Bar Bulletin), states that lawyers are exempt from the provisions of the order when “the attorney’s entire compensation [is] derived from the practice of law ... in the attorney’s capacity as an employee handling legal matters of a corporation or organization, or any agency of the federal, state, local government, or a member of the judiciary who is prohibited by statute or ordinance from practicing law.”

Paralegal Division

The Paralegal Division invites members of the legal profession to bring a lunch and join their monthly CLE from noon to 1 p.m., Jan. 11, at the State Bar Center. Briggs Cheney will present Substance Abuse in the Office: The First To Know ... Then What? Attendees will earn 1.0 ethics CLE credit. The cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. Registration begins at 11:30 a.m. For more information, contact Cheryl Passalaqua, (505) 872-7470, or Amy Paul, (505) 883-8181.

Senior Lawyers Division

2005 Election Results

An announcement for the 2005 election was published online and in the Bar Bulletin in recent months. The nominating committee report was published in Vol. 44, No. 47 of the Bar Bulletin along with a petition deadline of Dec. 9 to contest any of the positions. Since no petitions were submitted, the slate of nominees set forth by the nominating committee is elected by acclamation and will begin serving their terms on Jan. 6. The 2006 Senior Lawyers Division board of directors is as follows:

- Wycliffe V. Butler 2004-2006
- Charles A. Pharris 2004-2006
- Albert J. Ussery 2004-2006
- Stevan J. Schoen 2004-2006
- Timothy M. Padilla 2005-2007
- Barbara C. Everage, Chair 2006-2008
- J. Carter Clary 2006-2008
- R. Thomas Dawe 2006-2008
- Terrence Revo 2006-2008
- Robert S. Simon 2006-2008
- Ronald T. Taylor 2006-2008

2006 LICENSE AND DUES

- The 2006 license and dues forms have been mailed.
- License and dues are due on or before Feb. 1, 2006.
- Members who have not received the form by the end of December should notify the State Bar office, (505) 797-6092 or (505) 797-6035.
- For members’ convenience, dues may be paid online through secured eCommerce at www.nmbar.org.
- License and disciplinary fees are mandatory and must be paid to maintain license status.
- Without exception, dues and license fees are due regardless of whether you received your form.

Late fees may be assessed if payment is not postmarked by Feb. 1, 2006.

ONLINE BULLETIN 2005

Vol. 44, No. 31

American Bar Association

Midyear Meeting

The American Bar Association’s midyear meeting will be held Feb. 8–13 in Chicago. The ABA House of Delegates is meeting on Feb. 13. The agenda is printed on page 9 and is also available on the ABA’s Web site at www.abanet.org/leadership/2006/mid-year/prelimagenda.doc. ABA members are asked to review the agenda and direct questions or comments to State of New Mexico Delegate Mary Torres, (505) 848-1800, or mtorres@modrall.com.

OTHER NEWS

2006 Children’s Law Institute

The annual New Mexico Children’s Law Institute will be held Jan. 11–13 at the Marriott Pyramid North in Albuquerque. The conference, co-sponsored by the UNM Institute of Public Law, the Supreme Court’s Court Improvement Project, CYFD and the New Mexico CASA Network, is intended for judges, attorneys, volunteer advocates, social workers, juvenile probation officers and others who work with children and families. Attorneys can earn 13.2 total CLE credits (1.0 E and 1.0 P optional).

The conference brochure and registration form can be downloaded from http://ipl.unm.edu/childlaw or obtained from Andrea Poole, (505) 474-8800 or apoolo@cybermesa.com. Registrations should be mailed to the Institute of Public Law at the address listed on the form.

OTHER BARS

Albuquerque Bar Association

Monthly Meeting Luncheon and CLE

The Albuquerque Bar Association’s monthly meeting luncheon will be at noon, Jan. 3, at the Albuquerque Petroleum Club. U.S. District Court Chief Judge Martha Vazquez will provide the luncheon address. The CLE program, Protecting Consumers from Predators, will be presented by Richard Feferman of Feferman & Warren. The CLE, for 2.0 general CLE credits, will be held from 1:30 to 3:30 p.m. Lunch only: $20 members/$25 non-members; lunch and CLE: $60 members/$85 non-members; and CLE only: $40 members/$60 non-members. Register by noon, Dec. 29, at www.abqbar.com; by e-mail at abqbar@abqbar.com; by mail or phone to the Bar office at 400 Gold SW, Suite 620, Albuquerque 87102; or call (505) 842-1151 or (505) 243-2615.

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Preliminary Agenda, American Bar Association
House of Delegates 2006 Midyear Meeting


Report 100. Section of Legal Education and Admissions to the Bar: Conurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting the revisions to the Rules of Procedure for Approval of Law Schools and to Standard 103 and its Interpretations of the Standards for Approval of Law Schools.

Report 101. Standing Committee on Paralegals: Grants approval, reopening, and extension of the term of approval to several paralegal education programs, and withdraws the approval of one program at the request of the institution.

Report 102. Section of Family Law, Section of Individual Rights and Responsibilities, Commission on Homelessness and Poverty: Opposes legislation and policies that prohibit, limit or restrict placement into foster care of any child on the basis of sexual orientation of the proposed foster parent when such foster care placement is otherwise determined to be in the best interest of the child.

Report 103. Standing Committee on Medical Professional Liability, Section of Dispute Resolution, Section of Litigation, Tort Trial and Insurance Practice Section: Refirms opposition to legislation that places a dollar limit on recoverable damages that operate to deny full compensation to a plaintiff in a medical malpractice action and opposes the creation of healthcare tribunals that would deny patients injured by medical negligence the right to request a trial by jury or the right to receive full compensation for their injuries.

Report 104A. National Conference of Commissioners on Uniform State Laws: Approves the Uniform Foreign-Country Money Judgments Recognition Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2005 as an appropriate Act for those States desiring to adopt the specific substantive law suggested therein.

Report 104B. Approves the Uniform Debt-Management Services Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2005 as an appropriate Act for those States desiring to adopt the specific substantive law suggested therein.

Report 104C. Approves the Uniform Certificate of Title Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2005 as an appropriate Act for those States desiring to adopt the specific substantive law suggested therein.

Report 104D. Approves the Uniform Assignment of Rents Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2005 as an appropriate Act for those States desiring to adopt the specific substantive law suggested therein.

Report 105. Commission on Renaissance of Idealism, Standing Committee on Pro Bono and Public Service, Senior Lawyers Division, Section of Business Law, Section of Litigation: Urges all lawyers to contribute to the public good through community service activities in addition to their professional responsibility to deliver pro bono service in accordance with the Model Rules of Professional Conduct Rule 6.1.

Report 106A. Tort Trial and Insurance Practice Section: Recommends that any legislation establishing an administrative process in lieu of state, territorial or federal tort-based asbestos-related claims should insure access by claimants to adequate representation in the claims process.

Report 106B. Recommends that any legislation establishing an administrative process in lieu of state, territorial or federal tort-based asbestos-related claims should insure that awards to claimants not be depleted by taxation or by subrogation from any private or governmental entity and should forestall independent claims existing under state, territorial or federal law relating to safety or other obligations of employers.

Report 106C. Recommends that any legislation establishing an administrative process in lieu of state, territorial or federal tort-based asbestos-related claims should contain specific provisions to insure adequate upfront financing and disclosure of certain information concerning contributors.

Report 106D. Recommends that any legislation establishing an administrative process in lieu of state, territorial or federal tort-based asbestos-related claims should contain specific contingent provisions to respond to any potential occurrence of a shortfall of funds.

Report 106E. Supports proper care and treatment of animals as an essential part of the response to any disaster or emergency situation as part of any emergency preparedness operational plans.

Report 107A. Commission on Immigration: Supports the due process right to counsel for all persons in removal proceedings and the availability of legal representation to all non-citizens in immigration-related matters.

Report 107B. Supports a regulated, orderly and safe immigration system that addresses the undocumented population, need for immigrant labor, value of family reunification, and the need for an effective enforcement strategy; and supports lawful permanent residence and citizenship for undocumented persons who entered the United States as minors.

Report 107C. Supports adequate funding appropriate for agencies adjudicating immigration applications in a timely manner and reduce backlogs; and urges an administrative agency structure for the implementation of immigration laws that will provide non-citizens with due process protections throughout the immigration process.

Report 107D. Supports a transparent, user-friendly, accessible, fair and efficient system for administering immigration laws that has sufficient resources to carry out its functions in a timely manner.

Report 107E. Opposes the detention on non-citizens in immigration or federal proceedings except in extraordinary circumstances, which would include a determination, following a hearing and subject to judicial review, that a person presents a threat to national security or public safety, or presents a substantial flight risk.

Report 107F. Supports the establishment of laws, policies, and practices that ensure optimum access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge.

Report 107G. Supports avenues for lawful immigration status, employment authorization, and public benefits for victims of human trafficking and other crimes including rape, torture, domestic violence, sexual assault and sexual exploitation and supports the use of Legal Services Corporation funding to provide services to such victims.

Report 108A. Section of Individual Rights and Responsibilities, Council on Racial and Ethnic Justice: Urges Congress to create and appropriate funds for a Commission to study and make findings relating to the present day social, political and economic consequences of both slavery and the denial thereof of equal justice under law for persons of African descent living in the United States and authorizes the Commission to propose public policies or governmental actions, if any, that may be appropriate to address such consequences.

Report 108B. Urges Congress to enact legislation to establish a process to provide federal recognition and to restore self-determination to Native Hawaiians.

Report 109. Section of Dispute Resolution: Supports the use of federal consent decrees that are consistent with specified principles and opposes legislation that limits the efficacy of consent decrees when state and local governments are parties thereto.

Report 110. Section of International Law. Urges the development and adoption thereafter, of a uniform law that would permit unworn declarations under penalty of perjury to be executed by persons located outside the United States in lieu of affidavits, verifications, or other sworn documents in state or territorial judicial proceedings, as is currently the federal practice under 28 U.S.C. §1746.

Report 111. Center For Human Rights: Urges bar associations through out the world to speak out in their respective communities in support of the Rule of Law.

Report 112. Section of Administrative Law and Regulatory Practice: Urges the Attorney General of the United States to issue a memorandum to Freedom of Information Act (FOIA) officials at federal agencies clarifying that the designation of agency records as “sensitive but unclassified” cannot be a basis for withholding agency documents from release.

Report 177B. Board Of Governors: Recommends that membership dues be increased by approximately 17% to be effective with Fiscal Year 2006-07 and further recommends that limited testing of new dues pricing concepts be allowed.
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<td>5.6 G, 1.0 E</td>
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**G** = General  
**E** = Ethics  
**P** = Professionalism  
**VR** = Video Replay  
Programs have various sponsors; contact appropriate sponsor for more information.
29 
Ethics: Now What are You Gonna Do?
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30 
2005 Professionalism: Lawyers Concerned for Lawyers
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Center for Legal Education of NMSBF
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30 
Ethics: Now What are You Gonna Do?
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Center for Legal Education of NMSBF
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JANUARY

4 
Fundamentals of Construction Contracts: Understanding the Issues
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Lorman Education Services
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Marriott Pyramid North, Albuquerque
UNM Institute of Public Law
13.2 Total Credits (1.0 E, 1.0 P optional)
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19 
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20 
Discovery Skills for Legal Staff
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Lorman Education Services
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FEBRUARY

1 
Ounce of Prevention Pound of Cure: Critical Financial Mistakes Made in Divorce in NM
State Bar Center, Albuquerque
National Business Institute
5.0 G, 1.0 E
(800) 835-8525
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8 
How to Draft Wills and Trusts in New Mexico
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12 
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## WRITS OF CERTIORARI

**As Updated by the Clerk of the New Mexico Supreme Court**

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

**Effective December 22, 2005**

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

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### CERTIORARI GRANTED BUT NOT YET SUBMITTED TO THE COURT:

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**WRITS OF CERTIORARI**

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

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

**EFFECTIVE DECEMBER 22, 2005**

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**CERTIORARI GRANTED AND SUBMITTED TO THE COURT**

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

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**PETITION FOR WRIT OF CERTIORARI DENIED:**

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<td>State v. Renteria (COA 25,142)</td>
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### OPINIONS

**As Updated by the Clerk of the New Mexico Court of Appeals**

Patricia C. Rivera Wallace, Chief Clerk New Mexico Court of Appeals  
PO Box 2008 • Santa Fe, NM 87504-2008 • (505) 827-4925

**Effective December 16, 2005**

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<tr>
<td>NO. 24740 8th Jud Dist Taos CV-03-76, Magnolia Mountain Limited Partnership v. Ski Rio Partners, LTD. (affirm)</td>
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<tr>
<td>NO. 25835 5th Jud Dist Chaves CR-04-321, State v. Rachael Benavidez (affirm)</td>
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<td>NO. 25773 2nd Jud Dist Bernalillo CR-04-1983, State v. Rogelio Avila (affirm)</td>
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<td>NO. 25830 2nd Jud Dist Bernalillo CV-02-8330, Maria Enriquez v. State of New Mexico, Department of Human Services (affirm)</td>
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<td>NO. 24417 2nd Jud Dist Bernalillo CV-96-9869, John Rendall v. Robert Tipman (affirm)</td>
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Slip Opinions for Published Opinions may be read on the Court’s Web site:  
## Clerk Certificates

**From the New Mexico Supreme Court**

### Clerk’s Certificate of Name, Address, and/or Telephone Changes

<table>
<thead>
<tr>
<th>Name</th>
<th>Office/Address</th>
<th>Phone Numbers</th>
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<tbody>
<tr>
<td>Jonathan A. Abbott</td>
<td>30 Boltwood Walk (01004) PO Box 2368, Amherst, MA 01004-2368</td>
<td>(413) 253-0052 (telecopier)</td>
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<tr>
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<tr>
<td>Hon. Rosemarie Lazcano</td>
<td>Bernaalillo County Metropolitan Court</td>
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<td></td>
<td>401 Lomas Blvd., NW</td>
<td>(505) 256-3184 (telecopier)</td>
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<tr>
<td>Adam S. Baker</td>
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<td><a href="mailto:abaker@taoslawoffice.com">abaker@taoslawoffice.com</a></td>
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<tr>
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<td>Basham &amp; Basham, P.C. 2205 Miguel Chavez Rd., Ste. A</td>
<td>(505) 988-4575 (telecopier)</td>
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<td>Santa Fe, NM 87505 (505) 988-4575</td>
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<td>Rosemary L. Bauman</td>
<td>Protection and Advocacy System 1720 Louisiana Blvd., NE, Ste. 204 Albuquerque, NM 87110</td>
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# Clerk Certificates

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<tr>
<td>La Morena Law, L.L.C.</td>
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<td>Ray A. Padilla</td>
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<td>201 W. Picacho St.,</td>
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<td>Raul P. Sedillo</td>
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<td>524-6370 Ext. 151 (505) 524-6379 (telecopier)</td>
<td><a href="mailto:drupp@da.state.nm.us">drupp@da.state.nm.us</a></td>
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<td>Butt, Thornton &amp; Baehr, P.C.</td>
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<tr>
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<td>Buttrum, Sperling, Roehl, Harris &amp; Sisk, P.A.</td>
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<td>Kerri Leslie Yamashita</td>
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<td><a href="mailto:yamashitak@wemed.com">yamashitak@wemed.com</a></td>
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<td>Wilson, Elser, Moskowitz, Edelman &amp; Dicker, L.L.P.</td>
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<td>New York, NY</td>
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<tr>
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<tr>
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<td>Rachel L. Winston</td>
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<td>Richard B. Word</td>
<td>NM Environment Department</td>
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Roxanna M. Chacon, Chair
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Valerie Suzanne Reighard
Mock Interview Program -
Martha Chicosky

Message from the YLD Chair...

By: Roxanna M. Chacon, Chair

I would like to
begin by stating
that I have truly
enjoyed and am
very grateful
for having had
the opportunity
to serve as the
2005 Chair of
the New Mexico
Young Lawyers
Division. It is
hard to believe that the year is now coming
to a close and we are about to begin a new
one. I leave the leadership of the Division
in the very capable hands of the 2006 Chair
Carolyn Ramos. Carolyn has dedication and
enthusiasm that will serve the YLD well in
the year to come.

This past year was a busy one for the YLD,
beginning with the Ski-LE we co-sponsored
in February in Ruidoso. In addition, we
helped with a number of events at the
University of New Mexico School of Law.
We continued our tradition of holding
Brown Bag Lunches with both Federal and
State Court Judges. We organized a number
of networking opportunities for YLD board
members, which included a social with the
El Paso area Texas Young Lawyers that was
held in conjunction with our April Board
meeting in Las Cruces. We hosted a dinner
for the officers and directors of the American
Bar Association Young Lawyers Division,
who held their leadership retreat in New
Mexico in August. We also recently held
the YLD Holiday Mixer in Albuquerque
on December 15, 2005. We closed this year
with the implementation of a committee
that is busy organizing the American Bar
Association Rocky Mountain Regional
Conference scheduled for March 2-5, 2006
in Santa Fe. I would like to thank the 2005
YLD board members for their hard work and
dedication to ensure that these events and
programs were a success. It was a pleasure
and honor to work with each of you.

In closing, I think that it is important to
note that the YLD is just but a segment
of the State Bar membership and none
of the accomplishments we have attained
would be possible without the support
and encouragement of the Board of Bar
Commissioners and the assistance of the
State Bar staff. For these reasons, I would
like to extend my deepest gratitude to these
individuals and of course to all of you, the
members of the State Bar of New Mexico.
YLD Summer Fellowship Program
Huge Success...

By: J. Brent Moore & Mo Chavez

The Young Lawyers Division (YLD) of the State Bar started a new fellowship program during the summer of 2005. In efforts to reach out to law students here in NM, YLD created and funded the fellowship program which is designed to allow one law student the ability to work in an unpaid position in the area of public interest law or the government sector. The fellowship award was specifically intended to provide the opportunity for a law student to work in a position that might not otherwise be possible because the position was unpaid.

The fellowship award of $3,000 was awarded Tim Gardner, who is a law student at the University of New Mexico School of Law. Mr. Gardner worked during the summer 2005 with an organization called Enlace Comunitario. This organization’s primary mission is to provide general assistance and legal assistance to Spanish-speaking victims of domestic violence. The YLD plans to make this summer fellowship an annual program and expand the program to multiple fellowships. Here is a letter from Mr. Gardner to the YLD regarding the fellowship:

Last week I had a conversation with a client that opened my own eyes to the importance of the work we do at Enlace Comunitario. This woman has five kids and is separated from her abusive husband, who has continued to manipulate and take advantage of her through the legal system and in other ways since he kicked her out of their house. She expressed to me that until she got involved with EC she had resigned herself to the unpleasant life she had, and only through her work with us was she able to realize that she deserves and can achieve so much better. With the help of our legal department, she has secured an order of protection for her own safety and the safety of her children, she has begun to receive child support, and she has initiated the process of getting her divorce and claiming some much-deserved personal freedom.

Without the assistance of the Young Lawyers Division, I do not know what I would have done this summer, but I’m sure I could have found some sort of gainful employment, although without a doubt it would not have been nearly as personally or socially rewarding. This was a position that EC and I created, and I know that the organization would not have found anyone else to do what I was able to do. It is questionable whether the organization would have been able to get its legal department up and functioning at all, and the women we have served might have remained as vulnerable as they had been – as vulnerable as just about anyone in the society in which we live. I deeply thank and highly commend the Young Lawyers Division for your contributions.

With great appreciation,
Tim Gardner

Dear Young Lawyers Division:

I write to thank you again for the $3000 fellowship to support my work with Enlace Comunitario (EC) this summer. This was a remarkable opportunity for me personally, and also truly valuable for the immigrant victims of domestic violence that we serve.

Before I started with EC this summer, the organization had no legal component. Our attorney Beth Rourke, who brought great passion and many years of experience with domestic violence and family law matters, started at EC shortly after I began. In coordination with, and under the supervision of, Ms. Rourke, we were able to create a legal department that currently has an active caseload of 40, with dozens more who have been helped with consultations or other brief legal services. We are now virtually the only legal service provider in the community for indigent and Spanish-speaking immigrant victims of domestic violence, and we are currently looking for ways to allow our legal program to grow to even better satisfy the unmet needs in our area.

During the summer I learned a great deal about the process for securing a domestic order of protection, and I will be fully capable of taking on such cases when I begin practicing law next year. I also had the chance to participate in a great variety of family law actions, such as divorces and paternity, custody and child support cases. With EC I was also able to expand my legal research skills. Most meaningful to me, I was able to get significant direct client contact, and I feel I am now much better at conducting client interviews and understanding client needs.

Region V
Report...

By: S. Carolyn Ramos, Chair-Elect

I am thrilled to report that the Board of Bar Commissioners (BBC) continues its fervent support of the YLD. Our 2006 budget was approved and included allocations for a second Public Interest Law Fellowship, funds for a homeless legal clinic in Las Cruces, networking, CLE, attendance at ABA/YLD meetings and conferences and other community endeavors.

New Mexico was well represented in Louisville, Kentucky, of all places, in October. We had ten young lawyers at the ABA/YLD Fall Conference. The delegation was strong and brainstormed with ABA/YLD Affiliate Assistance Teams, attended CLE’s on depositions and emotional intelligence, participated in community service projects in the city and networked with fellow newbies from across the nation. It was at this meeting that ABA District 23 Rep. Mo Chavez and YLD Chair Roxanna Chacon pitched the Land of Enchantment to the powers that be and secured our first ABA/YLD Rocky Mountain Regional Conference SKI-LE to be held March 2-4 in Santa Fe.

Region V hosted its second “Demystifying Federal Court” Judicial Luncheon on December 7, 2005 in Albuquerque. Chief Judge Martha Vázquez, Senior District Judge James Parker, Judge Bruce Black and Chief Magistrate Judge Lorenzo Garcia all showed up to chat with new lawyers about their obligations to the Court, the profession and themselves. While much needed do’s and don’ts were covered, the theme quickly became integrity, professionalism, quality of life and the intersection of the three. The Judges were down to earth, informative, funny and sincere in their commitment to the training of young lawyers. It was a huge success. We received several requests for a Las Cruces luncheon so anyone interested in organizing an event with the feds down south please contact me at scramos@btblaw.com.
Four New Mexico Young Lawyer’s Division members participated in the American Bar Association’s Young Lawyer’s Division Spring 2005 Conference this year. Young Lawyer’s Division Chair Roxanna Chacon, Director-at-Large members Román R. Romero and Erika Anderson and member Marguerite Carr represented New Mexico’s young lawyers during the three-day event in Miami, Florida.

This ABA/YLD conference provided excellent networking opportunities, at events like the Friday night dinner/dance at the Vizcaya resort in Miami Beach. The other added benefit to the conference included seminars on bar leadership and how to implement programs that aide young lawyers in their first years of practice. Attendees had the opportunity to engage in round table discussions regarding what their state’s young lawyers are doing and many of these programs have already been implemented in other areas of the country.

The next ABA/YLD conference is scheduled for February 9-12, 2006, in Chicago, Illinois.

In mid-July, the Young Lawyers Division (YLD) hosted a brown bag luncheon with Chief Justice Richard Bosson of the New Mexico Supreme Court in Santa Fe, NM. Justice Bosson was on the New Mexico Court of Appeals for eight years and elected to the Supreme Court in 2002. He was also named the Chief Justice for the New Mexico Supreme Court in January 2005. The luncheon was an informal setting that provided young lawyers an opportunity to ask Justice Bosson questions. Justice Bosson talked about filing an appeal with the Supreme Court, the duties of a Supreme Court Justice and the additional responsibility he has as the Chief Justice. He also talked about his own experiences as a lawyer and how to become a judge in New Mexico. The luncheon was well attended and, all in all, was a complete success.

The Conference provided valuable insights concerning the recent changes to the bankruptcy code, marketing small law practices, law office management, technology that facilitates the efficient practice of law, partnerships, creative client billing systems and diversity in the practice of law. Amongst the conference highlights were seminars led by a Florida Supreme Court Justice and area lawyers in a variety of practice fields.

The New Mexico Young Lawyers Division will be hosting the 2006 ABA/YLD Regional Conference and SKI-LE in Santa Fe. The ABA Region includes New Mexico, Arizona, Nevada, Utah, Colorado, Wyoming, Missouri and Idaho. The conference will begin on March 2, 2006 and will be held at the Inn and Spa at Loretto. Conference attendees will receive great rates of $106.00 plus tax per night at the Inn and Spa at Loretto.

The Conference will kick-off with a hosted reception on Thursday, March 2, 2006. The Conference will include morning CLEs covering general, ethics and professionalism courses. The afternoon will be open for participants to ski, snowmobile, shop or spend a day at the spa.

The YLD is honored to be hosting the first ever regional conference in New Mexico. “We are thrilled to be able to host this Conference in Santa Fe. We have an exciting program planned with an emphasis on the judiciary and meaningful practice pointers from trial and appellate judges,” stated YLD Chair-Elect, Carolyn Ramos. “A lot of work is going into this and I thank Mo Chavez and Roxanna Chacon, both ABA-YLD affiliates, for selling New Mexico and shephardizing us through the process and Rob Koonce for lining up a great program. It will not only be a great Conference from a CLE perspective, but also from a networking and camaraderie perspective. Participants should be prepared to work hard and play hard.”

Please mark your calendars for this special event! If you have any questions about the ABA/YLD Regional Conference please contact Briana Zamora at bhzamora@btblaw.com or Mo Chavez at mo@chavezlaw.com for additional information.
Equal Access to Justice (“EAJ”) provides financial support to legal aid programs for low-income families throughout New Mexico. Through annual fund-raising drives, EAJ is able to provide much-needed funds to a variety of legal services throughout the state, including New Mexico Legal Aid, DNA People's Legal Services, the New Mexico Center on Law and Poverty and Law Access New Mexico. As awareness and donations to EAJ increase, we hope to provide funding for additional programs. These programs provide a variety of invaluable services, including assistance with housing and domestic violence issues, applications for disability and many others. The attorneys at these agencies are paid well below private sector attorneys but are committed to serving those in need. Without the legal assistance these agencies and their attorneys provide, the almost 25% of New Mexico's population who qualify for their services would have no way to obtain much needed legal aid.

As YLD members, your interest in and contributions to EAJ are much needed. Whether you can afford to donate $25.00 or $250.00, your contribution is appreciated and will go to support these worthwhile agencies. Please consider making EAJ one of your yearly charitable contributions (which is tax-deductible as permitted by law).

For more information about EAJ, please contact Meredith McBurney at 797-6064 or mm8091@aol.com.

It is easy to make a gift to help increase access to justice for low-income New Mexicans:
- You can go to our website (www.eaj-nm.org) and click on "Donations", or
- Send your contribution with the form below.

Yes. I am pleased to support Equal Access to Justice.

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My gift of ______________ is enclosed.
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he should be committed for treatment to that time competent to stand trial and that the State stipulated that Defendant was not at that time competent to stand trial. The test for competency but recommended that Defendant be assessed further. The State concluded Defendant marginally met the test for competency but recommended that Defendant be assessed further. The district court to an institution for treatment to attain competency. In November 1999, the district court entered an order committing Defendant for treatment pursuant to NMSA 1978, § 31-9-1.2(B) (1999). Section 31-9-1.2(B) provides that a defendant who is determined to be incompetent and found to be dangerous may be committed by the district court to an institution for treatment to attain competency.

Pursuant to the commitment order, Defendant was transferred on December 20, 1999, from the Lea County Detention Center (LCDC) to the Las Vegas Medical Center (LVMC), for treatment to attain competency and treatment for dangerousness. Doctors who evaluated, tested, interviewed, interacted with, and observed Defendant over the approximate three months of Defendant’s commitment at the LVMC determined that Defendant was competent to stand trial and was not mentally retarded. On March 31, 2000, Defendant was transferred back to the LCDC. The competency hearing was originally set for September 18, 2000, but was continued several times before the hearing finally occurred, during which Defendant struck an officer in the head with a cup, causing a laceration on the officer’s ear. In December 2000, the magistrate court at Defendant’s request transferred his aggravated battery case to district court for the purpose of determining his competency. The aggravated battery case was joined with the murder case for the sole purpose of making a competency determination.

In April 2001, LVMC informed the court by letter that Defendant was competent to stand trial. Defendant was evaluated by doctors selected by the defense and these doctors concluded that Defendant was not competent to stand trial and was mentally retarded. The district court held the competency hearing in May, June, and October 2001. Two doctors from LVMC testified on behalf of the State that Defendant was competent to stand trial and not mentally retarded. However, the three defense doctors testified that Defendant was not competent to stand trial and was mentally retarded.

On December 17, 2001, the court, Judge R.W. Gallini presiding (in the murder case and the joint competency hearing), determined that Defendant was competent to stand trial and was not mentally retarded. On December 21, 2001, the court entered an order setting Defendant’s case for trial based on the court’s findings that Defendant was competent to stand trial and did not have mental retardation. The court found that the LVMC doctors determined that Defendant understood the nature and gravity of the proceedings against him, that Defendant had a factual understanding of the criminal charges, and that Defendant was capable of assisting in his own defense. The court also found the LVMC doctors to be more credible than Defendant’s experts. It concluded that the State met its burden of proof in proving competency. It further concluded that Defendant failed to prove by a preponderance of the evidence that he was
mentally retarded. Defendant’s aggravated battery case moved forward. (While it is not relevant to this appeal, Defendant’s murder charge was subsequently resolved by a plea of guilty.) Judge Gary Clingman was assigned to the aggravated battery case on February 12, 2002. Trial was held on August 8, 2002.

7) Just before trial, Defendant’s third counsel, who entered her appearance on February 12, 2002, asked the court to “find [Defendant] today not competent to proceed to trial,” and “to make a determination with regard to [Defendant’s] competency this morning.” Pointing out the long stretch between Defendant’s last evaluations and even the hearing on competency before Judge Gallini, and the present proceeding, counsel told the court that she thought Defendant’s deterioration stemmed from his isolated confinement in prison following the last competency hearing. Defendant asked the court to take judicial notice of the second competency proceeding before Judge Gallini in May, June, and October 2001 because evidence in that proceeding pertained to Defendant’s request before the court. Specifically, Defendant’s counsel asked the court “to make its own finding with regard to competency”, keeping in mind, I’ve asked the Court to take judicial notice of the entire proceedings with regard to competency.”

8) In further support of her request that the court make a competency determination, Defendant’s counsel stated that she had fourteen years of experience “doing this kind of work,” and that she had had contacts with Defendant as a go between for Defendant and his death penalty team before she represented Defendant on the battery charges. Based on her experience and time with Defendant, she stated her opinion to be that Defendant was not competent to stand trial and was mentally retarded. More specifically, defense counsel stated that since the second competency hearing Defendant had been “held primarily in isolation” at the LCDC and that “he deteriorates while he sits, and is held in isolation.” Based on her view that Defendant’s history showed him as functionally illiterate, counsel told the court that Defendant “doesn’t even have the solace of being able to read, to occupy his mind while he’s locked up, and I would have to say to the Court that at this time, it’s my belief and my request that the Court find him today not competent to proceed to trial.”

9) At one point, unsure that there was a sufficient record under Rule 5-602 NMRA, counsel asked the court to consider “other issues” in making a determination on competency. Counsel handed the court a sealed envelope, as an offer of proof, for the court’s eyes only, containing “confidences” revealed to her by Defendant. Although concerned about a violation of ethical rules by offering the confidences because, in her opinion, Defendant was not competent to waive his attorney/client privilege at the time, counsel explained that the confidences would “make a record for a self-defense instruction.” Yet counsel could not permit Defendant to testify because the death penalty team had advised her not to allow Defendant to testify, for fear of incriminating himself relating to the murder trial. Counsel, then, felt she could not render effective assistance of counsel, in that Defendant needed to testify in order to establish self-defense as shown in the confidential information in the sealed envelope.

10) At a later hearing the same day, counsel informed the court that she had met with Defendant between hearings and had discussed an earlier court order regarding cross-examination limitations if Defendant were to testify. She also stated that she had discussed with Defendant giving testimony in his own behalf and whether to waive his right against self-incrimination. Counsel further told the court that it was clear to her that Defendant did not believe he was able to understand or comply with the court’s order. Counsel was “left with the abiding conclusion that [Defendant] is not competent today to make such a decision either to waive or to assert [his privilege against self-incrimination].” Counsel then, again, stated that, in attempting to explain to Defendant the benefits and detriments of waiver, Defendant “was not able to understand the parameters of the order.” After a recess, counsel told the court that she did not think Defendant was capable of understanding the implications of presenting to the jury an instruction on the lesser included offense of battery on a peace officer.

11) The court’s ruling actually came early in these discussions. It was the court’s only ruling and rationale underlying its ruling on the competency issue. The court stated the following:

I have known Judge Galini [sic] a long time, as I’ve known both counsel, and both counselors [are] very good advocates to their position. However, Judge Galini [sic] did hold a very long hearing in this regard, and did find the evidence presented in this matter, and did make these findings and conclusions and his conclusion is that [Defendant] is competent, and we’ll go ahead and proceed in that the objective [sic] is noted. Defendant was convicted of battery on a peace officer.

12) Defendant’s points on appeal are that the district court erred by: (1) refusing to make a contemporaneous determination of Defendant’s present ability to intelligently assist his attorney, (2) blindly relying on the prior competency ruling without independently analyzing the past and present evidence of Defendant’s competency, (3) not allowing Defendant to present the issue of his present competency to the jury, and (4) giving a confusing excessive force instruction to the jury.

13) The State asserts we should affirm the district court because: (1) Defendant failed to raise competency from the date of Judge Gallini’s determination of competency until the morning of Defendant’s trial date, (2) Defendant’s sole request to the court was to determine that Defendant was not competent to proceed to trial that day, (3) defense counsel failed to ask the court to conduct another competency hearing, (4) defense counsel failed to present any evidence to substantiate her belief that Defendant was not competent and failed to explain why she believed Defendant’s competence had deteriorated, and (5) defense counsel requested that the court simply reweigh the evidence heard by Judge Galini and reach a different conclusion.

DISCUSSION

1. The Issue of the Court’s Refusal to Again Look into Competency

14) The critical issue before us is whether the district court erred in subjecting Defendant to trial instead of having Defendant evaluated a third time for competency.

A. Competency Law and Procedure

15) “It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” Drope v. Missouri, 420 U.S. 162, 171 (1975). “[T]he failure to observe procedures adequate to protect a defendant’s right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.” Id. at 172.

16) “[I]t is a violation of due process to

“A person is competent to stand trial when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . he has a rational as well as factual understanding of the proceedings against him.” *Id.* (internal quotation marks and citation omitted); *State v. Najar*, 104 N.M. 540, 542, 724 P.2d 249, 251 (Ct. App. 1986) (“The competency issue is whether a defendant understands the nature and significance of the proceedings, has a factual understanding of the charges, and is able to assist his attorney in his defense.”). “An accused must have the capacity to assist in his own defense and to comprehend the reasons for punishment.” *Rotherham*, 122 N.M. at 252, 923 P.2d at 1137.

A man should not arbitrarily or capriciously be denied upon his day in court a trial in which he may competently bring to his defense any fact of which he may be apprised; and if he suffers from mental disorder at that time so as not to understand the nature of the proceedings against him, or lacks the ability to communicate to his counsel any elements in his defense, he is denied that right. *State v. Folk*, 56 N.M. 583, 592, 247 P.2d 165, 171 (1952). In this opinion, we refer to the *Rotherham* due process requirement as “the ability to consult and understand.” 17 Our Legislature built the due process alert into New Mexico law. It did not mince words in broadly stating that “[w]henever it appears that there is a question as to the defendant’s competency to proceed in a criminal case, any further proceeding in the cause shall be suspended until the issue is determined.” *NMSA 1978*, § 31-9-1 (1993). The issue of competency to stand trial may be raised by motion at any stage of the proceedings. Rule 5-602(B)(1). Once an issue of competency to stand trial is raised, the issue must “be determined by the judge, unless the judge finds there is evidence which raises a reasonable doubt as to the defendant’s competency to stand trial.” Rule 5-602(B)(2). Thus, whether a “question as to the defendant’s competency to proceed” exists is judged by whether there is evidence that raises a reasonable doubt as to the defendant’s competency to stand trial. § 31-9-1; Rule 5-602(B)(2).

“If a reasonable doubt as to the defendant’s competency to stand trial is raised prior to trial, the court shall order the defendant to be evaluated as provided by law.” Rule 5-602(B)(2)(a). Our law requires that when a question as to a defendant’s competency is raised, the defendant’s competency must be professionally evaluated by a qualified professional who must submit a report to the court. *Rotherham*, 122 N.M. at 252, 923 P.2d at 1138; *see NMSA 1978*, § 31-9-1.1 (1993). As well, a mental examination will be required before any determination of competency “[u]pon motion and upon good cause shown.” Rule 5-602(C); *see also NMSA 1978*, § 31-9-2 (1967) (stating “[u]pon motion of any defendant, the court shall order a mental examination of the defendant before making any determination of competency under Section[] . . . 31-9-1”); *State v. Herrera*, 2001-NMCA-073, ¶ 34, 131 N.M. 22, 33 P.3d 22 (holding that no error occurred in refusing to order a competency evaluation after the defendant entered an *Alford* plea, where the assertion of incompetency did not give rise to a reasonable doubt as to competency); *State v. Hovey*, 80 N.M. 373, 376, 456 P.2d 206, 209 (Ct. App. 1969) (deciding under *NMSA 1953*, § 41-13-3.1 (1967), the predecessor to Section 31-9-1, and under Section 41-13-2.1, the predecessor to Section 31-9-2, that no error occurred in denying a motion for a psychiatric examination where the “impression of counsel” as to the defendant’s incompetency did not constitute reasonable cause for belief that the defendant was not competent).1

18) *NMSA 1978*, §§ 31-9-1 to -2 (1967, as amended through 1999), procedurally govern the process of determining competency to proceed in a criminal case. Sections 31-9-1.1 through 31-9-1.6 set out procedures as to determinations of competency and mental retardation.

19) We read the applicable statutes and rules, considered together, to intend that whenever a legitimate concern about the present ability of a defendant to consult and understand is brought to the court’s attention, the court is required to consider whatever competency-related evidence is before the court and to determine whether there exists a reasonable doubt as to the defendant’s competency to stand trial. In considering the evidence and whether reasonable doubt exists, the court must, of course, keep in mind the requirement that a defendant must have sufficient present ability to consult and understand as required under due process of law. If the court determines that there is reasonable doubt as to the defendant’s competency, the court must have the defendant’s competency professionally evaluated. If the court does not determine that there is such reasonable doubt, then the court is to determine the defendant is competent.

B. Standard of Review

{20} We review the denial of a motion for a competency evaluation for an abuse of discretion. *Herrera*, 2001-NMCA-073, ¶ 31; *Najar*, 104 N.M. at 542, 724 P.2d at 251; *see also United States v. Ramirez*, 304 F.3d 1033, 1035 (10th Cir. 2002) (“Whether to order a competency examination is reviewed for an abuse of discretion.”); *United States v. Prince*, 938 F.2d 1092, 1095 (10th Cir. 1991) (holding that a trial court’s refusal to order a second competency exam is reviewed for abuse of discretion). No competency hearing is required when there is minimal or no evidence of incompetency. *United States v. Crews*, 781 F.2d 826, 833 (10th Cir. 1986).

{21} Defendant asserts that the issue of whether the district court erred in refusing further competency proceedings is reviewed de novo because it implicates his constitutional right to due process. In support of this footnoted assertion, Defendant cites *State v. Attaway*, 117 N.M. 141, 145-46, 870 P.2d 103, 107-08 (1994) (analyzing the standard of review of mixed questions of fact and law, and stating that “factors favoring de novo review are most predominate when the mixed question implicates constitutional rights*). We are not persuaded that this case requires de novo review. We see no basis on which to apply Defendant’s proposed standard and we adhere to the standard clearly stated in *Herrera* and *Najar*.

C. The Evidence Before the Court

{22} As indicated earlier in this opinion,

1 Section 31-9-1 is the successor to *NMSA 1953*, § 41-13-3.1 (1967), and Section 31-9-2 is the successor to *NMSA 1953*, § 41-13-3.2 (1967). *See 1967 N.M. Laws* ch. 231, §§ 2, 3; 1972 N.M. Laws ch. 71, § 18; 1988 N.M. Laws ch. 107, 1; § 31-9-2 (history). Section 31-9-1 amended Section 41-13-3.1 and it has been amended several times. Section 31-9-2 did not change Section 41-13-3.2 and it has not been amended. No cases analyze whether Section 31-9-2 still has a purpose or vitality separate from Sections 31-9-1 through 31-9-1.6.
the district court had the duty to consider evidence presented by Defendant and to determine, based on that evidence, whether there was a question as to Defendant’s competency to proceed; that is, whether reasonable doubt existed as to Defendant’s present ability to consult and understand. Defendant’s counsel requested the court to consider three matters: (1) the evidence at the previous competency hearing, (2) her opinions based on Defendant’s solitary confinement and on her observations and experience, and (3) the time lapses from the evaluations of Defendant and from the second competency hearing. We turn to the three matters raised by Defendant’s counsel.

1. The Second Competency Hearing

{23} Over the course of approximately three months in late 1999 and early 2000, after the State stipulated that Defendant was not competent to stand trial, and as a part of their evaluation of Defendant, the LVMC doctors administered tests designed to measure competency to determine Defendant’s competency to stand trial. They evaluated his adaptive functioning, his academic and family history, and his intellectual functioning. Although they diagnosed Defendant with anti-social personality disorder and borderline intellectual functions, the doctors reported that Defendant was competent and not mentally retarded.

{24} Defendant’s experts, for the most part, contradicted the State’s experts. Defendant’s experts also administered tests to Defendant to assess his competency and possible mental retardation. Among other things, they found him to be within the range of mental retardation, significantly intellectually impaired, and suffering from possible brain insults or injuries. Their opinion was that Defendant was mentally retarded and incompetent to stand trial.

As stated earlier in this opinion, Judge Gallini found the LVMC experts to be more credible than Defendant’s experts. Defendant further asserts that the court ignored Defendant’s experts’ testimony and “all the more-qualified and more-comprehensive testing” that showed Defendant was incompetent and mentally retarded. Defendant attacks the LVMC experts, asserting, among other views, that the experts did not consider Defendant’s family and school history as indicative of mental retardation, their interpretation of IQ and verbal test scores was incorrect, they failed to assess Defendant’s adaptive functioning, and they failed to specifically testify that Defendant had a “rational” understanding of the charges against him. Defendant states on appeal that he wanted the court to take judicial notice of the evidence before Judge Gallini so that it could “understand the context in which [counsel] was raising competency again.” Defendant also faults the court for ignoring his evidence and blindly relying on Judge Gallini’s prior ruling, because, in Defendant’s view, Judge Gallini’s ruling was not made under the correct legal standards for competency and for mental retardation.

{25} To the extent Defendant may have been requesting the district court in the present case relating to Defendant’s battery charge to reweigh the evidence in the prior competency hearing and then and there independently decide competency based on that evidence, or to look into error on the part of Judge Gallini, the court had no such duty. The record can be read, however, as Defendant having requested the court to review that evidence as background that the court should consider in determining whether there was a reasonable doubt as to Defendant’s present competency and whether to proceed with trial or to suspend the proceedings.

2. Counsel’s Observations and Opinions

{26} Testimony of experts is not required to support a contention of incompetency. 

Najar, 104 N.M. at 543, 724 P.2d at 252. Non-experts who have observed a defendant and who have knowledge of that defendant’s mental state and are thereby able to form an opinion as to competency can form the basis for a further determination by the court as to the need for an evaluation. Id.

{27} It nevertheless appears that, in New Mexico law, something more than counsel’s unsubstantiated assertions and opinion regarding a defendant’s competency is required to pass the reasonable doubt and good cause tests. See Herrera, 2001-NMCA-073, ¶ 32-34. In Herrera, we held that the district court did not abuse its discretion in denying the defendant a mental examination. Id. ¶ 34. We ruled that the defense counsel’s assertions of facts used to show the defendant’s mental status were insufficient to raise the issue of competency and did not show good cause to order an evaluation. Id. In that case, no affidavits or other documentary evidence were submitted and counsel did not assert the defendant’s inability to consult and understand. Id. We reasoned that “[a] question regarding a defendant’s competency . . . is not raised by an assertion of that issue, even though the assertion is in good faith.” Id. ¶ 33 (internal quotation marks and citation omitted). Likewise, in State v. Smith, 80 N.M. 742, 743-44, 461 P.2d 157, 158-59 (Ct. App. 1969), we held that the issue of competency was not raised based on the defendant’s counsel’s statement that the defendant had, “on an occasion been committed to a state mental hospital” and the defendant’s statements that he had been committed for psychiatric examination and hospitalization a year earlier to determine whether he was a kleptomaniac. (Internal quotation marks omitted.)

{28} Similarly, in Najar we stated that assertions by defense counsel must be substantiated. 104 N.M. at 543, 724 P.2d at 252; see also State v. Chacon, 100 N.M. 704, 706, 675 P.2d 1003, 1005 (Ct. App. 1983) (stating that defense counsel’s conclusions, without more, did not demonstrate good cause to require an examination); Hovey, 80 N.M. at 376, 456 P.2d at 209 (stating that defense counsel’s impression as to the defendant’s mental capacity was insufficient to constitute reasonable cause for a belief that the defendant was incompetent to stand trial); State v. Tartaglia, 80 N.M. 788, 790, 461 P.2d 921, 923 (Ct. App. 1969) (holding that “when there has been a prior judicial determination of a defendant’s incapacity to be tried, a redetermination of mental capacity must be based on more than the prosecutor’s interpretation of a report neither in evidence nor in the record”).

{29} We read the foregoing New Mexico cases to say that a court may consider defense counsel’s observations and opinions, but that those observations and opinions alone cannot trigger reasonable doubt about the defendant’s competency. “Although we do not, of course, suggest that courts must accept without question a lawyer’s representations concerning the competence of his client, an expressed doubt in that regard by one with the closest contact with the defendant is unquestionably a factor which should be considered.” Drope, 420 U.S. at 178 n.13 (internal quotations marks and citations omitted); see also United States v. Johns, 728 F.2d 953, 957 (7th Cir. 1984) (“While we have stated before that an attorney’s representations about his client’s competency are entitled to consideration, we believe that where no explanation for the attorney’s competency assessment is elicited or offered, and the attorney’s familiarity with his client has been drawn into question by his obvious surprise at his
client’s actions, his assessment is not dispositive.” (citation omitted); Connecticut v. Deslaurier, 646 A.2d 108, 116 (Conn. 1994) (acknowledging that “the opinion of the defendant’s counsel is unquestionably a factor which should be considered,” but that the “court need not accept it without question” (internal quotation marks and citation omitted)).

{30} Of course, trial courts at times may be legitimately leery of requests for competency evaluations, since some requests are undoubtedly made primarily or solely for the purpose of delay. We note such concern as expressed in Drope: “The sentencing judge observed that motions for psychiatric examinations have often been made merely for the purpose of delay, and estimated that almost seventy-five percent of those sent for psychiatric examinations are returned mentally competent.” 420 U.S. at 178 n.13 (internal quotation marks and citation omitted). It is likely this concern that gave rise to New Mexico case law’s requirement that a defendant offer something more than defense counsel’s bare representations about the defendant’s competency.

{31} We do not read the case law as requiring expert testimony in order to obtain an evaluation of his or her competency pursuant to Rule 5-602(C). See Najjar, 104 N.M. at 543, 724 P.2d at 252 (“Defendant was not required to offer the testimony of experts to support his incompetency contentions.”). Instead, a defendant could offer an affidavit from someone who has observed the defendant and formulated an opinion about his or her competency, such as a corrections officer or defense counsel’s paralegal. See id. (“If nonexperts had the opportunity to observe [the defendant] and had knowledge of his mental state, and were thus able to form an opinion as to his competency, their opinions could have been offered and received, and could have formed the basis for a further determination by the court.”).

3. Time Lapses

{32} The length of time from the evaluations of Defendant and also from Defendant’s second competency hearing, and Defendant’s possible deterioration over time, present a somewhat troubling history. Although Judge Gallini’s determination nine months earlier must go unchallenged, his ultimate determination turned on which set of experts was more credible than the other. Defendant’s experts were well qualified. Defendant had initially been determined not to be competent. He was treated to competency in only three months. At least two years then passed after the LVMC evaluations regarding Defendant’s competency, during which Defendant was in prison with murder and then aggravated battery charges pending. We note that such a substantial interval between assessment and trial may well justify a motion for further evaluation, but as we discuss later in this opinion, the burden remains on Defendant to raise a reasonable doubt as to competence with substantiated claims.

D. The Issue of Reasonable Doubt

{33} Although it is not all that clear from Defendant’s counsel’s statements to the district court, it appears that counsel was requesting the court to determine that a reasonable doubt existed as to Defendant’s present competency, thereby requiring the court to order an evaluation of Defendant as required under Rule 5-602(B)(2)(a). We reach our conclusions in this case based on the view that Defendant was making a request consistent with Section 31-9-1 and Rule 5-602(B)(2).

{34} Defendant’s counsel presented aspects of Defendant’s competency history, presented her recent observations regarding Defendant’s mental state, asked the court to consider the second competency hearing evidence, and gave her opinion regarding Defendant’s ability to consult and understand. Since nothing in the record or in argument indicates anything to the contrary, we assume that Defendant had time and opportunity before his battery trial to gather evidence concerning his present competency and was not precluded before trial from presenting whatever evidence he could gather.

{35} We conclude that the district court did not abuse its discretion in determining there was no reasonable doubt as to Defendant’s competency. The evidence presented a borderline case for reasonable doubt. The history of Defendant’s competency evaluations, determinations, and treatment did not necessarily reflect Defendant’s present competency. The observations and conclusions of Defendant’s counsel as to Defendant’s ability to consult and understand were not supported by any affidavits or testimony regarding observations of Defendant’s present abilities. “When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion.” Grant v. Cumiford, 2005-NMCA-058, ¶ 13, 137 N.M. 485, 112 P.3d 1142 (internal quotation marks and citation omitted).

II. The Court Was Not Required to Present the Issue of Defendant’s Competency to the Jury

{36} Defendant argues that the issue concerning his competency should have been submitted to the jury. Specifically, he argues that “New Mexico law provides that even after a trial court has determined that a defendant is competent, an accused is allowed to submit the question for ultimate determination to the jury, as long as there is evidence that raises a ‘reasonable doubt’ as to defendant’s competency.” This argument has no merit. First, the pretrial evidence Defendant presented did not raise a reasonable doubt as to Defendant’s competency. See Rule 5-602(B)(2). Second, the record does not reflect that Defendant requested that UJI 14-5104 NMRA or the issue of competency be given to the jury. Finally, even if Defendant had requested that UJI 14-5104 be given or that the issue otherwise be submitted, no offer of proof was made at trial and no evidence was presented for jury consideration concerning Defendant’s competency that would warrant giving the instruction to the jury. See Rule 5-602(B)(2)(a), (b); State v. Nelson, 96 N.M. 654, 657, 634 P.2d 676, 679 (1981) (“The right to have a jury determination of competency attaches only where competency to stand trial is at issue and when a reasonable doubt is raised after the trial has begun but before it has ended.”).

{37} Defendant by-passes the foregoing circumstances and law and asserts that he has a constitutional right to submit the issue of competency to the jury under Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000). Defendant contends that the district court’s “finding” that Defendant was competent by a preponderance of evidence exposed Defendant to a greater deprivation of liberty and the “finding” of competency had to be made by a jury beyond a reasonable doubt.

{38} Apprendi held that the defendant’s sentence for possession of a firearm, which was enhanced under a hate crimes penalty based on a preponderance of the evidence standard, violated the defendant’s right to a jury determination that he was guilty of every element of the crime beyond a reasonable doubt. 530 U.S. at 476-77. Ring concluded that a defendant is entitled to a jury determination, beyond a reasonable doubt, of any fact on which a legislature conditions an increase in the maximum punishment. 536 U.S. at 589. That entitlement exists whether the aggravating factors
are elements of an offense or constitute sentencing considerations. *Id.* at 588-89.

{39} Defendant’s argument is without merit. Competency to stand trial is not and does not act as an element of an offense. Nor does a competency determination enhance or increase a defendant’s maximum sentence. This is illustrated in *State v. Flores*, 2004-NMSC-021, ¶¶ 7-8, 135 N.M. 759, 93 P.3d 1264, in which Defendant’s interlocutory appeal in his murder case was certified to our Supreme Court on a question regarding execution of the mentally retarded. The Supreme Court “conclude[d] that the Sixth Amendment does not require the issue of a defendant’s mental retardation in a capital prosecution to be proved to a jury beyond a reasonable doubt.” *Id.* ¶ 8. Neither *Appendix nor Ring* can be reasonably interpreted to apply to a competency determination.

### III. The District Court Did Not Err in Regard to Jury Instructions

{40} Defendant argues that the district court erred by giving a confusing excessive force jury instruction that both did not explain its relationship to the elements of the crime and improperly shifted the burden onto Defendant to prove excessive force. {41} The district court instructed the jury on the elements of battery upon a peace officer. The instruction included each element of the offense including the elements of unlawfulness and absence of self-defense. The court also instructed the jury on the elements of self-defense. That instruction included the requirement that in order for the jury to find that Defendant acted in self-defense, it must find that he “was acting in response to the use of excessive force by the officer who was attempting to effect compliance with the officer’s instructions.” Both instructions placed the burden of proof on the State. In this way, both instructions complied with New Mexico law. See *State v. Parish*, 118 N.M. 39, 43-44, 878 P.2d 988, 992-93 (1994) (requiring that the instruction include the element of unlawfulness when self-defense is raised); *State v. Foxen*, 2001-NMCA-061, ¶ 8, 130 N.M. 670, 29 P.3d 1071 (requiring that the State must prove beyond a reasonable doubt that the defendant did not act in self-defense); *State v. Kraul*, 90 N.M. 314, 319, 563 P.2d 108, 113 (Ct. App. 1977) (requiring that the State must prove beyond a reasonable doubt that the defendant did not act in response to the use of excessive force).

{42} The instructions, which included all the necessary elements and burdens, and read together, conveyed to the jury that the claim of self-defense negates a specific element of battery upon a peace officer. The district court did not err in submitting these instructions to the jury.

### CONCLUSION

{43} We affirm Defendant’s conviction for aggravated battery on a peace officer.

{44} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

CYNTHIA A. FRY, Judge

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**Certiorari Not Applied For**

From the New Mexico Court of Appeals

**Opinion Number: 2005-NMCA-136**

IN THE MATTER OF PHILIP M. KLEINSMITH, Respondent-Appellant.

No. 23,999 (filed: September 9, 2005)

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY

JOSEPH L. RICH, District Judge

PHILIP M. KLEINSMITH

KLEINSMITH & ASSOCIATES, P.C.

Colorado Springs, Colorado

Pro se Appellant

PATRICIA A. MADRID

Attorney General

FRANK D. WEISSBARTH

Assistant Attorney General

Santa Fe, New Mexico

for Appellee

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**OPINION**

**A. JOSEPH ALARID, JUDGE**

{1} The case is before us pursuant to an order of the New Mexico Supreme Court quashing the writ of certiorari previously issued to this Court on April 5, 2005, and remanding this matter to this Court with directions that we convert our Memorandum Opinion issued February 4, 2005, to a formal, published opinion. Accordingly, we hereby withdraw our February 4, 2005, Memorandum Opinion and substitute the following formal opinion in its place.

{2} Respondent-Appellant, Philip M. Kleinsmith, appeals the district court’s judgment finding him in contempt of court for violating an order appointing Appellant to represent a child pursuant to the Children’s Mental Health and Disabilities Act. Appellant argues that the underlying district court order appointing him to represent the child *pro bono* is unconstitutional under various provisions of the United States and New Mexico Constitutions and that it usurps the New Mexico Supreme Court’s authority to regulate the practice of law. Applying the collateral bar rule, we decline to address Appellant’s challenges to the validity of the underlying order of appointment. Appellant also challenges the proceedings on the order to show cause why he should not be held in contempt, arguing that the order to show cause was defective and that he was denied an impartial judge. Finally, Appellant argues that he lacked the ability to comply with the order, or, alternatively, that he did not intentionally violate the order of appointment. We reject these claims of error on the merits. We affirm the judgment of the district court holding Appellant in contempt of court and fining him $500.

### BACKGROUND

{3} In October 2002, the district court entered an Administrative Order for the purpose of establishing an effective and fair system for *pro bono* attorney appointments in McKinley County. The order required, *inter alia*, that all lawyers who had appeared as counsel in three or more cases filed in McKinley County during the preceding twelve-month period would be eligible for *pro bono* appointment on a rotating basis.

{4} On December 16, 2002, a petition was filed with the district court pursuant to the Children’s Mental Health and
Developmental Disabilities Act, NMSA 1978, §§ 32A-6-1 to -22 (1995, as amended through 1999) (CMHDDA) seeking appointment of an attorney for a child who had been admitted to a residential mental health facility. The chief deputy clerk of the district court reviewed the petition and the pro bono appointment list, determining that pursuant to the Administrative Order, Appellant was the next attorney due for a pro bono appointment. The deputy clerk prepared an order appointing Appellant as attorney for the child. On December 18, 2002, a district judge signed the order. The order was filed and a copy of the order and petition for appointment of an attorney were faxed by the clerk’s office to Appellant. The order provided as follows:

THIS MATTER having come before the Court upon the filing of Petition in the matter, and pursuant to Section 32A-6-12 G, NMSA 1978 (as amended) an attorney shall be appointed to represent the child in this matter.

IT IS THEREFORE ORDERED that PHILLIP [sic] KLEINSMITH an attorney licensed to practice law in the New Mexico Court[s] is hereby appointed to represent [] the child in this matter.

IT IS FURTHER ORDERED that PHILLIP [sic] KLEINSMITH, shall meet with the child pursuant to [s]ection 32A-6-12 J, and shall advise the Court of said meeting, pursuant to Section 32A-6-12 J, NMSA.


Philip M. Kleinsmith responds to his appointment of counsel herein by stating that his office received this order by fax at 10:46 a.m. on December 18, 2002. It was given to him at about 12:30 p.m. Mr. Kleinsmith spent the entire day yesterday in a hearing and has spent all day today attending to matters for which clients have paid him. No other time is available before he leaves on a planned vacation (12/19/02 thru 12/24/02) early in the morning on 12/19/02. Mr. Kleinsmith requests the Court to appoint someone else.

The deputy clerk telephoned the district court and informed the deputy clerk that the child wanted to speak with her attorney. The deputy clerk gave Mr. Bitsilly Appellant’s name and telephone number. Mr. Bitsilly attempted to contact Appellant, leaving several messages asking Appellant to telephone Mr. Bitsilly. Appellant did not return Mr. Bitsilly’s phone calls.

On January 22, 2003, the district court issued an order to show cause void ab initio and to stay further proceedings in the district court. The Supreme Court denied the petition without explanation on February 10, 2003.

On March 19, 2003, the district court judge held a hearing on the order to show cause. The judge found Appellant in contempt of court and imposed a fine of $500.

DISCUSSION

Collateral Bar Rule

Generally, a party must obey an order issued by a court with subject matter and personal jurisdiction until the order is set aside. A party who disobeys an order may not collaterally attack the validity of the underlying order in the course of an appeal from a judgment holding the party in criminal contempt of court for violating the order. State v. Cherryhomes, 114 N.M. 495, 498, 840 P.2d 1261, 1264 (Ct. App. 1992).

With strictly limited exceptions, see, e.g., Maness v. Meyers, 419 U.S. 449 (1975), these principles, known as the “collateral bar rule,” apply even where the underlying order is unconstitutional. Cherryhomes, 114 N.M. at 498, 840 P.2d at 1264.

District courts are courts of general jurisdiction. “The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law.” N.M. Const. art. VI, § 13. In entertaining the petition for appointment of an attorney, the district court was exercising jurisdiction conferred on district courts by the Children’s Code. NMSA 1978, § 32A-1-4(C) (2003) (defining “court” to mean “the children’s court division of the district court”); NMSA, § 32A-1-5(A) (1993) (establishing children’s court as a division of the district court of each county); NMSA 1978, § 32A-1-8(A) (1993) (confering “exclusive original jurisdiction [in the children’s court] of all proceedings under the Children’s Code”); § 32A-6-12(G) (requiring the court to appoint an attorney for a child voluntarily admitted to a residential treatment or habilitation program upon petition by the residential treatment or habilitation program). The district court clearly was acting within its subject matter jurisdiction in appointing an attorney to represent the child. Appellant has not challenged the personal jurisdiction of the district court. Because the district court was not proceeding in excess of its subject matter or personal jurisdiction in appointing Appellant to represent the
child, the collateral bar rule precludes Appellant from challenging the validity of the underlying order of appointment.

Contempt Proceeding

{13} Appellant argues that the contempt proceedings were fatally defective because they were initiated by an unverified order to show cause. In *State v. Clark*, 56 N.M. 123, 127, 241 P.2d 328, 330 (1952), the defendant was charged in an unverified motion with having violated an injunction prohibiting the defendant from operating houses of prostitution. The defendant was convicted. On appeal, the Supreme Court reversed, holding that a verified motion or affidavit was “a prerequisite to jurisdiction in the case.”

{14} We consider the present case to be distinguishable from *Clark*, for the reasons announced in *In re Avallone*, 91 N.M. 777, 778, 581 P.2d 870, 871 (1978). In *In re Avallone*, the contemnor was appellate counsel for a defendant in a criminal case before this Court. The contemnor committed numerous errors of omission in violation of the rules of appellate procedure:

(1) Appellant did not file a description of the parts of proceedings believed necessary for inclusion in the transcript or serve a copy of the same upon the appellee. (2) Appellant did not request a designation conference prior to filing the brief in chief. (3) Appellant did not file a designation of the transcript of proceedings or proof of satisfactory arrangements. (4) Appellant did not file a transcript of proceedings under the limited calendar requirements of the rules. (5) Appellant failed to provide references to the transcript or the record proper in the brief in chief.

91 N.M. at 777-78, 581 P.2d at 870-71 (citations omitted). Rather than dismiss the appeal, this Court issued an order to show cause why the defendant’s counsel should not be held in contempt. At the show cause hearing, counsel argued that the proceedings should be dismissed because the contempt proceedings had not been initiated by a sworn pleading, or a pleading accompanied by a sworn affidavit. We rejected this contention and found counsel in contempt of court for failing to comply with the rules of appellate procedure. The Supreme Court affirmed our judgment of contempt. The Supreme Court stated that “[w]here the court’s records show whether a fact of filing was or was not accomplished, it is not necessary to support a show cause order by affidavit.” *Id.* at 778, 581 P.2d at 871.

{15} In the present case, the order appointing Appellant directed Appellant to meet with the child and to advise the district court of the meeting. The district court’s records would have indicated the facts of Appellant’s appointment, Appellant’s request to be relieved, the absence of an order relieving Appellant of his appointment, and the absence of the written statement contemplated by Section 32A-6-12(J) (requiring attorney to prepare a written certification that the child understands his rights and desires to remain in the program and to forward a copy to the court within seven days of the child’s admission). Here, the absence of the Section 32A-6-12(J) statement would have indicated to the district court that Appellant had not complied with the district court’s order. In such a case, it was not necessary to support the order to show cause with a sworn affidavit.

{16} Citing *Wollen v. State*, 86 N.M. 1, 2, 518 P.2d 960, 961 (1974), Appellant contends that the district judge was required to disqualify himself. *Wollen*, which adopted a per se rule of disqualification, was overruled by *State v. Stout*, 100 N.M. 472, 672 P.2d 645 (1983). Under *Stout*, a judge who initiates a contempt proceeding may preside at the show cause hearing so long as he has not become so enmeshed in the controversy that he is unable to fairly and objectively decide the matter. *Id.* at 475, 672 P.2d at 648. Here, the district court judge was not subjected to a personal attack; his only demonstrable interest was in vindicating the authority of the court. We have listened to the tape-recorded transcript of the hearing on the order to show cause and we are satisfied that any irritation the judge may have felt upon learning that his order had been ignored by Appellant did not interfere with his ability to conduct the show cause hearing in a dignified, temperate, and impartial manner. The district court judge did not err in declining to disqualify himself.

{17} Lastly, Appellant argues that the record does not demonstrate that he committed contempt because he lacked the ability to carry out the district court’s order and because he did not intentionally violate the district court’s order.

{18} The district court heard testimony that, although a face-to-face meeting is preferred, Appellant could have interviewed the child by telephone to carry out his responsibilities under Section 32A-6-12(I). While we encourage attorneys appointed to represent children pursuant to the CMHDDA to meet with their clients in person, we acknowledge, consistent with the testimony presented to the district court, that in the case of attorneys who are contacted on short notice and who live a considerable distance from the facility in which the child has been placed, that contact by telephone is a reasonable method of complying with the duties imposed by Section 32A-6-12.

{19} At the show cause hearing, Appellant had a full and fair opportunity to explain his failure to obey the order of appointment. Appellant’s excuse was that he assumed he did not hear back from the district court that the district court had automatically granted his request to be relieved and had appointed another member of the bar to fulfill Appellant’s duties to the child. We reject Appellant’s attempt to shift the burden of notification to the district court. Appellant does not dispute that he had actual notice of the order appointing him to represent the child. Pursuant to Rule 10-113(B) NMRA, an attorney appointed by the court to represent a child “shall continue such representation until relieved by the court.” Notwithstanding his pending request to be relieved, Appellant remained subject to the duty to carry out the district court’s order of appointment unless and until he was notified by the district court that Appellant’s request to be relieved had been granted.

{20} The district court’s findings indicate that the court disbelieved Appellant, who

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1 Section 32A-6-12(I), which was cited in the order appointing Appellant, sets out the initial duties of an attorney appointed to represent a child who has been voluntarily admitted to a residential mental health program: Within seven days of the admission, an attorney representing the child pursuant to the provisions of the Children’s Mental Health and Developmental Disabilities Act . . . shall meet with the child.
denied receiving phone messages from Mr. Bitsilly, and instead, the court believed Mr. Bitsilly, who testified that during the week of December 30, 2002, he left several messages at Appellant’s phone number asking Appellant to phone him. During the same period that Appellant was receiving phone messages from Mr. Bitsilly, Appellant necessarily knew that he had not received a written order or other communication from the district court granting his request that the district court appoint someone else. Appellant compounded his initial contempt in leaving on vacation without contacting the child when, following his return from vacation, he repeatedly ignored phone calls from Mr. Bitsilly, knowing that he had not received a written order or other communication from the district court relieving him of the appointment. Under New Mexico law, intent is not an essential element of either civil or criminal contempt. Seven Rivers Farm, Inc. v. Reynolds, 84 N.M. 789, 792, 508 P.2d 1276, 1279 (1973). Appellant’s willful indifference to the status of his appointment as demonstrated by his failure to contact the district court subsequent to the filing of his December 18, 2002, response, coupled with Appellant’s failure to carry out his appointment, fully justified the district court’s finding of contempt. See In re Avallone, 91 N.M. at 778, 581 P.2d at 871 (upholding finding of contempt based upon evidence of counsel’s unexcused failure to comply with the rules of appellate procedure).

CONCLUSION

{21} We affirm the judgment of the district court finding Appellant in criminal contempt and fining Appellant $500.

{22} IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Chief Judge
IRA ROBINSON, Judge
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-137

ARLO and JOYCE MURKEN, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, versus
SOLV-EX CORPORATION, JOHN S. RENDALL, W. JACK BUTLER, and DEUTSCHE MORGAN GRENFELL, INC., Defendants-Appellees,
and
JOHN S. RENDALL, and W. JACK BUTLER, Counter and Cross Claimants-Appellees,

versus

SUNCOR ENERGY, INC.; SYNCRUDE (CANADA), LTD.; SHELL (CANADA) LTD.; EXXON-MOBIL CORP.; DEUTSCHE BANK, AG; LEE RAYMOND and KENNETH RAWL (EXXON); AL HYNDMAN (TRUE NORTH ENERGY); HELMAR KOPPER (DEUTSCHE BANK); and MERRILL LYNCH PIERCE FENNER and SMITH, INC.,
Third Party Defendants-Appellees,

and

BERNARD C. BAIER (including shares held by Pension and Profit sharing Plan FBO Bernard C. Baier with Suburban Radiology, Patricia A. Baier, Mary Kathleen Baier, and Susan Baier); JOHN BOESSEL; HAROLD S. CARPENTER (including shares held by Marilyn N. Carpenter, Heartland Systems Company, and Carpenter Investment Company); LEE S. CHAPMAN; CLARK A. COLBY (including shares held by Thomas Colby, Kimberly Colby, Clark A. Colby, Jr., Melinda Colby, Clark A. Colby III, Vicki Colby, Robert Vogel, and Mr. and Mrs. Kenneth Brooke, Lloyd Clarke, Peggy Williams, Stephanie Kempf, Jeff Lamson, Charles I. Colby and Ruth Colby Family Trust Number One, Ruth Colby Trust ‘A’, Charles I. Colby and Ruth Colby Nation Development Trust, Charles I. Colby and Ruth Colby Family Trust, and The Six Incorporated Trust); KEITH DENNER; JOEY FESTE; JOE FIELDER; WILLIAM R. and VIRGINIA R. FIELDER; JERRY V. FLATT; SAMUEL A. FRANCIS; KENNETH L. HAACK; ARMON J. HELVIG; STEVE LINDELL; HOLBROOK MAHN; EDWARD J. MICHAEL; TOBY MICHAEL; CLIFF PHELPS; KELLY WENTZEL; and DON WHITE,

Proposed Intervenors-Appellants.

No. 24,685 (filed: October 25, 2005)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

WILLIAM F. LANG, District Judge

ROBERT J. DESIDERIO
SANCHEZ, MOWRER & DESIDERIO, P.C.
Albuquerque, New Mexico

for Appellants

JOHN R. COONEY
CHARLES A. ARMGARDT
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
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JEFFREY BARIST
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New York, New York

MICHAEL D. NOLAN
Washington, D.C.

for Appellee

Merrill Lynch

for Appellee

Deutsche Morgan Grenfell, Inc.
OPINION
RODERICK T. KENNEDY, Judge

{1} A securities fraud class action was filed against Solv-Ex Corporation (Solv-Ex), two of its executives (John S. Rendall and W. Jack Butler), and Deutsche Morgan Grenfell, Inc. (DMG) on October 29, 1996, after the value of Solv-Ex stock abruptly plummeted. Almost seven years later, on August 13, 2003, a group of persons claiming to be class members sought to intervene (the Intervenors), asserting that their claims were different from the class claims because the Intervenors believed that DMG, Merrill Lynch, and other unidentified third parties were at fault and not Rendall or Butler. This appeal asks us to determine whether the district court properly denied this motion to intervene.

{2} We initially hold that the Intervenors have, through a failure to include specific cites to the voluminous record proper, limited the scope of our review. We hold that, to the extent that we are able to review their arguments, the district court did not abuse its discretion in ruling that the Intervenors’ motion to intervene was untimely. We affirm.

BACKGROUND

{3} In October 1996, after the value of Solv-Ex stock plummeted, Solv-Ex shareholders sued Solv-Ex, Rendall, Butler, and DMG, primarily claiming that Defendants had in various ways deliberately distorted Solv-Ex’s financial condition. The underlying facts of this case were also litigated in several other forums. See, e.g., In re Solv-Ex Corp. Secs. Litigation, 198 F. Supp. 2d 587 (S.D.N.Y. 2002). In this case, various motions to dismiss the complaint were litigated for almost a year before DMG was dismissed as a party in July 1997. Solv-Ex filed bankruptcy the next month.

{4} On August 22, 1997, the Class Plaintiffs1 filed an amended complaint naming only DMG, Rendall, and Butler. DMG also moved to dismiss this complaint. While the litigation in the other Solv-Ex cases apparently continued, and Solv-Ex asserted some third-party claims in 1998, the record otherwise remains silent as to what occurred in the case before us over the next several years. In July 2001, the district court dismissed some of the Class Plaintiffs’ claims. After this, there are no pleadings in the record until October 25, 2002, when Rendall filed his answer along with counterclaims, cross-claims, and a third-party complaint. Rendall named approximately a dozen new parties that he blamed for Solv-Ex’s downfall. Butler later asserted his own claims.

{5} The numerous new parties filled the next year with extensive motions, hearings, and orders. Rendall’s claims against Merrill Lynch were compelled to arbitration and he appealed that ruling. Otherwise, approximately six motions to dismiss, several answers, and other matters were pending. On May 22, 2003, the parties attended mediation in Texas.

{6} On August 13, 2003, a motion to intervene was filed on behalf of over twenty individually named parties claiming to be “named Solv-Ex shareholders.” The motion stated that these parties were “shareholders or former shareholders of Solv-Ex stock.” However, the motion did not specifically describe the Intervenors’ relationship to the Class Plaintiffs. The motion asserted that the Intervenors’ claims were different from the Class Plaintiffs’ shareholders’ claims because the Intervenors believed that DMG and Merrill Lynch, not Rendall or Butler, were at fault. The Class Plaintiffs, Merrill Lynch, and DMG all filed responses opposing intervention (and are hereinafter referred to as “the opponents”). The opponents asserted, inter alia, that the Intervenors’ motion was untimely, that their proposed complaint failed to state a claim for which relief could be granted, had not shown that their rights were not adequately represented by the Class Plaintiffs, and that the Intervenors had failed to show that they had an interest that would be impaired by resolution of the litigation.

{7} The district court heard this matter in October 2003. The Intervenors’ counsel stated that the individuals he represented currently owned approximately one-third of Solv-Ex stock. He asserted that this meant that the Intervenors suffered one-third of the damage when Solv-Ex stock fell. Therefore, counsel reasoned, the Intervenors had an interest relating to the property or transaction.

{8} The Intervenors further claimed that, as class members, they had a right to intervene when the named representatives were not adequately representing their interests. The allegedly inadequate representation stemmed from the Intervenors’ wish to assign blame to someone else for a common injury. The Intervenors asserted that because the class had never been certified, they had never had an opportunity to be heard on this issue.

{9} The opponents pointed out that there was no evidence that the Intervenors were part of the putative class at all. The Intervenors responded that they were part of the putative class. They argued that since Rendall, Butler, and the Intervenors combined owned at least half of the Solv-Ex stock, that meant that the Intervenors must have purchased or sold some of their stock within the ten-month class period.

{10} The opponents also argued that the Intervenors were not asserting the same claims that the Class Plaintiffs had against Defendants. Instead, they claimed, the Intervenors were attempting to institute a new action against parties not named in the Class Plaintiffs’ complaint based on a theory different from the Class Plaintiffs’ theory. Merrill Lynch focused on its assertion that the Intervenors’ claims were identical to Rendall’s and Butler’s claims, which had been compelled to arbitration.

{11} The Intervenors agreed that their claims were different from Class Plaintiffs’ claims. The Intervenors reiterated that they were not adequately represented, but “at odds with” the Class Plaintiffs. The district court denied the motion to intervene, finding that:

There is no basis for intervention whatsoever. Even in the most unfathomable concept of time, as imagined by lawyers and judges, seven years cannot be considered timely, given what has transpired in this case. For that and for all of the reasons advanced by the opponents to the motion, the motion is not well-taken and is therefore denied.

The district court’s November 2003 written order found the motion to intervene untimely. The district court also found that the Intervenors had not shown “an interest in the subject matter” of the suit, had “fail[ed] to show any interest that would be impaired by the disposition” of the suit, and had “fail[ed] to show any interest

1 We have been unable to ascertain whether the Class Plaintiffs’ action was ever certified as a class action. Intervenors represent in their brief in chief that a class has not been certified except for a settlement class, and that the settlement class has not been finally approved. They assert their frustration as to lack of class certification as a basis for their motion to intervene. We refer to the plaintiffs as Class Plaintiffs for convenience only.
that would not already be adequately represented by current parties.” This appeal followed.

DISCUSSION

Standard of Review


Timeliness

{13} The Intervenors do not argue, and we do not address, whether they should have been permitted to intervene pursuant to Rule 1-024(B) (permissive intervention). We also note that this case raises other questions that we do not reach, such as whether intervention by class members is the appropriate procedure when such members are dissatisfied with the putative class representatives. The first and dispositive issue in this case is whether the Intervenors’ motion to intervene was timely pursuant to Rule 1-024(A). We hold that the district court did not abuse its discretion in ruling that the Intervenors’ motion to intervene was untimely.

{14} “Timeliness is a threshold requirement for intervention” that “depends upon the circumstances of each case.” Apodaca, 86 N.M. at 133, 520 P.2d at 553. Where this threshold requirement is at issue, the burden is on the intervening party to establish the timeliness of the motion to intervene. See Neville v. Equal Employment Opportunity Comm’n, 511 F.2d 303, 305 (8th Cir. 1975). One “crucial factor . . . is whether the intervenor knew of its interest and could have sought to intervene earlier in the proceedings.” In re Norwest Bank of N.M., N.A., 2003-NMCA-128, ¶ 17. Ignoring the fact that they, not the opponents, have the burden to prove this “crucial factor,” the Intervenors assert that there is no evidence of this “crucial factor” or as to why they waited to file their motion. There is also no evidence “on how quickly the [party moving to intervene] acted once it learned that its interests were not protected by existing parties.” See Burge v. Mid-Continent Cas. Co., 1997-NMSC-

009, ¶ 18, 123 N.M. 1, 933 P.2d 210. The Intervenors do not cite to the record proper for any portion of their argument, which record spans approximately eight years and 4,712 pages of litigation. Cf. State v. Tarver, 2005-NMCA-030, ¶ 5, 137 N.M. 115, 108 P.3d 1 (stating that “we read Rule 12-213 NMRA to contemplate, and we generally require, citation to specific pages of the record proper” but declining to strike portions of the defendant’s brief because the record proper was “quite small” and the defendant’s references were easily found). Therefore, we decline to review the Intervenors’ arguments to the extent that we would have to comb the record to do so. In re Estate of Heeter, 113 N.M. 691, 694, 831 P.2d 990, 993 (Ct. App. 1992) (“This court will not search the record to find evidence to support an appellant’s claims.”). The Intervenors having conceded that no evidence shows that they did not know of their interests and could not have intervened at an earlier time, and having not cited any portion of the record to the contrary, we hold that they have not met their burden of demonstrating the timeliness of their motion.

{15} As explained above, the Intervenors have presented no factual basis whatsoever to support their argument that they did not know of their interest and could not have intervened at an earlier time. We thus hold that the Intervenors did not meet their threshold burden of showing that their motion to intervene was timely. Therefore, we hold that the district court did not abuse its discretion in finding that the Intervenors’ motion to intervene was untimely. Because the Intervenors have not met this threshold burden, we do not address whether they met the other requirements of Rule 1-024(A).

The Sufficiency of the District Court’s Order

{16} The Intervenors assert that the district court erred “by inadequately specifying its reasoning so as to permit meaningful appellate review.” We are not persuaded. The district court’s order sufficiently alerted this Court to the reasons it rejected the motion to intervene, including the motion’s untimeliness. Any lack of specificity did not hamper our review in this case.

The Intervenors’ Briefs

{17} The Intervenors’ brief in chief is twenty-eight pages long after the tables of contents and authorities, and excluding the signature page and certificate of service. This is seven pages short of the limit. While this Court appreciates having briefs under the page limit, it does not enjoy receiving briefs with one hundred eleven footnotes. Nor does it enjoy receiving footnotes that are single spaced and in very small print. {18} The appellate rules do not address footnotes. But the rules do address page limits, spacing, and size of print. Rule 12-213(F) limits briefs in chief to thirty-five pages double-spaced, and requires briefs to comply with Rule 12-305 NMRA. Rule 12-305(B) requires briefs to be in pica 10 pitch type style or a 12 point typeface, and requires the contents, except quotations, to be double spaced.

{19} The footnotes in the brief in chief included law review-type explanatory notes, citations to transcripts of proceedings, citations to treatises, and discussions of the content of court-filed documents. Most aggravating is that many, if not most, of the citations were to cases—many with parenthetical comment, some quite lengthy.

{20} While this Court does not reject a brief that contains a few or several footnotes, even when they are single spaced and in smaller than permissible print, the brief in chief in this case probably should have been rejected and this Court should have required that it be resubmitted in careful compliance with Rule 12-213(F) and Rule 12-203(B) NMRA. As the brief stands, it violates the rules because the footnotes do not consist of permissible type size and are not double spaced, and because if the footnotes were placed in the text of the brief, it would undoubtedly exceed thirty-five pages.

CONCLUSION

{21} We affirm.

{22} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JONATHAN B. SUTIN, Judge
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