Inside This Issue:

Fourth and Fifth Judicial Districts 6
Nominating Commissions

U.S. District Court 6
Proposed Amendment to Local Civil Rules

American Bar Association 8
Midyear Meeting
Nominations Solicited

First Judicial District Bar Association 9
Nominations for Treasurer

Legal Education Calendar
Writs of Certiorari
List of Court of Appeals’ Opinions
2005-NMCA-138: Gila Resources Information Project and New Mexico Environment Department v. New Mexico Water Quality Control Commission and Chino Mines Company
2005-NMCA-140: State v. Kevin Jensen

The 2006 License and Dues Forms have been mailed. See page 7
Depression, Alcohol or Drug Problems?
Help is as close as your phone.

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

Free Confidential* 24-Hour Hotline
Albuquerque (505) 228-1948
(800) 860-4914

*The NM Rules of Professional Conduct (Rule 16-803) and the NM Code of Judicial Conduct (Rule 21-300) provide for strict confidentiality.
Join a State Bar Practice Section

By joining you may:

• Obtain networking and educational opportunities with colleagues.
• Be connected to other section members through electronic discussions.
• Engage in legislative advocacy.

Become a member by:

• Visiting a section page of www.nmbar.org. Click on Divisions/Sections/Committees and select the section you wish to join.
• Completing the form below.

Please check the section(s) you wish to join and indicate method of payment.

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Mail To: State Bar of New Mexico, Accounting Department, PO Box 92860, Albuquerque, NM 87199-2860
Fax: (505) 797-6019
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.
Contributions and announcements to the *Bar Bulletin* are welcome, but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy available upon request.

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**TABLE OF CONTENTS**

- Notices ........................................................................................................ 6–9
- Legal Education Calendar ........................................................................... 10–11
- Writs of Certiorari ....................................................................................... 12–13
- List of Court of Appeals’ Opinions .............................................................. 14
- Opinions ....................................................................................................... 15–26

*From the New Mexico Court of Appeals*

- **No. 24,974:** HSBC Bank USA v. Fenton .................................................. 15
- **No. 24,478:** Gila Resources Information Project and New Mexico Environment Department v. New Mexico Water Quality Control Commission and Chino Mines Company ................................................................. 17
- **No. 24,905:** State v. Kevin Jensen ......................................................... 23

**Advertising** .................................................................................................. 27–32

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### Professionalism Tip

With respect to my clients:

I will be loyal and committed to my client’s cause, and I will provide my client with objective and independent advice.

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**Meetings**

**January**

<table>
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<th>Date</th>
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<tbody>
<tr>
<td>4</td>
<td>Employment and Labor Law Section Board of Directors noon, State Bar Center</td>
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<tr>
<td>9</td>
<td>Taxation Section Board of Directors noon, via teleconference</td>
</tr>
<tr>
<td>11</td>
<td>Office Management Committee noon, via teleconference</td>
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<td>12</td>
<td>Membership Services Committee noon, via teleconference</td>
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<tr>
<td>13</td>
<td>Natural Resources, Energy and Environmental Law Section Board of Directors noon, State Bar Center</td>
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<tr>
<td>17</td>
<td>Solo and Small Firm Practitioners Section Board of Directors 11:30 a.m., State Bar Center</td>
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**State Bar Workshops**

**January**

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<tr>
<td>18</td>
<td>Ena Mitchell Senior Center Lordsburg</td>
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<td>19</td>
<td>Silver City Senior Center Silver City</td>
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<td>26</td>
<td>San Felipe Pueblo</td>
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<td>Ena Mitchell Senior Center</td>
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*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; 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, jurors, 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.

Notice on Address Changes

All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information may be e-mailed to the Supreme Court at Suprvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848.

Information may be e-mailed to the State Bar at address@nmbar.org; faxed to (505) 828-3755; or mailed to PO Box 92860, Albuquerque, NM 87199-2860. The State Bar keeps both mailing and directory addresses. Contact the State Bar for more information.

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.

Attorneys 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.

Fourth Judicial District Nominating Commission

Four applications have been received in the Judicial Selection Office as of 5 p.m., Dec. 22, 2005, for the judicial vacancy on the 4th Judicial District Court due to the retirement of the Honorable Jay Harris. The District Judges Nominating Commission will meet at 9 a.m., Jan. 24, in Las Vegas, New Mexico to evaluate the applicants for this judicial position. The commission meeting is open to the public. Those wishing to make public comment are requested to be present at the opening of the meeting. The names of the applicants in alphabetical order are:

Abigail Paulette Aragon
Gerald E. Baca
Arthur Lee Bustos
Matthew J. Sandoval

Fifth Judicial District Nominating Commission

Nine applications have been received in the Judicial Selection Office as of 5 p.m., Dec. 22, 2005, for the judicial vacancy on the 5th Judicial District Court due to the retirement of the Honorable James Shuler. The District Judges Nominating Commission will meet at 9 a.m., Jan. 19, in Carlsbad, New Mexico to evaluate the applicants for this judicial position. The commission meeting is open to the public. Those wishing to make public comment are requested to be present at the opening of the meeting. The names of the applicants in alphabetical order are:

Daniel C. Banks
Denise A. Madrid Boyea
J. Richard Brown
Matthew T. Byers
Jane Shuler Gray
D’Ann Read
Raymond Lewis Romero
Walter R. Parr
William G. W. Shoobridge

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.

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

A proposed amendment to the Local Civil Rules of the United States District Court for the District of New Mexico is being considered. The proposed amendment...
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.

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

Mandatory Disclosure of Malpractice Insurance

Rule No. 05-8500, In the Matter of Mandatory Disclosure of Professional Liability Insurance Coverage 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 Annual Meeting and Luncheon

The Paralegal Division’s annual meeting and luncheon, in conjunction with a CLE co-sponsored by the Paralegal Division, will be held at noon, Jan. 21, at the State Bar Center in Albuquerque.

The CLE will feature the Seven Deadly Sins of Employment Law presented by Jean Bannon and Lee Pefler, and HIPAA Security: Double Secret Probation presented by Scot Sauder, all of UNM’s University Counsel. Jeffrey Wiggins, UNM’s HSC compliance director, will assist Sauder with the HIPPA presentation.

Registration for the annual meeting and luncheon will be separate from the CLE seminars. For additional information, see the Bar Bulletin Legal Education Calendar or check the division’s Web page at www.nmbar.org.

Monthly CLE

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.

Public Law Section Board Meeting

The next Public Law Section board meeting will be held at noon, Jan. 12, in the Risk Management Division Legal Bureau conference room on the first floor of the Montoya Building, 1100 St. Francis Dr., Santa Fe. All section members are invited to attend. Contact Deborah Moll, (505) 827-2000, for more information.

Other Bars

Albuquerque Bar Association Monthly Meeting Luncheon and CLE

The Albuquerque Bar Association’s monthly meeting luncheon will be held 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.org; 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.

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.
Legal Resource Seminar and Fair

Legal and social service providers will hold a seminar and fair Jan. 10 at the UNM School of Law, Room 2401 (free parking in “L” lot). The fair will begin at 2:30 p.m. when providers will be available to network and distribute literature. A seminar to discuss services will begin at 3 p.m. This is an excellent opportunity for those on the front lines of law offices and other agencies (those answering telephones and handling walk-ins) to get a broader knowledge of the types of legal services in the Albuquerque area and appropriate places to refer community members in need of legal assistance. Contact the Albuquerque Bar Association, (505) 842-1151 or abqbar@abqbar.com., for further information. Canned food donations will be gathered.

American Bar Association

2006 Michael Franck Award

The American Bar Association (ABA), through the Center for Professional Responsibility, is pleased to announce the 2006 Michael Franck Award. The award is named in honor of the late director of the State Bar of Michigan and long-time champion of improvements in lawyer regulation in the public interest. The ABA presents this award each year to someone whose contributions in the professional responsibility field evidence the highest level of dedication to the legal profession. Additional information and an application form are located online at http://www.abanet.org/cpr/franck.html. Questions can be directed to cpr@abanet.org or to George Kuhlman, ABA Ethics Counsel, (312) 988-5300. The award will be presented June 1 at the 32nd National Conference on Professional Responsibility in Vancouver, British Columbia. The deadline for nominations is Jan. 6.

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 was printed in the Dec. 26, Vol. 44, No. 51 Bar Bulletin and is also available on the ABA’s Web site at www.abanet.org/leadership/2006/midyear/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.

Nominations Solicited

Karen Mathis, the president-elect of the American Bar Association, is privileged to fill vacancies on the American Bar Association (ABA) standing and special committees, commissions, working groups, task forces and other ABA entities for the 2006-2007 association year. A list of those committees is provided below and is also available on the ABA Web site, www.abanet.org/appointments. To assist President-Elect Mathis and the appointments committee with this important process, President-Elect Mathis has asked members of the ABA House of Delegates to make recommendations for candidates for appointment to these entities. Anyone interested in serving on any of the committees should contact ABA State Delegate Mary T. Torres, (505) 848-1800, or mtorres@modrall.com. ABA members may also nominate themselves for committees, commissions, task forces, or working groups. Note that all nominations or applications must be made using the ABA’s on-line nomination form, which can be found at http://www.abanet.org/appointments. Direct questions regarding the on-line form to Megan Potter in the Office of the President, (312) 988-5103.

The deadline for submitting recommendations or nominations is Mar 1. All recommendations or nominations must be received by that date to ensure inclusion in the decision-making process. There are a limited number of vacancies to fill, and while all suggested candidates cannot be appointed, each nomination will be given serious consideration.

ABA Standing Committees:

Amicus Curiae Briefs
Armed Forces Law
Audit
Bar Activities and Services
Client Protection
Constitution and Bylaws
Continuing Legal Education
Delivery of Legal Services
Electoral Reform
Election Law
Election Law – Advisory Commission
Environmental Law
Ethics and Professional Responsibility
Judges Advisory Committee
Federal Judges Improvements
Federal Judiciary
Gavel Awards
Governmental Affairs
Group and Prepaid Legal Services
Judicial Independence
Law and National Security
Advisory Committee
Law Library of Congress

ABA Special Committees and Commissions:

Africa Law Initiative Council
Award Council
Commission on the American Jury
Project
Asia Law Initiative Council
Advocacy Council
Bioethics and the Law
Center for Human Rights
Central European and Eurasian Law Initiative
Commission on International Judicial and Legal Exchanges

ABA Special Committees and Commissions:

Advisory Committee
Conflict Resolution
Corporate Fiduciaries
Certified Public Accountants
National Conference of Lawyers and Certified Public Accountants
National Conference of Lawyers and Corporate Fiduciaries
National Conference of Lawyers and Representatives of the Media
Paralegals
Advisory Committee
Professional Discipline
Professionalism
Public Education
Advisory Committee
Publishing Oversight
Strategic Communications
Substance Abuse
Advisory Committee
Technology and Information Systems

Professional Responsibility

ABA Special Committees and Commissions:

ABA Standing Committees:
Amicus Curiae Briefs
Armed Forces Law
Audit
Bar Activities and Services
Client Protection
Constitution and Bylaws
Continuing Legal Education
Delivery of Legal Services
Electoral Reform
Election Law
Election Law – Advisory Commission
Environmental Law
Ethics and Professional Responsibility
Judges Advisory Committee
Federal Judges Improvements
Federal Judiciary
Gavel Awards
Governmental Affairs
Group and Prepaid Legal Services
Judicial Independence
Law and National Security
Advisory Committee
Law Library of Congress

Advisory Committee
Conflict Resolution
Corporate Fiduciaries
Certified Public Accountants
National Conference of Lawyers and Certified Public Accountants
National Conference of Lawyers and Corporate Fiduciaries
National Conference of Lawyers and Representatives of the Media
Paralegals
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Professionalism
Public Education
Advisory Committee
Publishing Oversight
Strategic Communications
Substance Abuse
Advisory Committee
Technology and Information Systems


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Nominations Solicited

Karen Mathis, the president-elect of the American Bar Association, is privileged to fill vacancies on the American Bar Association (ABA) standing and special committees, commissions, working groups, task forces and other ABA entities for the 2006-2007 association year. A list of those committees is provided below and is also available on the ABA Web site, www.abanet.org/appointments. To assist President-Elect Mathis and the appointments committee with this important process, President-Elect Mathis has asked members of the ABA House of Delegates to make recommendations for candidates for appointment to these entities. Anyone interested in serving on any of the committees should contact ABA State Delegate Mary T. Torres, (505) 848-1800, or mtorres@modrall.com. ABA members may also nominate themselves for committees, commissions, task forces, or working groups. Note that all nominations or applications must be made using the ABA’s on-line nomination form, which can be found at http://www.abanet.org/appointments. Direct questions regarding the on-line form to Megan Potter in the Office of the President, (312) 988-5103.

The deadline for submitting recommendations or nominations is Mar 1. All recommendations or nominations must be received by that date to ensure inclusion in the decision-making process. There are a limited number of vacancies to fill, and while all suggested candidates cannot be appointed, each nomination will be given serious consideration.

ABA Standing Committees:

Amicus Curiae Briefs
Armed Forces Law
Audit
Bar Activities and Services
Client Protection
Constitution and Bylaws
Continuing Legal Education
Delivery of Legal Services
Electoral Reform
Election Law
Election Law – Advisory Commission
Environmental Law
Ethics and Professional Responsibility
Judges Advisory Committee
Federal Judges Improvements
Federal Judiciary
Gavel Awards
Governmental Affairs
Group and Prepaid Legal Services
Judicial Independence
Law and National Security
Advisory Committee
Law Library of Congress

ABA Special Committees and Commissions:

Africa Law Initiative Council
Award Council
Commission on the American Jury
Project
Asia Law Initiative Council
Advocacy Council
Bioethics and the Law
Central European and Eurasian Law Initiative
Commission on Immigration Policy, Practice and Pro Bono
Commission on Interest on Lawyer Trust Accounts
Latin America Law Initiative Council
Award Council
Commission on Law and Aging
Commission on Lawyer Assistance Programs
Advisory Committee
Commission on Mental and Physical Disability Law
Commission on Racial and Ethnic Diversity in the Profession
Council on Racial and Ethnic Justice
Steering Committee on the Unmet Legal Needs of Children
Commission on Women in the Profession
Presidential Advisory Council on Diversity in the Profession
ABA Fund for Justice and Education
Editorial Board ABA/BNA Lawyers’ Manual on Professional Conduct
Legal Opportunity Scholarship Fund Selection Committee
ALI-ABA Continuing Professional Education

First Judicial District Bar Association
Nominations for Treasurer
The First Judicial District Bar Association is seeking nominations for treasurer. The individual who is selected will serve a four-year term on the board of directors, rotating through the various officer positions. Contact Dana Hardy, dana.hardy@gmail.com, to submit a nomination. The election will be held at the association’s January meeting.

UNM School of Law
Law Library
Exam and Holiday Hours
Jan. 2 Library Closed
Jan. 3–10 8 a.m. to 6 p.m.
Jan. 8 Closed
Jan. 11 Library resumes regular hours, 8 a.m. to 11 p.m.
Jan. 16 Closed MLK Day

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).

Other News
Center for Civic Values (CVC)

Attorney Needed
Lordsburg High School in Lordsburg, New Mexico needs an attorney coach for its two mock trial teams. In-person assistance is preferred, but the team could also benefit from access to an attorney upon whom they could call for guidance via telephone or e-mail. Contact the CCV mock trial program, (505) 764-9417 ext. 13, or (800) 451-1941 ext. 13 (outside Albuquerque).

National Legal Fiction Writing Competition for Lawyers
SEAK, Inc., a provider of continuing education and professional training for lawyers, is sponsoring the 5th Annual National Legal Fiction Writing Competition for Lawyers. The competition is open to any licensed attorney in the U.S. and its territories. A short story or novel excerpt in the legal fiction genre should be submitted. There is no fee to enter the competition and authors will maintain the original copyright to their materials. A cash prize of $1,000 will be awarded to the First Prize winner.

The deadline for submissions is June 30. For more information, interested attorneys should contact Kevin J. Driscoll, Esq., (508) 548-4542 or kevin.driscoll@verizon.net.

The Bar Bulletin now accepts letters to the editor. Submit letters to notices@nmbar.org.

The complete editorial policy may be found on www.nmbar.org under Publications/Media.
## JANUARY

### 4 Fundamentals of Construction Contracts: Understanding the Issues
State Bar Center, Albuquerque
Lorman Education Services
6.6 G
(715) 833-3940
www.lorman.com

### 10 Drafting Legal Opinions
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbar.org

### 11–13 Children’s Law Institute
Marriott Pyramid North, Albuquerque
UNM Institute of Public Law
13.2 Total Credits, (1.0 E and 1.0 P optional)
(505) 277-1051

### 12 Identity Theft
Branigan Library, Las Cruces
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbar.org

### 12 Workplace Privacy
Branigan Library, Las Cruces
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbar.org

### 13 Bridge the Gap 2005: Developing a Winning Courtroom Strategy
Branigan Library, Las Cruces
Center for Legal Education of NMSBF
5.2 G, 1.6 P, 1.0 E
(505) 797-6020
www.nmbar.org

### 17 2005 Professionalism: Lawyers Concerned for Lawyers
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
1.6 P
(505) 797-6020
www.nmbar.org

### 17 Ethics: Now What are You Gonna Do?
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
1.0 E
(505) 797-6020
www.nmbar.org

### 17 Estate Planning for Transfers of Real Property
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbar.org

### 17 Identity Theft
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbar.org

### 17 Medicare’s New Drug Coverage: The Impact on Your Clients
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
1.7 G
(505) 797-6020
www.nmbar.org

### 17 Workplace Privacy
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbar.org

### 17 Workplace Privacy
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbar.org

### 19 Defending Clients Against IRS Audits
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbar.org

### 19 Workers’ Compensation in NM
State Bar Center, Albuquerque
Lorman Education Services
6.0 G
(715) 833-3940
www.lorman.com

### 20 Discovery Skills for Legal Staff
State Bar Center, Albuquerque
Lorman Education Services
6.0 G
(715) 833-3940
www.lorman.com

### 21 Seven Deadly Sins of Employment Law and HIPAA Security: Double Secret Probation
State Bar Center, Albuquerque
Paralegal Division and Center for Legal Education of NMSBF
5.7 G
(505) 797-6020
www.nmbar.org

### 24 Bridge the Gap 2005: Developing a Winning Courtroom Strategy
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
5.2 G, 1.6 P, 1.0 E
(505) 797-6020
www.nmbar.org

### 24 The Changing Law Regarding Church-State Issues
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
4.0 G
(505) 797-6020
www.nmbar.org

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**G** = General  
**E** = Ethics  
**P** = Professionalism  
**VR** = Video Replay  
Programs have various sponsors; contact appropriate sponsor for more information.
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<td>24</td>
<td>Lawyering with Emotional Intelligence</td>
<td>VR–State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>1.6 P</td>
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<td>24-25</td>
<td>Understanding the Fundamentals of Securities Law, Parts 1 &amp; 2</td>
<td>Teleseminar Center for Legal Education of NMSBF</td>
<td>2.0 G</td>
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<td>31</td>
<td>Environmental Justice &amp; the Public Welfare: Evolving Concepts of the Public Interest</td>
<td>VR–State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>4.1 G, 1.6 P</td>
<td>(505) 797-6020</td>
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**FEBRUARY**

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<td>Ounce of Prevention Pound of Cure: Critical Financial Mistakes Made in Divorce in NM</td>
<td>State Bar Center, Albuquerque National Business Institute</td>
<td>5.0 G</td>
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<td>(800) 835-8525</td>
<td><a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>2</td>
<td>Choice of Business Entity-2006</td>
<td>Satellite Broadcast Center for Legal Education of NMSBF</td>
<td>3.6 G</td>
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<td>8</td>
<td>How to Draft Wills and Trusts in New Mexico</td>
<td>State Bar Center, Albuquerque</td>
<td>5.5 G</td>
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<td>(715) 835-8525</td>
<td><a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>9</td>
<td>Employee Discharge and Documentation</td>
<td>State Bar Center, Albuquerque Lorman Education Services</td>
<td>6.6 G</td>
<td></td>
<td>(715) 833-3940</td>
<td><a href="http://www.lorman.com">www.lorman.com</a></td>
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<td>9</td>
<td>Council on Education in Management</td>
<td>State Bar Center, Albuquerque Public Sector Employment Law Update</td>
<td>11.0 G</td>
<td>(800) 942-4494</td>
<td><a href="http://www.counciloned.com">www.counciloned.com</a></td>
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<td>Commercial and Real Estate Loan Documents</td>
<td>State Bar Center, Albuquerque Lorman Education Services</td>
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<td>(715) 833-3940</td>
<td><a href="http://www.lorman.com">www.lorman.com</a></td>
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<td>24</td>
<td>Confidentiality of Medical Records</td>
<td>State Bar Center, Albuquerque Lorman Education Services</td>
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<td>(715) 833-3940</td>
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**NEW ENGLAND**

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<td>(505) 797-6020</td>
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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 29, 2005**

<table>
<thead>
<tr>
<th>Petitions for Writ of Certiorari Filed and Pendi:</th>
<th>Certiorari Granted but not yet Submitted to the Court:</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO. 29,599 State v. Dubois (COA 24,607) 12/20/05</td>
<td>(Parties preparing briefs) Date Writ Issued</td>
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<tr>
<td>NO. 29,598 Krieger v. Wilson (COA 24,421/24,497) 12/20/05</td>
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<tr>
<td>NO. 29,597 State v. Harbison (COA 24,940) 12/19/05</td>
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<td>NO. 29,596 State v. Sedillo (COA 25,907) 12/19/05</td>
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<td>NO. 29,593 State v. Dean (COA 25,854) 12/16/05</td>
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<tr>
<td>NO. 29,592 State v. King (COA 24,323) 12/16/05</td>
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<tr>
<td>NO. 29,590 State v. Villegas (COA 25,736) 12/15/05</td>
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<tr>
<td>NO. 29,585 Jaramillo v. Vallejos (12-501) 12/14/05</td>
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<tr>
<td>NO. 29,584 State v. Pittman (COA 24,671) 12/13/05</td>
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<td>NO. 29,583 State v. Gomez (COA 25,899) 12/12/05</td>
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<td>NO. 29,581 Carrillo v. Qwest (COA 25,833) 12/12/05</td>
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<td>NO. 29,504 McNeill v. Rice Engineering (COA 25,213) 12/9/05</td>
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<tr>
<td>NO. 29,580 State v. Graham (COA 25,836) 12/8/05</td>
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<td>NO. 29,576 State v. Cook (COA 25,150) 12/8/05</td>
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<tr>
<td>NO. 29,571 State v. Cardon (COA 25,176) 12/5/05</td>
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<td>NO. 29,570 Paragon v. Livestock (COA 25,256) 12/5/05</td>
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<td>NO. 29,529 State v. Phillips (COA 25,147) 12/5/05</td>
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<td>NO. 29,518 Torrez v. State (COA 26,050) 12/5/05</td>
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<td>NO. 29,569 State v. Watkins (COA 26,052) 12/2/05</td>
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<td>NO. 29,568 State v. Romero (COA 25,926) 12/2/05</td>
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<td>NO. 29,562 State v. Scott (COA 24,735) 11/29/05</td>
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<td>NO. 29,560 Montoya v. Brave (12-501) 11/29/05</td>
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<td>NO. 29,559 Krause v. Cumbie (COA 25,782) 11/29/05</td>
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<td>NO. 29,550 Fiala v. City of Albuquerque (COA 26,112) 11/22/05</td>
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<td>NO. 29,546 Martin v. Snedeker (12-501) 11/21/05</td>
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<td>NO. 29,5105 State v. Cook (COA 25,137) 3/22/05</td>
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<td>NO. 29,128 State v. Stephen F. (COA 24,007) 4/26/05</td>
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<td>NO. 29,153 State v. Armijo (COA 24,951) 4/26/05</td>
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<tr>
<td>NO. 29,158 State v. Otto (COA 23,280) 4/26/05</td>
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<tr>
<td>NO. 29,179 State v. Taylor (COA 23,477) 5/9/05</td>
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<tr>
<td>NO. 29,174 State v. Vincent (COA 23,832) 5/20/05</td>
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<tr>
<td>NO. 29,232 Reyes v. State (12-501) 6/2/05</td>
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<td>NO. 29,213 State v. Evans (COA 25,332) 6/8/05</td>
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<tr>
<td>NO. 29,203 Hassler v. Affiliated Foods (COA 25,093) 6/3/05</td>
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<td>NO. 29,223 State v. Ransom (COA 25,171) 6/3/05</td>
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<td>NO. 29,244 State v. Atton (COA 25,274) 6/20/05</td>
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<tr>
<td>NO. 29,286 State v. Gutierrez (COA 25,279) 7/11/05</td>
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<tr>
<td>NO. 29,258 State v. Hunter (COA 24,166) 7/11/05</td>
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<tr>
<td>NO. 29,218 Montoya v. Ulibarri (12-501) 7/15/05</td>
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<tr>
<td>NO. 29,272 US Xpress v. State (COA 24,702) 7/15/05</td>
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<tr>
<td>NO. 29,257 State v. Kirby (COA 24,845) 8/1/05</td>
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<tr>
<td>NO. 29,325 Jacobo v. City of Albuquerque (COA 24,459/25,256) 8/5/05</td>
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<tr>
<td>NO. 29,332 Flores v. Clovis College (COA 25,627) 8/5/05</td>
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<tr>
<td>NO. 29,334 State v. Garvin (COA 24,299) 8/5/05</td>
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<tr>
<td>NO. 29,275 Moffat v. Branch (COA 24,307) 8/5/05</td>
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<tr>
<td>NO. 29,350 Doe v. Santa Clara Pueblo (COA 25,125) 8/12/05</td>
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<td>NO. 29,340 State v. Fielder (COA 24,190) 8/12/05</td>
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<td>NO. 29,336 State v. Kerby (COA 24,350) 8/12/05</td>
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<tr>
<td>NO. 29,320 State v. Quihuis (COA 24,296) 8/12/05</td>
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<tr>
<td>NO. 29,351 Lopez v. San Felipe Pueblo (COA 25,884) 8/26/05</td>
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<td>NO. 29,385 State Farm v. Luebbers (COA 23,556) 8/26/05</td>
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<td>NO. 29,344 State v. Hughy (COA 24,732) 8/26/05</td>
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<td>NO. 29,373 State v. Martinez (COA 25,376) 8/26/05</td>
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<td>NO. 29,361 State v. McDonald (COA 24,559) 9/2/05</td>
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<td>NO. 29,410 State v. Ten Gaming Devices (COA 24,479) 9/21/05</td>
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<td>NO. 29,411 State v. McClure (COA 25,436) 9/23/05</td>
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<td>NO. 29,435 State v. Duhon (COA 24,222) 10/13/05</td>
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<td>NO. 29,456 State v. Salazar (COA 24,465) 10/14/05</td>
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<td>NO. 29,476 Salazar v. Torres (COA 23,841) 11/7/05</td>
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<td>NO. 29,484 State v. Wilson (COA 25,017) 11/14/05</td>
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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 29, 2005

WRITS OF CERTIORARI

NO. 29,437 City of Sunland Park v. Harris
(COA 23,593) 11/14/05

NO. 29,478 State v. Monteleone
(COA 24,811/24,795) 11/15/05

NO. 29,495 State v. Campos (COA 25,513)
12/5/05

NO. 29,513 State v. Grogan (COA 25,699)
12/5/05

NO. 29,517 State v. Bonjour (COA 25,633)
12/5/05

NO. 29,515 Shiver v. NM Mutual Casualty
(COA 25,106) 12/6/05

NO. 29,521 State v. Parra (COA 25,484)
12/6/05

NO. 29,527 State v. Chee (COA 25,112)
12/6/05

NO. 29,528 State v. Jensen (COA 24,905)
12/6/05

NO. 29,507 State v. Noriega (COA 25,593)
12/7/05

NO. 29,505 State v. Bocanegra (COA 25,382)
12/8/05

NO. 29,533 State v. Kerby (COA 25,891)
12/8/05

NO. 29,538 State v. Gallegos (COA 24,480)
12/12/05

NO. 29,537 State v. Rodarte (COA 25,273)
12/12/05

NO. 29,543 State v. Tkach (COA 23,500)
12/20/05

NO. 29,557 State v. Pacheco (COA 24,154)
12/21/05

NO. 29,196 Grine v. Peabody (COA 24,354) 11/16/05

NO. 29,226 Upton v. Clovis (COA 24,051) 12/12/05

NO. 29,246 Chavarria v. Fleetwood
(COA 23,874/24,444) 12/12/05

NO. 29,178 State v. Maestas (COA 25,077)
12/13/05

NO. 28,950 State v. Nyce (COA 25,077)
12/13/05

NO. 29,160 Benavidez v. City of Gallup
(COA 25,373) 12/13/05

NO. 29,206 State v. Maldonado (COA 23,637)
12/13/05

PETITION FOR WRIT OF CERTIORARI DENIED:

NO. 29,545 State v. Renteria (COA 25,142) 12/14/05

NO. 29,547 State v. Orona (COA 25,725) 12/19/05

NO. 29,548 State v. Powell (COA 25,863)
12/19/05

NO. 29,553 State v. Bitsilly (COA 25,874)
12/19/05

NO. 29,554 State v. Newsome (COA 25,393)
12/19/05

NO. 29,589 Ring v. Bravo (12-501)
12/21/06

NO. 29,582 Sanders v. State (12-501)
12/21/05

NO. 29,587 Morris v. Ulibarri (12-501)
12/21/05

NO. 29,555 State v. Woods (COA 25,795)
12/21/05

WRIT OF CERTIORARI QUASHED:

NO. 29,100 State v. Casanova (COA 22,952) 12/22/05

NO. 28,068 State v. Gallegos (COA 22,888)
12/22/05

CERTIORARI GRANTED AND SUBMITTED TO THE COURT

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

(Submission Date)

NO. 27,945 State v. Munoz (COA 23,094) 11/18/03

NO. 28,241 State v. Duran (COA 22,611)
3/29/04

NO. 28,426 Sam v. Estate of Sam (COA 23,288)
9/13/04

NO. 28,471 State v. Brown (COA 23,610)
9/15/04

NO. 27,269 Kmart v. Tax & Rev (COA 21,140)
10/14/04

NO. 28,628 Herrington v. State Engineer
(COA 23,871) 11/16/04

NO. 28,500 Manning v. New Mexico Energy &
Minerals (COA 23,396) 12/13/04

NO. 28,410 State v. Romero (COA 22,836)
2/14/05

NO. 28,688 State v. Gutierrez (COA 24,731)
2/14/05

NO. 28,812 Battishill v. Farmers Insurance
(COA 24,196) 2/16/05

NO. 28,660 State v. Johnson (COA 23,463)
3/11/05

NO. 28,816 Romero v. City of Santa Fe (COA 24,775)
5/9/05

NO. 28,898 Deflon v. Sawyers (COA 23,013)
5/10/05

NO. 28,823 Payne v. Hall (COA 22,383)
6/13/05

NO. 28,997 Maestas v. Zager (COA 24,200)
6/14/05

NO. 28,983 Callahan v. New Mexico (COA 23,645)
8/16/05

NO. 29,058 Sanchez v. Pellicer (COA 25,082)
9/29/05

NO. 29,016 State v. Jade G. (COA 23,810)
10/11/05

NO. 29,017 State v. Jade G. (COA 23,810)
10/11/05

NO. 29,042 State v. Frank G. (COA 23,165/23,497)
10/11/05

NO. 29,018 State v. Pamela G. (COA 23,497/23,787)
10/11/05

NO. 29,159 State v. Romero (COA 24,390)
11/14/05

NO. 29,134 State v. Kathleen D.C. (COA 24,540)
11/14/05

NO. 29,190 Aguilera v. Board of Education
(COA 23,895) 11/14/05

NO. 29,202 Montgomery v. Lomos Altos
(COA 24,297) 11/16/05

NO. 29,206 State v. Maldonado (COA 23,637)
12/13/05
### Published Opinions

<table>
<thead>
<tr>
<th>No.</th>
<th>Date Opinion Filed</th>
<th>Case Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>25582</td>
<td>12/21/05</td>
<td>2nd Jud Dist Bernalillo CV-04-447, R &amp; R Deli, Inc. v. Santa Ana Star Casino; Tamaya Enterprises, Inc.; The Pueblo of Santa Ana; Conrad Granito, General Manager of Santa Ana Star Casino; Aaron Armijo, Chairman of Tamaya Enterprises, Inc., and Leonard Armijo, Governor of Pueblo of Santa Ana (affirm)</td>
</tr>
<tr>
<td>25298</td>
<td>12/21/05</td>
<td>8th Jud Dist Taos CV-03-322, Cora Maes v. Audubon Indemnity Insurance Group (reverse)</td>
</tr>
<tr>
<td>25309</td>
<td>12/21/05</td>
<td>5th Jud Dist Eddy JR-04-91, State v. Indie C. (affirm)</td>
</tr>
<tr>
<td>25355</td>
<td>12/21/05</td>
<td>7th Jud Dist Sierra CV-02-152, Jerry V. Mayeux and Sally Brown Mayeux v. James R. Winder and Katrina Erica Winder (affirm)</td>
</tr>
</tbody>
</table>

### Unpublished Opinions

<table>
<thead>
<tr>
<th>No.</th>
<th>Date Opinion Filed</th>
<th>Case Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>26006</td>
<td>12/19/05</td>
<td>4th Jud Dist San Miguel CV-01-20, Hillcrest Restaurant Inc. v. Lavinia Flores Fenzi (affirm)</td>
</tr>
<tr>
<td>25746</td>
<td>12/20/05</td>
<td>12th Jud Dist Lincoln CR-03-135, State v. Gene Carney (affirm)</td>
</tr>
<tr>
<td>25435</td>
<td>12/20/05</td>
<td>5th Jud Dist Eddy CR-04-200, State v. Benjamin Walter Prichard (affirm)</td>
</tr>
<tr>
<td>25726</td>
<td>12/21/05</td>
<td>3rd Jud Dist Dona Ana CR-03-67, State v. Billy Plentybears (affirm)</td>
</tr>
<tr>
<td>25882</td>
<td>12/21/05</td>
<td>12th Jud Dist Otero CR-03-520, State v. Kennedy McDow (affirm)</td>
</tr>
<tr>
<td>25873</td>
<td>12/21/05</td>
<td>11th Jud Dist San Juan CR-05-321, State v. Pedro Kirk (affirm)</td>
</tr>
<tr>
<td>25808</td>
<td>12/21/05</td>
<td>12th Jud Dist Otero CR-03-246, State v. Raymond Krasnahill (affirm)</td>
</tr>
<tr>
<td>25737</td>
<td>12/21/05</td>
<td>3rd Jud Dist Dona Ana CR-04-555, State v. Jeffrey Parsons (affirm)</td>
</tr>
<tr>
<td>26166</td>
<td>12/21/05</td>
<td>2nd Jud Dist Bernalillo LR-05-32, State v. Kenneth Frisby (affirm)</td>
</tr>
<tr>
<td>24367 &amp; 25723</td>
<td>12/21/05</td>
<td>10th Jud Dist Quay CR-03-26, State v. Danny McKinney (affirm)</td>
</tr>
<tr>
<td>24195</td>
<td>12/21/05</td>
<td>5th Jud Dist Lea CV-01-144, Fred Marshall v. Hobbs Iron &amp; Metal Co., Inc. and Gene Day (affirm)</td>
</tr>
<tr>
<td>25304</td>
<td>12/21/05</td>
<td>2nd Jud Dist Bernalillo DR-95-2675, Floyd H. Grant III v. Leslie D. Cumiford f/k/a Leslie D. Interrante (affirm)</td>
</tr>
</tbody>
</table>

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OPINION

MICHAEL D. BUSTAMANTE, CHIEF JUDGE

{1} This case decides how New Mexico will prioritize redemption attempts by more than one party after a mortgage foreclosure. The district court held that the assignee of the original owner had priority to redeem over the assignee of the redemption right of a lien creditor, even though the lien creditor was the first to file. We adopt the first in time, first in right rule, and reverse the decision of the district court.

BACKGROUND

{2} The basic facts in this case are undisputed. Lisa Fenton (Fenton) executed and delivered a note and mortgage to Option One Mortgage Corporation, who later assigned the note and mortgage to HSBC Bank. Fenton defaulted. The original Plaintiff, HSBC Bank USA, filed a complaint for foreclosure against Fenton. The mortgage provides for a one month redemption period after any judicial sale. The district court entered summary judgment ordering foreclosure of the mortgage and appointed a special master. The special master filed a report indicating that the property at issue was sold to Daniel Hudson at the foreclosure sale. The district court then entered an order approving the special master’s sale and noting the conveyance was subject to the one month redemption period. Mark Fenton, a lien creditor, assigned his right of redemption to Hudson, and Hudson filed a Petition for certification of redemption on March 25, 2004.

{3} Vista de la Cumbre filed a Petition for certificate of redemption on April 5, 2004. As grounds for its petition, Vista de la Cumbre stated that Fenton had assigned her right of redemption to it. The district court found that as the assignee of the former owner of the property, Vista de la Cumbre stood in the shoes of the owner and had the priority right to redeem the property. The district court ordered redemption in favor of Vista de la Cumbre.¹

DISCUSSION

{4} Cagle contends the petition filed by his predecessor—the assignee of the redemption right held by a lien creditor —was filed first in time, and therefore has priority for redemption. Cagle argues that absent statutory language or clear legislative intent defining the priority to be given redeemers, we should apply a first in time rule. We agree and reverse the decision of the district court.

{5} This case presents an issue of statutory interpretation, a legal question which we review de novo. State v. Davis, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064.

{6} The statute we must interpret and apply is NMSA 1978, § 39-5-18(A) (1987), which states:

After sale of any real estate pursuant to any such judgment or decree of any court, the real estate may be redeemed by the former defendant owner of the real estate, his heirs, personal representatives or assigns or by any junior mortgagee or other junior lienholder.[…]

“The principal objective in the judicial construction of statutes is to determine and give effect to the intent of the legislature.” Regents of Univ. of N.M. v. N.M. Fed’n of Teachers, 1998-NMSC-078, ¶ 28, 125 N.M. 401, 962 P.2d 1236 (citation omitted). In doing so, we look first to the plain meaning of the statute, which requires us to give effect to the statute’s language and refrain from further interpretation when the language is clear and unambiguous. See Sims v. Sims, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153. Furthermore, we will not read into a statute language which is not there, particularly if it makes sense as written. High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599.

{7} Applying the plain meaning rule to Section 39-5-18(A), it is clear that the legislature provided for no order of priority

¹ Following this decision, the district court entered an order allowing Clarke Cagle (Cagle) to be designated as a petitioner by substitution for Daniel Hudson. Cagle appeals the district court order allowing redemption in favor of Vista de la Cumbre.
in statutory redemption. Our Supreme Court recently stated that “[o]ne of the purposes of the redemption statute is to give the property owner, or certain others listed under the redemption statute, a reasonable opportunity to redeem the property.” Chase Manhattan Bank v. Candelaria, 2004-NMISC-017, ¶ 9, 135 N.M. 527, 90 P.3d 985. This indicates an intent to allow redemption by all those listed in the statute, but provides no guidance in terms of priority. The word “or” in the statute should be given its normal disjunctive meaning because the context of the statute does not demand otherwise. See Hale v. Basin Motor Co., 110 N.M. 314, 318, 795 P.2d 1006, 1010 (1990). “Redemption is a statutory right that our courts construe narrowly.” Brown v. Trujillo, 2004-NMCA-040, ¶ 14, 135 N.M. 365, 88 P.3d 881. Furthermore, we note that the commonly stated purposes of statutory redemption are to encourage full value bidding at foreclosure sales and to protect mortgagors. 12 David A. Thomas, Thompson on Real Property § 101.07(c)(1) (Thomas ed. 1994). In the absence of any stated priority of allowance, and considering the use of the disjunctive word “or,” we decline to read a priority into the statute based on the status of the redeemer.

{8} We noted in Western Bank of Las Cruces v. Malooly, 119 N.M. 743, 749, 895 P.2d 265, 271 (Ct. App. 1995) that “[o]ur redemption statute is silent as to whether more than one party can seek to redeem during the redemption period.” In a concurring opinion, Judge Hartz urged the legislature to revisit the redemption statute. Id. at 751, 895 P.2d at 273. Judge Hartz stated:

[Without knowing more about what policy considerations motivated the legislature to enact statutory redemption, the courts face great confusion and difficulty in determining whether a bare-bones statute like New Mexico’s (1) permits successive redemptions, (2) gives any particular holder of a statutory right of redemption priority over another holder if only one redemption is permitted, and (3) requires a redeeming junior lienholder to pay a senior lien of a prior redeemer.

Id. at 751-52, 895 P.2d at 273-74 (Hartz, J., concurring).

{9} Judge Hartz noted that other states have statutes that address these issues, and the legislature can obtain substantial guidance by examining those statutes. Id. The Arizona redemption statute provides an example. The Arizona statute allows for redemption by the judgment debtor or his successor in interest at any time within six months after the date of the foreclosure sale. Ariz. Rev. Stat. Ann. § 12-1282(B) (1963). If redemption is not made by the judgment debtor or his successor in interest within six months, “the senior creditor having a [legal or equitable] lien . . . may redeem within five days after expiration of the [six months].” Section 12-1282(C). “[E]ach subsequent creditor having a lien in succession, according to priority of liens, within five days after the time allowed the prior lienholder . . . may redeem by paying [specified amounts to the] person from whom redemption is made.” Id.

{10} The absence of any such language in our own statute leaves us without legislative guidance as to priority. We therefore look to other states that have addressed similar issues. We are persuaded by the holding and rationale in Feldman v. M.J. Associates, 324 N.W.2d 496 (Mich. Ct. App. 1982). In Feldman, the Michigan court held that where the statute in question provided for no order of priority in redemption, and absent any overriding equitable considerations, “the fairest approach is to grant priority to the first party to exercise its right of redemption.” Id. at 498. The Michigan court held that “a valid redemption of property generally operates to cut off the redemption rights of other parties entitled to redeem.” Id. We adopt this first in time rule because it is fair and easy to apply. Furthermore, the first in time rule is not contrary to the language of the statute and does not interfere with the purpose of encouraging full value bidding at foreclosure sales.

{11} Vista de la Cumbre argues that applying a first in time rule can have the effect of cutting off all other redemption rights, even if claims are filed within the statutory time period. We understand this potential outcome. However, to hold otherwise or to establish an order of priority for redemption would be the equivalent of rewriting the statute, which is the job of the legislature. See generally State v. Cleve, 1999-NMSC-017, ¶ 15, 127 N.M. 240, 980 P.2d 23 (stating that the courts’ role in statutory construction “is not to sculpt the most just law possible out of the words used by the [l]egislature or to attribute the meaning to a statute that contemporary ideals would deem preferable”); State v. Anaya, 1997-NMSC-010, ¶ 29, 123 N.M. 14, 933 P.2d 223 (stating that in interpreting statutes, “[t]he judicial branch simply must select the rationale that most likely accomplishes the legislative purpose—or best fills [the] void not addressed by the legislature”).

CONCLUSION

{12} For the foregoing reasons, we reverse the decision of the district court, and remand for proceedings consistent with this opinion.

{13} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Chief Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

RODERICK T. KENNEDY, Judge
Certiﬁrari Denied, No. 29,400, September 27, 2005, 2005-NMCERT-009

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-139

GILA RESOURCES INFORMATION PROJECT
and NEW MEXICO ENVIRONMENT DEPARTMENT,
Appellants,
versus
NEW MEXICO WATER QUALITY CONTROL COMMISSION
and CHINO MINES COMPANY,
Appellees.

IN THE MATTER OF THE APPEAL PETITION ON CHINO MINES COMPANY’S
PROPOSED GROUND WATER SUPPLEMENTAL DISCHARGE
PERMIT FOR CLOSURE—DP-1340.
No. 24,478 (filed: June 15, 2005)

APPEAL FROM THE NEW MEXICO WATER QUALITY
CONTROL COMMISSION
DERRITH WATCHMAN-MOORE, Chair-Designee

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Chino Mines Company

OPINION

JONATHAN B. SUTIN, JUDGE

{1} A ground water discharge permit was
issued to Chino Mines Company by the
New Mexico Department of Environment.
Gila Resources Information Project, a
community organization that engages in
public outreach, education, and advocacy,
filed an administrative appeal with the New
Mexico Water Quality Control Commission.

The Department joined that appeal. This
appeal results from the Commission’s
dismissal of the administrative appeal on
procedural grounds. Because we hold that
the Commission’s dismissal was arbitrary,
an abuse of discretion, and not supported
by substantial evidence, we reverse and
remand.

REGULATORY SETTING

{2} The New Mexico Water Quality
Control Commission (the Commission)
was created under the Water Quality Act,
NMSA 1978, §§ 74-6-1 to -17 (1967, as
amended through 2003). § 74-6-3(A).
Among other duties, the Commission
is required to adopt a comprehensive
water quality management program,
adopt water quality standards for surface
and ground waters, adopt regulations
to prevent or abate water pollution, and
assign responsibility for administering its
regulations to constituent agencies. § 74-6-
4(B) to (E). The Commission is authorized
to adopt regulations requiring persons to
obtain from a constituent agency a permit
for the discharge of any water contaminant.
§ 74-6-5(A).

{3} The New Mexico Department of
Environment (the Department) was created
under the Department of Environment
Act, NMSA 1978, §§ 9-7A-1 to -12
head of the Department is the secretary
of environment (the Secretary). §§ 9-
7A-2, -5. The Secretary sits as one of the
Commission’s twelve members. § 74-6-
3(A)(1). Under the Water Quality Act,
the Department is a “constituent agency.”
§ 74-6-2(K)(1). The Department is required
to provide staff support to the Commission.
“[a]ll powers, duties and responsibilities
of the [Commission] . . . are hereby
explicitly exempted from the authority of
the [Secretary].” Id.

{4} The Water Quality Act sets out general
requirements relating to a constituent
agency’s denial of an applicant’s request
for a permit, § 74-6-5(E). In addition, the
Commission is required to adopt regulations
developing procedures that ensure that the
public receives notice of applications for
permit issuance and modification and that
ensure a public hearing is held that gives
a reasonable opportunity for all interested
persons to be heard. § 74-6-5(F).

{5} The Commission adopted regulations
governing the permitting and setting
out ground water standards. See 20.6.2
NMAC (2004). These regulations cover,
among other things, the requirements for
and issuance of discharge permits by the
Secretary, and also cover public hearings
and appeals relating to the issuance of
permits by the Secretary. See 20.6.2.3104,
.3106, .3110, .3112 NMAC. Commission
regulations also cover the issuance by the
Secretary of closure permits that require
those who discharge water contaminants
to protect ground water when they close
their facilities. See 20.6.2.3107(A)(11)
NMAC.

{6} Any party who participates in a
permitting proceeding before the Department may appeal the Department’s decision by filing a petition for review before the Commission. § 74-6-5(N). Gila Resources Information Project (GRIP) participated in the permitting proceeding in this case and therefore had standing to appeal the Department’s permitting decision to the Commission. The Commission regulations contain adjudicatory rules that set forth specific requirements for filing petitions for review and for conducting a hearing on the petition. See generally 20.1.3 NMAC (2001). More particularly, 20.1.3.2(A)(1) NMAC governs “Appeal Hearings,” which includes, among other proceedings, appeals from permitting actions under Section 74-6-5(N). 20.1.3.2(A)(1), (B)(1) NMAC. The regulations refer to the “petition for review” described in Section 74-6-5(N) as an “Appeal Petition.” 20.1.3.7(A)(12) NMAC. An appeal petition can be an “informal Appeal Petition,” or a “formal Appeal Petition.” 20.1.3.200(A)(3)(c) NMAC. The regulations define a proceeding before the Commission initiated by an appeal petition as a “Petition Hearing.” 20.1.3.7(A)(12) NMAC. Section 20.1.3.200 governs the “Appeal Hearing” which is initiated by an “Appeal Petition.” 20.1.3.200(A) NMAC.

We use the nomenclature in the regulations throughout this opinion. Thus, GRIP filed an “appeal petition” and obtained an “appeal hearing” before the Commission. GRIP first filed an “informal appeal petition” and then filed a “formal appeal petition.”

BACKGROUND

7 Appellee Chino Mines Company (Chino) operates an open pit copper mine in southwestern New Mexico. The mine discharges contaminants that move into ground water. Chino was therefore required to obtain, and did obtain, discharge permits related to its mine operation. In anticipation of Chino closing its mines, the Department issued a draft closure permit that set forth conditions relating to protecting ground water at the site upon its closure. In August 2001, the Department held a public hearing on the draft permit. GRIP appeared as a party at the hearing.

8 After the hearing, Chino and the Department engaged in settlement discussions to attempt to narrow their different positions. These discussions resulted in a draft stipulated permit containing general terms and conditions of a closure permit. In February 2002, the Department held a public hearing on the draft stipulated permit. The Department, Chino, GRIP, and another organization participated as parties. GRIP objected to certain provisions of the draft stipulated permit. In January 2003, the hearing officer issued a report and findings of fact and conclusions of law. The hearing officer generally affirmed the draft stipulated permit and specifically affirmed provisions that GRIP found objectionable. On February 24, 2003, through the Chief of its Ground Water Quality Bureau, the Department issued a final closure permit to Chino, designated Supplemental Discharge Permit for Closure DP-1340. On the same day, GRIP began the Commission appeal process based on the hearing officer’s adverse determination.

9 Under the Commission’s procedural regulations governing the appeal process, the petitioner must file the appeal petition within thirty days “from the date notice is given of the permitting action.” 20.1.3.200(A)(1)(a) NMAC. While this appeal petition initiates the appeal hearing, see 20.1.3.200(A) NMAC, if the petitioner “wishes to delay a hearing in order to negotiate with the Department, the petitioner may file an informal appeal petition” within the thirty-day period. 20.1.3.200(A)(3) NMAC. If an informal appeal petition is filed, the petitioner must waive the right to hearing within ninety days. 20.1.3.200(A)(3)(a) NMAC. Further, the informal appeal petition must “be filed with the Commission and a copy served on the Department.” 20.1.3.200(A)(1)(f) NMAC; 20.1.3.200(A)(3)(a) NMAC.

10 If the petitioner and the Department are unable to resolve an informal appeal petition within ninety days, the petitioner must file a formal appeal petition or, alternatively, “[t]he ninety day period may be extended by a stipulated or unopposed motion.” 20.1.3.200(A)(3)(c) NMAC. If this extension is obtained, but the informal petition is not resolved, the petitioner must then file a formal appeal petition. The appeal is subject to dismissal for failure to file a timely formal petition. 20.1.3.200(A)(3)(d) NMAC.

11 GRIP initiated the appeal hearing process through an informal appeal petition. The Commission hearing clerk issued a notice of docketing of the informal appeal petition and served the Department, GRIP, and Chino. GRIP and the Department held settlement negotiations. GRIP also engaged in separate settlement negotiations with Chino. All negotiations proved unsuccessful. On May 23, 2003, GRIP, noting that the deadline for filing a formal appeal was May 27, 2003, filed a stipulated motion with the Commission requesting an additional ninety-day extension to negotiate further with the Department and to file a formal appeal petition if the negotiations remained unsuccessful. The Commission extended the time to file a formal appeal petition until August 25, 2003, based on the stipulated motion. GRIP attempted to further negotiate with the Department but had no success. On August 22, 2003, GRIP filed a formal appeal petition with the Commission and served the petition on the Department and Chino.

12 GRIP’s formal appeal petition raised several objections to DP-1340. In September 2003, Chino filed a motion to dismiss GRIP’s formal appeal petition. Chino’s basic attack was that the Commission regulations required GRIP to obtain Chino’s concurrence in the stipulated motion for a ninety-day extension as a condition precedent to issuance of an order granting the extension. Chino argued that GRIP’s failure to obtain Chino’s concurrence rendered the Commission’s extension order invalid. It further argued that because the order was invalid, GRIP’s formal appeal petition was untimely and subject to dismissal under 20.1.3.200(A)(3)(d) NMAC, which provides for dismissal of untimely formal appeal petitions. GRIP responded.

13 The Commission heard argument on Chino’s motion to dismiss in November 2003. Both GRIP and the Department argued against dismissal. The Commission voted six to five to dismiss GRIP’s formal appeal petition. In its order granting Chino’s motion to dismiss, the Commission concluded that under its regulations: (1) a “party” included a permittee, and “a permittee must be part of motion practice under the appeal hearing rules”; (2) failure to include Chino in the May 2003 motion practice was prejudicial to Chino; and (3) “dismissing this appeal was not prejudicial to GRIP because the conditions that it appealed can be revisited within permitting processes.” GRIP appealed from that order. See § 74-6-7(A) (authorizing appeal directly to the Court of Appeals).

1 It is unclear why the regulations use “appeal hearing” in various provisions, but define the hearing as a “Petition Hearing.” See 20.1.3.7(A)(12) NMAC.
The Department intervened in the appeal as an appellant.  

{14} On appeal, GRIP asserts that the Commission’s determination is erroneous, in that: (1) the Commission’s findings are not supported by substantial evidence; (2) the Commission erred as a matter of law in finding that the dismissal was not prejudicial to GRIP; (3) GRIP was unfairly penalized for following ambiguous Commission regulations; and (4) the Commission’s dismissal is based on an incorrect interpretation of, and conflicts with, the intent of the Water Quality Act.

The Department asserts on appeal that the Commission’s determination is erroneous because: (1) the Commission’s actions permitting an extension and then dismissing the formal petition were arbitrary; (2) the Commission erred in its interpretation of its regulations; and (3) a commissioner’s vote in favor of affirming DP-1340 must be disqualified because it was based on matters outside of the record, rendering the Commission’s determination invalid.

**DISCUSSION**

A. Standard of Review

{15} According to the Water Quality Act, this Court can set aside the Commission’s dismissal order only if we determine the Commission’s decision is “(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law.” § 74-6-7(B). We engage in whole record review. See Atlitxco Coalition v. Maggiore, 1998-NMCA-134, ¶ 23, 125 N.M. 786, 965 P.2d 370.

{16} “A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.” Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm’n, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. We will generally defer to the Commission’s reasonable interpretation of its own ambiguous regulations. See id.

B. The Commission’s Interpretation of Its Regulations

{17} A Commission regulation generally relating to motions requires that, with respect to “unopposed motions,” the motion must “state that the concurrence of all other parties was obtained.” 20.1.3.111(B)(2) NMAC. The term “document” means, among other material, a “motion.” 20.1.3.111(A) NMAC. Another regulation defines “party” as “the Petitioner, the Applicant if different from the Petitioner, the Respondent, the Department, or any person who is permitted to intervene.” 20.1.3.7(A)(10) NMAC. In the present case, GRIP was the “Petitioner” and Chino was the “Applicant.”

{18} GRIP’s stipulated motion requesting the Commission to grant an extension of time to file a formal appeal petition was filed on May 23, 2003, which was the last business day prior to the expiration of the first ninety-day period. The deadline to file a formal appeal can be extended by the Commission based on a “stipulated or unopposed motion.” 20.1.3.200(A)(3)(c) NMAC. In its stipulated motion, GRIP stated in one place that “[t]he Department stipulates to this motion,” and, in another place, after noting the deadline for filing a formal appeal petition, stated:

However, the Rules allow for the ninety day period for filing a formal appeal to be extended “by a stipulated or unopposed motion.” [The Department] has stipulated to this motion through its counsel. Since the nature of the informal appeal is a negotiation with the [Department] (20.1.3.200[(A)][3] NMAC), the only parties to this action are GRIP and [the Department].

GRIP submitted the stipulated motion to the Department’s attorney before it was filed and GRIP received the Department’s attorney’s approval. GRIP submitted the stipulated motion with a proposed order to the Commission’s hearing clerk, who indicated that the order would be signed. The order, dated May 27, 2003, was signed by the Secretary, who was the Commission’s chairman, and who was acting on behalf of the Commission. The order specifically noted that the Department had stipulated to the motion and the order granted an extension until August 25, 2003. GRIP did not serve Chino with the stipulated motion or the order granting that motion, nor did GRIP attempt to obtain Chino’s concurrence in the extension requested in the stipulated motion or granted in the order. The Department and GRIP failed to reach a settlement. GRIP filed a formal appeal petition on August 22, 2003, and served that petition on Chino.

{19} After being served with the formal appeal petition, Chino filed a motion to dismiss GRIP’s formal appeal. The Commission heard Chino’s motion. Chino argued that the Commission heard Chino’s motion. Chino argued to the Commission that it was a party, that its stipulation or lack of opposition was required to serve the motion for an extension, and that GRIP was required to serve the motion and order on Chino. The Commission granted Chino’s motion, holding that “party,” in 20.1.3.7(A)(10) NMAC, included Chino and that 20.1.3.113 NMAC required “all parties to be a part of motion practice.” We interpret this last statement to mean that the Commission interpreted 20.1.3.113 NMAC to require Chino’s lack of opposition or stipulation to the motion for an extension of time to file the formal appeal as well as service of the motion and order on Chino.

{20} On appeal, Chino and the Commission assert that “party” and “parties” as those terms appear in the Commission regulations, include Chino, the permit applicant. They argue that GRIP was required to obtain Chino’s concurrence in the stipulated motion and in the order granting the motion. Thus, according to Chino and the Commission, the Commission’s interpretation of the regulation that requires GRIP to include Chino in any motion practice was appropriate. GRIP and the Department take another tack.

{21} GRIP asserts that the Commission regulations are unclear, bolstering this assertion by referring to the fact that a member of the Commission thought they were unclear. GRIP refers to the informal appeal petition process specifically set forth in 20.1.3.200(A)(3) NMAC and shows that nowhere in that regulation is there a mention of “party” or “parties.” Nor, GRIP indicates, does it mention “applicant” or “permittee.” The language of the regulation, and the absence of these terms, GRIP contends, indicates that the only participants in the informal appeal petition process are the petitioner and the Department. In contrast, GRIP points out, the formal appeal petition process, set out in 20.1.3.200(A) NMAC, references not only the petitioner and the Department, but also requires the Department to serve “only the index to the record on other parties,” states that “[t]he parties may stipulate” in regard to what portions of the record are to be filed, and requires the Department to deliver to the hearing clerk “a list of all persons . . . who participated in a public hearing on the permitting action[.]” 20.1.3.200(A)(2)(a), (b) NMAC. Thus, according to GRIP,
the formal process, but not the informal process, includes the applicant and any other party as defined in 20.1.3.7(A)(10) NMAC. Further, GRIP states that there exist no separate regulations that require all “interested parties” or all “parties” to become involved in negotiations in the informal appeal petition process. Therefore, GRIP concludes, the regulations for informal appeal petitions limit the process to the petitioner and the Department and “GRIP should not be penalized for following the [Commission’s] rules and procedures to the best of its ability.”

{22} The Department, too, takes the position that the Commission regulations are “anything but clear.” Like GRIP, the Department shows that the specific regulations governing informal appeal petitions permit a petitioner to delay a hearing in order to negotiate with the Department, and that nothing in the regulations requires settlement negotiations to include the applicant where the applicant is not the petitioner. The process, according to the Department, is to allow the petitioner to negotiate with the Department. Further, no provision exists in the informal appeal petition process specifically requiring the permit applicant or any “parties” to concur in the stipulated motion to extend the negotiation period. Thus, the Department concludes, the regulations governing the informal appeal petition process do not include the permit applicant, and the regulations contemplate that the only parties to the negotiations are the petitioner and the Department. Based on these observations, the Department argues that requiring the participation of the permit applicant “based entirely on the fact that the word ‘motion’ appears in the provision and then hobbling together an argument requiring the participation of an entity otherwise not mentioned in the provision – is an overly strained interpretation of the Commission’s rules.”

{23} Here, we have two independent regulatory bodies at loggerheads as to the proper interpretation and enforcement of the Commission regulations. The Commission, having issued the pertinent regulations, and being required to entertain appeals, is placed in a position of having to interpret, as well as to enforce, its own procedural regulations. The Department, which is required to engage in the permitting process, including negotiations in the appeal process, is also placed in a position of having to interpret the Commission’s permit and procedural regulations. To somewhat complicate the roles and authority of the interested government regulatory bodies, the New Mexico Mining Act, NMSA 1978, §§ 69-36-1 to -20 (1993, as amended through 2001), also governs a mine’s closeout process. See 19.10.5.506(J)(5) NMAC (2001) (stating that before a mining closeout plan may be approved by the Director of the Mining and Materials Division (the Division), the Division must receive “a written determination . . . from the Secretary . . . stating that the application has demonstrated that the activities to be permitted or authorized will be expected to achieve compliance with all applicable air, water quality, and other environmental standards if carried out as described in the closeout plan.”). GRIP points out that it is the determination of the Secretary, as discussed in 19.10.5.506(J)(5) NMAC of the Division regulations, that GRIP appealed to the Commission.

{24} GRIP and the Department make reasonable arguments given the ambiguity of the regulations. We by no means shut out the Department’s suggestions as to the manner in which the law and regulations should be interpreted and applied. However, given that the Legislature vested the power to promulgate regulations and to administer them in the Commission, we will defer to the Commission’s interpretation of those regulations as long as it is reasonable. See Atisixo Coalition, 1998-NMCA-134, ¶ 30 (“[I]n resolving ambiguities in the . . . regulations which an agency is charged with administering, the Court generally will defer to the agency’s interpretation if it implicates agency expertise.”); Morningstar Water Users Assoc. v. N.M. Pub. Util. Comm’n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995) (stating that we accord some deference to an agency’s interpretation of the statute that governs the agency); see also Archuleta v. Santa Fe Police Dep’t ex rel. City of Santa Fe, 2005-NMSC-006, ¶ 16, 137 N.M. 161, 108 P.3d 1019 (stating “[t]here is a sound basis to afford substantial deference to an agency’s ruling on [an order denying discovery] and reverse the ruling only for an abuse of discretion that is arbitrary or capricious or contrary to law.”). We believe the Commission’s interpretation is reasonable. See id. ¶ 19 (“Our inquiry is whether the decision was reasonable.”).

{25} The meaning of the word “party” as defined in regulation 20.1.3.7(A)(10) NMAC includes the permit applicant “if different from the Petitioner.” Although the regulation specific to informal appeals does not expressly discuss the permit applicant, the Commission’s application of the provision defining “party” to the specific regulations governing informal appeals was reasonable. We see the structure of the Commission’s adjudicatory regulations as not significantly different than that of the Rules of Civil Procedure governing actions in the district courts. The Rules of Civil Procedure for the district courts govern specific proceedings such as, summary judgment (Rule 1-056 NMRA), trial (Rules 1-038 to -052 NMRA), writs, injunctions, and receivers (Rules 1-064 to -066 NMRA), supplementary proceedings (Rule 1-069 NMRA), and Human Rights Commission and Unemployment Compensation appeals (Rules 1-076, 1-077 NMRA). The rules also generally govern motions, see Rules 1-007, -007.1 NMRA, and service of motions, see Rule 1-005(A) NMRA. We know of no rule or practice in the district courts that disassociates the general requirements relating to motions from the rules relating to specific proceedings. We see no reason to treat the Commission regulations differently. Thus, we see no reason to disassociate the Commission’s general regulations relating to motions from those relating to formal and informal appeal petitions and appeal hearing proceedings.

{26} We hold that the Commission’s requirement that GRIP must and should have obtained Chino’s concurrence in the stipulated motion and approval of the order granting the stipulated motion was not erroneous. However, as we discuss later in this opinion, under the circumstances at the time, it was reasonable for the stipulated extension to have been granted.

C. The Commission’s Dismissal of GRIP’s Formal Appeal Petition

{27} GRIP and the Department attack the Commission’s dismissal of its formal appeal petition on several different grounds. Combined, the grounds are: (1) the finding of prejudice to Chino was not supported by substantial evidence; (2) the finding that GRIP was not prejudiced was erroneous as a matter of law; (3) it was unfair to penalize GRIP by dismissing its appeal petition where GRIP followed ambiguous regulations to the best of its ability; (4) the dismissal conflicts with the intent of the Water Quality Act to allow interested parties to initiate and control permit appeals, and dismissal constitutes a clearly incorrect administrative interpretation of the Water Quality Act; (5) the vote for dismissal of one commissioner was arbitrary and an abuse of discretion, and
his improper vote must be disqualified, requiring the dismissal to be overturned; (6) the sanction of dismissal was arbitrary because the justification for that sanction could only have been extreme or willful conduct, and GRIP’s conduct was neither extreme nor willful; and (7) it was arbitrary, fundamentally unfair, and prejudicial to GRIP for the Commission to grant the stipulated motion knowing that only the Department stipulated to it and to then dismiss GRIP’s formal appeal for failing to involve Chino in the extension process. For the reasons that follow, we agree that the dismissal was arbitrary, an abuse of discretion, and not supported by substantial evidence.

28. Preliminarily, our view is that before the Commission interpreted its regulations in this case, they were, as GRIP and the Department contend, unclear. It is not clear whether the general regulations pertaining to motions and service of documents were intended, when adopted, to apply to informal appeal petition proceedings. The lack of clarity as to intent and application of the regulations are highlighted not only by the stark disagreement between the Department and the Commission, and between Chino and GRIP, but also by the views expressed by the Commission’s attorney and a commissioner during the proceedings relating to the dismissal of the formal appeal petition.

29. Further, we think the following circumstances are noteworthy. During the extension request process, the Department agreed to the stipulated motion and the order with neither the motion nor the order reflecting Chino’s concurrence. The Secretary appears to have interpreted the regulations to permit extended negotiations between GRIP and the Department without requiring concurrence from Chino in the motion or the order, and without requiring service of the motion on Chino. The Secretary as chair of the Commission, and acting on its behalf, signed the order granting the extension. The Commission’s hearing clerk did not serve the motion or order on Chino. GRIP’s reading of the regulations was not unreasonable given their lack of clarity. GRIP’s completing the extension process without Chino’s concurrence was reasonable given the Department’s and the Commission’s approvals of the stipulated motion, and the Secretary’s and the Commission’s approval of the extension. It is also noteworthy that Chino requested the Commission to rescind the order, but the Commission did not do so. Rather, the Commission chose to interpret its regulations in a manner that in effect said that the order was improvidently granted because GRIP should have involved Chino in the request for an extension.

1. The Prejudice Issues

30. Chino argued before the Commission that, as a result of the order granting another ninety-day extension to file a formal appeal petition, there was an unjustified delay of the hearing process that prejudiced Chino’s right to a timely hearing on the appeal of its permit. Chino also argued that it expended substantial resources in complying with the permit requirements in reliance on the finality of the permit. Further, Chino argued that the Department’s permit issuance was required before Chino could obtain approval of a closeout plan by the Division, an approval that was required within six months of DP-1340 unless extended by the Director of the Division. Chino expressed concern that “GRIP’s unjustifiable delay in filing a formal appeal petition could affect Chino’s compliance with the Mining Act.” GRIP responded, arguing that there was no undue prejudice to Chino shown, and that it was GRIP that would be prejudiced by a dismissal.

31. On appeal, GRIP argues that the denial of its right under Section 74-6-5(N) of the Water Quality Act and the regulations to a timely hearing was prejudicial. GRIP further argues that the Water Quality Act does not provide any means for it to participate further in the permitting process or to address its concerns with the discharge permit after a dismissal of an appeal. Answering Chino’s argument to the Commission that GRIP could pursue a remedy under the Mining Act, GRIP argues that the Mining Act does not provide for an appeal of an Environment Department decision, including a discharge permit issued under the Water Quality Act. GRIP also argues that even were there a hearing available under the Mining Act, the persons entertaining the issues would not consist of the same water quality experts or level of expertise in water quality issues as the Commission. Answering a commissioner’s point that GRIP could address the issues again in five years when the discharge permit was up for renewal, GRIP repeats its argument that it has been prejudiced by the denial of its right to a timely hearing and argues further that it is unprotected if Chino were to begin cessation of operations before five years passed. The Department contends that the dismissal resulted in substantial prejudice to GRIP for much the same reasons. With respect to prejudice to Chino, the Department contends that Chino has misframed the inquiry and asserts that, as framed, there exists no evidence to support the facts Chino argued as to its expenditure of resources, and that, in fact, the record reflects that Chino did not expend resources as it contends.

32. We agree with GRIP and the Department that there is no evidence in the record supporting the Commission’s finding that Chino was prejudiced by the grant of the extension. While Chino now argues that there are due process and permitting uncertainty issues that constitute bases on which the Commission might have thought Chino was prejudiced, none are of record below. We are not able to discern the circumstances underlying the Commission’s determination of prejudice. Further, the grant of an extension by the Commission and later dismissal of the formal appeal petition appears to have been potentially prejudicial to GRIP. Had the Department’s attorney indicated that the Department would not stipulate to an order granting the extension, or had the Secretary, acting for the Commission, refused to sign the order on the date it were signed, GRIP arguably would have been able to timely proceed with a formal appeal petition that would not have been procedurally attackable. Further, we are unable to discern how the Commission came to the conclusion that the conditions GRIP appealed could be revisited within the permitting process.

33. GRIP appealed directly to this Court pursuant to Section 74-6-7(A). Neither this section nor any other section in the Water Quality Act explicitly states that the Commission must provide a written factual and legal basis for its decision. See VanderVossen v. City of Espanola, 2001-NMCA-016, ¶ 26, 130 N.M. 287, 24 P.3d 319 (requiring a city council to provide a written factual and legal basis for its decision as required under NMSA 1978, § 39-3-1.1(B)(1) (1999)); Atlixco Coalition, 1998-NMCA-134, ¶¶ 17, 19 (requiring a statement of reasons for adjudicative action taken by the Secretary, as required under NMSA 1978, § 74-9-29(B)(1) (1990)). However, Section 74-6-7(A) explicitly gives GRIP a right to appellate review by this Court. We must be able to provide effective, meaningful judicial review. We are unable to do so if an administrative agency’s adjudicatory decision of dismissal with prejudice is founded on unexplained conclusions with inadequate support in the
record. See Fasken v. Oil Conservation Comm’n, 87 N.M. 292, 294, 532 P.2d 588, 590 (1975) (determining disclosure by agency of its reasoning in reaching its ultimate findings to be utterly lacking and stating: “We do not have the vaguest notion of how the [agency] reasoned its way to its ultimate findings. We have only the theories stated in argument of counsel which we are ill-equipped to gauge.”); Atlixco Coalition, 1998-NMCA-134, ¶ 17 (stating that “one of the purposes of requiring a statement of reasons is to allow for meaningful judicial review”); Akel v. N.M. Human Servs. Dep’t, 106 N.M. 741, 743, 749 P.2d 1120, 1122 (Ct. App. 1987) (stating that for adequate appellate review “the hearing officer’s decision [must] adequately reflect the basis for [the] determination and the reasoning used in arriving at such determination”).

{34} Further, because our review is of an administrative, rather than a judicial, decision, we will take care not to inappropriately tread on the executive branch’s functions by looking for a factual or legal basis to support an agency’s decision that is not stated by the agency as the underlying reason for its decision. See Atlixco Coalition, 1998-NMCA-134, ¶¶ 20-21 (stating that where the Legislature directs an agency to give reasons for its action, the appellate court “may not supply a reasoned basis for the agency’s action that the agency itself has not given” (internal quotation marks and citation omitted)).

{35} In the present case, the Commission sought to sanction what it determined to be a violation by GRIP of procedural regulations relating to motion practice. In doing so, the Commission invoked standards of prejudice and lack of prejudice resulting from the violation. The problem was not in the use of these standards, but in the Commission’s conclusions. All the Commission provided was an unexplained conclusion of prejudice to Chino with no evidentiary support in the record and a conclusion of lack of prejudice to GRIP based on an unexplained determination that “the conditions that [GRIP] appealed can be revisited within permitting processes.” This Court is hardly able to effectively and meaningfully review whether the Commission’s ultimate decision to dismiss was erroneous under the Section 74-6-7(B) standard of review.

{36} The issues of prejudice and lack of prejudice were critical to the Commission’s dismissal. But we will not simply defer to the Commission when the exercise of its adjudicatory power results in a dismissal with prejudice based on conclusions that lack support in the record and are not adequately supported by expressed factual and legal reasons.

{37} The Legislature has recognized that administrative agencies must provide written factual and legal bases for their decisions. See, e.g., § 39-3-1.1(B)(2); NMSA 1978, § 74-9-27(B)(1) (1990); § 74-9-29(B)(1). This recognition undoubtedly stems from not only the concepts of fairness and transparency in administrative proceedings, but also from the difficulty in our conducting effective and meaningful statutorily prescribed review.

{38} Unable to effectively and meaningfully review the Commission’s dismissal of GRIP’s formal appeal, we reverse the dismissal and remand for further administrative proceedings as are necessary to adjudicate the issues surrounding GRIP’s formal appeal. Cf. Atlixco Coalition, 1998-NMCA-134, ¶ 24 (holding that administrative action standard of review required agency to provide a “rational connection between the facts found and the choices made”). We hold that the Commission was required to provide reasoned bases for its conclusions. It did not do so. This Court will not attempt to “supply a reasoned basis for the agency’s action that the agency itself has not given.” Id. ¶ 20 (internal quotation marks and citation omitted).

2. The Sanction of Dismissal

{39} Except for dismissal for untimeliness and for violation of discovery orders in extreme cases, the Commission regulations do not provide for dismissal of a formal appeal petition under the circumstances in this case. See 20.1.3.200(A)(3)(d) NMAC; 20.1.3.400(D)(5)(d) NMAC. The regulations do provide, however, that absent “a specific provision . . . governing an action, the Commission may look to the New Mexico Rules of Civil Procedure . . . for guidance.” 20.1.3.106 NMAC. The Commission did not refer to the Rules of Civil Procedure. GRIP and the Department request us to apply Rule 1-041(B) NMRA, which provides for dismissal for failure of a plaintiff to comply with the Rules of Civil Procedure and for the dismissal to act as an adjudication on the merits.

{40} It appears reasonable to use Rule 1-041(B) and cases decided under that rule as guidelines. A Rule 1-041(B) dismissal with prejudice, being a drastic sanction, “should be used sparingly.” Lowery v. Atterbury, 113 N.M. 71, 74, 823 P.2d 313, 316 (1992); accord Newsome v. Farer, 103 N.M. 415, 420-21, 708 P.2d 327, 332-33 (1985); see also Healthsource, Inc. v. X-Ray Assocs. of N.M., P.C., 2005-NMCA-___, ¶ 15, ___ N.M.___, ___ P.3d ___ [(No. 24,589) (June 9, 2005)] (holding against dismissal of an appeal where the “sort of technicality” advanced for dismissal based on lack of jurisdiction was one “that should not result in a dismissal”); Lujan v. City of Albuquerque, 2003-NMCA-104, ¶¶ 12-13, 134 N.M. 207, 75 P.3d 423 (requiring a district court to set forth in the record an explanation of the reasons and justification for the sanction of dismissal with prejudice for failure of a party to respond to a motion for summary judgment, and holding that, absent such an explanation, the sanction of dismissal with prejudice was too severe).

“Dismissals under Rule 41(B) are limited to instances where the plaintiff’s conduct warranting dismissal is extreme.” Lowery, 113 N.M. at 74, 823 P.2d at 316; see Newsome, 103 N.M. at 420-21, 708 P.2d at 332-33 (stating that “[a] party’s simple negligence or other action grounded in a misunderstanding of a court order does not warrant dismissal” and holding that a willful violation of a court order warranted dismissal (internal quotation marks and citation omitted)). “[T]he trial court must consider lesser sanctions prior to dismissal.” Lowery, 113 N.M. at 74, 832 P.2d at 316.

{41} In the present case, there exists no evidence of wrongful or willful conduct on the part of GRIP in presenting a stipulated motion without the concurrence of Chino, in failing to serve Chino with a copy of the stipulated motion, or in failing to obtain Chino’s approval of the order. It is noteworthy that Chino had notice of the informal appeal petition and the deadlines, and was in a position to check on the existence of either a request by GRIP for an extension or the filing or not of a formal appeal petition by GRIP. We determine that the dismissal was arbitrary because it was too extreme a sanction under the circumstances.

3. The One Commissioner’s Vote Issue

{42} Although Chino and the Commission strongly argue to the contrary, one commissioner appears to have based his vote for dismissal on factors outside of the testimony and evidence before the Commission. The commissioner explained his vote, stating that “I’m basing my vote upon what I heard the other days in [the Tyrone mine] hearings. But I’m not going to discuss those with the Commission.”
It also appears that the commissioner was referring to a hearing before the Commission in October and November 2002 on the closure of another mine, involving Chino, called the Tyrone mine. The commissioner’s explanation at the time of his vote was given notwithstanding that the commissioner had been counseled by the Commission’s attorney to keep the Tyrone mine matter separate from the mine at issue. It may be unclear and there appears to be room for disagreement on whether the commissioner clearly based his vote on matters outside the record before him. However, what is clear is that with a six to five vote of the Commission for dismissal that rested solely on the weighing of prejudice to the parties, this commissioner’s explanation for his vote for dismissal creates a serious enough concern about the validity of the outcome of the vote to add support to our view that the Commission’s dismissal was arbitrary and an abuse of discretion.

4. The Timeliness Issue

Contrary to Chino’s contention, GRIP’s petition for formal appeal cannot, under the circumstances, be considered untimely and therefore subject to dismissal under 20.1.3.200(A)(3)(d) NMAC. The Commission did not dismiss on that ground. See Atlixco Coalition, 1998-NMCA-134, ¶¶ 20-21; see also Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (“[W]e may not supply an interpretation . . . to uphold the Board when the Board has not provided that interpretation”). Further, granting the extension was an authorized act of the Commission, having been signed by the Secretary acting on behalf of the Commission. Moreover, the Secretary must be charged with knowledge of the Commission’s adjudicatory regulations. Having granted an extension under the Commission regulations that were at the time unclear, it would have been patently arbitrary for the Commission to turn around and dismiss the formal appeal as being untimely.

CONCLUSION

For the reasons set out in this opinion, we reverse the Commission’s dismissal of GRIP’s formal appeal of Chino’s closure permit and remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

RODERICK T. KENNEDY, Judge

Certiorari Granted, No. 29,528, December 6, 2005

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-140

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
KEVIN JENSEN,
Defendant-Appellant.
No. 24,905 (filed: October 18, 2005)

APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY
KEVIN R. SWEAZEA, District Judge

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OPINION

JONATHAN B. SUTIN, Judge

1. Defendant Kevin Jensen’s house was filthy, filled with animal feces, and was stench-ridden. Rotten food was in the refrigerator. Daily, his fifteen-year-old neighbor, Robbie Stroup, came over to Defendant’s filthy house, drank alcoholic beverages excessively, smoked cigarettes, and visited pornographic websites on Defendant’s computer. Defendant was charged with two counts of contributing to the delinquency of a minor and one count of child abuse. Defendant was convicted on all three counts and appeals only his child abuse conviction. We reverse.

BACKGROUND

2. Chief Deputy Susan Encinias went to the home of Bernice and John Stroup, in Moriarty, New Mexico, on October 28, 2002, regarding a report that the Stroups’ fifteen-year-old son Robbie was missing. Defendant and Jeremy Wetherill were there at the time, along with Ms. Stroup. Upon Encinias’s request, she and two other deputies went with Defendant to Defendant’s house, which was located about five houses from the Stroups’ home. Prior to entering Defendant’s residence, Defendant and Ben Wetherill, an eighteen-year-old friend of Robbie’s, had to move several dogs from the house to the garage. Encinias testified as to the “totally horrible,” “filthy,” “nasty,” and “terrible” conditions inside Defendant’s residence. The chief deputy also testified to seeing what she believed was some type of rodent droppings virtually everywhere. Encinias described that when she opened a door to one of the bedrooms, an emu rushed up to her and surprised her just as she stepped in dog feces. Encinias also testified that the stench of Defendant’s home “just blew your mind away.”

3. Defendant told Encinias that Robbie was at Defendant’s house the prior day,
October 27, 2002. That day, according to Defendant, Robbie and Ben cleaned out Defendant’s van and also played on the computer. Defendant cooked Robbie some sausage. Defendant and Robbie then went to a haunted house in Albuquerque. They returned at about 8:30 p.m. and Defendant made Robbie a hamburger. Robbie played on the computer some more and then walked home around 10:00 p.m.

On October 29, 2002, a deputy sheriff searched Defendant’s house pursuant to a consent signed by Defendant. The deputy found the house with a lot of dog feces on the floor. The deputy seized Defendant’s computer. An animal control officer who came to take the emu had to go outside twice to avoid vomiting from the smell. Encinias prepared a criminal complaint, listing charges of contributing to the delinquency of a minor and child abuse.

Photographs of Defendant’s home were taken on November 1, 2002, and used at trial. According to Encinias, the condition of Defendant’s house had not changed in any substantial way since October 28. In the living room area, there were dog feces, what appeared to be dog vomit on the floor, rat and bird droppings in a cage, and a horrendous stench. In the kitchen there were dog feces and dog vomit. The entire kitchen area, including stove, dishwasher, sink, and counter top, was filthy; areas were littered with dirt and dust, papers, and bottles. A table where Robbie had frequently used a computer was covered with rat or mouse droppings. Black, rotten food was in the refrigerator next to some good hamburger meat. The dining room table was littered with papers, rat droppings, dirt, dust, and spider webs. The baseboards were filthy and looked as though dog or human urine was on them. The bathroom was filthy, too, with coke bottles and a filthy looking plastic soda pop jug with a yellowish orange liquid.

Ben testified that at Defendant’s expense, Defendant took him and Robbie to martial arts classes. Defendant would also take them to Albuquerque to restaurants and hobby shops. Ben and Robbie were at Defendant’s home every day, but only while Defendant was also home. According to Ben, the house was “one big old pig sty” and Defendant did not clean up after his animals and left trash everywhere. Ben testified that Defendant’s six dogs were inside most of the time, doing their “business” there, and that Defendant kept the emu in one of the bedrooms. Robbie spent most of the time in the kitchen and living room area because that was where the computer was located, although Robbie would use the bathroom and also went into the three bedrooms. Defendant cooked hamburgers for Ben and Robbie. Defendant provided beer and whiskey for Ben and Robbie most days through October. Ben would sometimes go with Defendant to a liquor store to buy alcoholic beverages. Ben observed Robbie drink too much and vomit on one of the dogs. Ben was drinking Bacardi 101 and Wild Turkey, and getting drunk every night for two weeks straight in October. Robbie got drunk every time Ben got drunk. Also while at Defendant’s house, Robbie smoked cigarettes that Defendant gave him.

An investigator from the attorney general’s office retrieved information from Defendant’s computer. Robbie used Defendant’s computer, with a user identification given to him by Defendant. Robbie went to adult nude websites on the internet every day and often while Defendant sat right beside him. An expert from the attorney general’s office determined that Robbie’s user identification had been added to Defendant’s account. He determined that Robbie’s user identification was used to visit various pornographic and other adult websites.

The district court informed the jury that Robbie died after the events at issue in the trial, and that the jury was not to speculate as to the circumstances of Robbie’s death. Defendant was convicted of one count of contributing to the delinquency of a minor, based on providing alcoholic beverages; one count of contributing to the delinquency of a minor, based on providing access to pornographic websites; and one count of child abuse by endangerment, based on placing Robbie in a situation dangerous to his health or life. Defendant appeals, asserting that his conduct did not constitute child abuse by endangerment.

**DISCUSSION**

### A. Standard of Review

In determining whether evidence is sufficient to uphold a conviction, we view the evidence in the light most favorable to the State and indulge all permissible inferences in support of the verdict. *State v. Graham*, 2005-NMSC-004, ¶ 6, 137 N.M. 197, 109 P.3d 285; *State v. Sanders*, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994). We make a legal determination whether the evidence viewed in that manner “could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt.” *Graham*, 2005-NMSC-004, ¶ 6 (quoting *Sanders*, 117 N.M. at 456, 872 P.2d at 874) (emphasis omitted).

### B. Child Abuse by Endangerment

In enacting Article 6 of the Crimes Against Children and Dependents, the Legislature set out crimes of (1) abandonment of a child, (2) abuse of a child, (3) abandonment of a dependent, (4) contributing to the delinquency of a minor, and (5) obstruction of reporting or investigation of child abuse or neglect. *NMSA 1978, §§ 30-6-1 to -4* (1963, as amended through 2004). The Legislature defined “child” as “a person who is less than eighteen years of age[.]” *§ 30-6-1(A)(1).* Further, the Legislature made distinctions as to the perpetrators. Only a parent, guardian, or custodian can be prosecuted for abandonment of a child. *§ 30-6-1(B).* Yet “a person” can be prosecuted for child abuse and “any person” can be prosecuted for contributing to the delinquency of a minor. *§§ 30-6-1(D), -3.*

Commonly referred to as child abuse by endangerment, the crime of which Defendant was convicted proscribes “knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be: (1) placed in a situation that may endanger the child’s life or health[.]” *§ 30-6-1(D)(1).* In the present case, Defendant was charged in the jury instruction only with the “causing” element, and not the “permitting” element, of Section 30-6-1(D). To sustain a conviction under this third degree felony statute, “[t]here must be a reasonable probability or possibility that the child will be endangered.” *Graham*, 2005-NMSC-004, ¶ 9 (internal quotation marks and citation omitted). The State does not have to prove that the child suffered physical harm. *Id.* “However, . . . the Legislature did not intend to criminalize conduct creating a mere possibility, however remote, that harm may result to a child.” *Id.* (internal quotation marks and citation omitted).

The jury was not instructed on the definition of “endangered.” When a common term is used, the jury may properly apply the common meaning of the term. *See State v. Carnes*, 97 N.M. 76, 79, 636 P.2d 895, 898 (Ct. App. 1981). To “endanger” is “to bring into danger or peril” or “to create a dangerous situation.” *Merriam-Webster’s Collegiate Dictionary* 380 (10th ed. 2002). *Black’s Law Dictionary* defines “child endangerment” as “[t]he putting of a child in a place or position that exposes him or
her to danger to life or health.” Black’s Law Dictionary 189 (7th ed. 2000).

{13} A defendant may be convicted when his actions are negligent, judged under a criminal negligence standard. Criminal negligence, as defined in Section 30-6-1(A)(3), “means that a person knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.” See also State v. Castaneda, 2001-NMCA-052, ¶ 20, 130 N.M. 679, 30 P.3d 368 (discussing the criminal negligence requirement and the Section 30-6-1(A)(3) definition of “negligently”). A reckless disregard requires that the defendant “[knew or should have known [his] conduct created a substantial and foreseeable risk, [he] disregarded that risk and . . . was wholly indifferent to the consequences of the conduct and to the welfare and safety of the child.” Graham, 2005-NMSC-004, ¶ 8 (quoting UJI 14-604 NMRA).

{14} Several New Mexico cases have applied the child abuse by endangerment statute to conduct when the situation endangered the child’s life or health but no actual physical harm befell the child. See id. ¶¶ 2, 10-12, 14 (sustaining conviction as to a one-year-old child and a three-year-old child living in a home because of the existence of marijuana and a marijuana bud at various locations in the home accessible to the children); State v. McGruder, 1997-NMSC-023, ¶¶ 37-38, 123 N.M. 302, 940 P.2d 150 (upholding conviction of child abuse by endangerment where the defendant threatened a child’s mother with a gun while child was standing behind her mother even though the child was not touched or physically harmed); Castaneda, 2001-NMCA-052, ¶¶ 7, 17 (noting that driving while intoxicated with unbuckled children in the car can constitute child abuse by endangerment and that “[a] defendant may be found guilty of third degree child abuse even if the child was never actually in danger or even likely to suffer harm”); State v. Ungarten, 115 N.M. 607, 609-10, 856 P.2d 569, 571-72 (Ct. App. 1993) (upholding conviction where the defendant brandished and thrust a knife in the direction of a nearby eleven-year-old child and his father and the child could not tell if the thrust was directed at him or his father). But see State v. Trujillo, 2002-NMCA-100, ¶¶ 1, 4-5, 19-20, 132 N.M. 649, 53 P.3d 909 (reversing conviction when an eight-year-old child was in a separate room from the room in which domestic violence was occurring and the child was neither exposed to significant risk of physical danger by direct threat nor in the direct line of danger); State v. Roybal, 115 N.M. 27, 34, 846 P.2d 333, 340 (Ct. App. 1992) (reversing conviction where a six-year-old child was in a car with her mother some ten to fifteen feet away from where her father was conducting a drug transaction, and stating, “[o]n the record before us, this charge was not supported by substantial evidence indicating that [the child] was in fact placed in danger”).

{15} The cases do not expressly discuss the Section 30-6-1(D) elements of “causing or permitting.” The cases illustrate, nevertheless, that convictions for child abuse in this jurisdiction have arisen from situations ranging from more direct and active threatening conduct with a child in a line of physical danger to less direct and more passive conduct that creates a dangerous condition with a child in close proximity to the dangerous condition. At the active end of the spectrum, under McGruder, a person’s threatening, violent conduct where the child is in a direct line of physical danger constitutes child abuse. 1997-NMSC-023, ¶ 38. In mid-court, under Castaneda, a person’s conduct, driving while intoxicated with children in the vehicle, constitutes child abuse. 2001-NMCA-052, ¶ 22. And, at the passive end, under Graham, a parent’s allowance of young children to be in the immediate vicinity of a controlled substance, where the substance is accessible to an infant and a three-year-old, constitutes child abuse. 2005-NMSC-004, ¶ 14. Trujillo and Roybal may be characterized as falling in the situational neighborhood of Castaneda and Graham, but falling outside of the proximity required for endangerment. The analyses in these cases focused on the manner in which and extent to which the defendant created a dangerous situation and brought a child into or exposed a child to danger or peril.

{16} Graham appears to have injected an inquiry in addition to proximity with respect to endangerment, namely, the child’s susceptibility to harm. Graham determined there was a “reasonable possibility of danger to the very young children from ingesting the marijuana.” 2005-NMSC-004, ¶ 14. The children’s mother testified she believed that if the children had ingested the marijuana, they would have become sick. Id. ¶ 4. Along that line, our cases indicate that the statute is intended to protect “defenseless” children. “The [L]egislature’s decision to criminalize the conduct described by the statute reflects a compelling public interest in protecting defenseless children. [C]hildren, who are often times defenseless, are in need of greater protection than adults.” Id. ¶ 9.

DEFENDANT’S CONTENTIONS

{17} Defendant raises issues in regard to the elements of endangerment, causation, and criminal negligence. In regard to causation and endangerment, Defendant contends no rational jury could have found that his conduct in allowing Robbie to be in his home, unclean as it was, created a reasonable probability or possibility that Robbie would be endangered. Defendant argues that he did not place Robbie in a line of physical danger or significant and articulable harm, or harm that was reasonably likely to come to pass. Defendant emphasizes that the risks involved from being in an unhealthy environment are not comparable to the immediate risks involved in being shot, stabbed, or in a vehicle accident, distinguishing the present case from Graham, McGruder, Ungarten, and Castaneda. Defendant relies on Trujillo and Roybal in which this Court essentially held that the mere proximity of a child to violence, without any direct threat or placement in a line of physical danger (Trujillo), or the mere proximity to a drug transaction where violence was only possible (Roybal), was insufficient to convict under the child abuse by endangerment statute. See Trujillo, 2002-NMCA-100, ¶¶ 4-5, 19-20; Roybal, 115 N.M. at 34, 846 P.2d at 340. In Defendant’s view, there existed nothing more than a “mere possibility of some harm to Robbie . . . by simply being present in [Defendant’s] home,” circumstances that “extend[] beyond the scope of the child abuse statute.”

{18} Thus, Defendant argues that his abnormal conduct does not amount to child abuse under the statute because his conduct and the circumstances did not create anything but speculative harm and were not what the Legislature intended to classify as a third degree felony. As part of his
argument, Defendant states that Robbie was an almost grown-up boy able to distinguish between good and contaminated food and to reject bad food, and that Robbie was at no greater risk in the home than an adult would be.

{19} In regard to criminal negligence, Defendant contends that the evidence was insufficient to show that he was indifferent to the consequences as to the health and safety of Robbie. Defendant argues that because he resided in his own home without health or safety problems having arisen, he could not foresee a substantial risk of harm to Robbie or be wholly indifferent to the consequences of the risk as the law requires. See State v. Mascarenas, 2000-NMSC-017, ¶¶ 9-11, n.4, 129 N.M. 230, 4 P.3d 1221 (discussing civil and criminal negligence and the propriety of an instruction defining reckless disregard in a criminal context as one stating the defendant was wholly indifferent to the substantial and foreseeable risk one’s conduct creates). To uphold his conviction, Defendant asserts, is to place at risk of a third degree felony conviction those parents whose homes are filthy, by his, due to a civil type of negligence where there is no intent to harm children.

THE STATE’S CONTENTIONS

{20} At trial, the State argued that Defendant essentially lured Robbie to his house with items Robbie could not reasonably procure at home, alcohol and pornography, and repeatedly placed Robbie in the filthy and harmful environment Defendant had created. On appeal, the State argues that the evidence of endangerment is that Robbie was at Defendant’s house on a daily basis for hours at a time drinking alcohol provided by Defendant; the house was replete with animal feces, rotten food, unrestrained animals, and general filth; and that these circumstances resulted in stench that caused at least two visitors to nearly vomit upon entry. The State argues that the potential harm of sickness or disease from the environment was not remote, speculative, or insignificant, and the conditions were potentially hazardous to anyone’s health, including, particularly, Robbie’s health because of his repeated exposure to the conditions. In regard to Defendant’s conduct, the State argues that “[t]he extreme condition of the house, coupled with Defendant’s obvious knowledge of it and continuing fostering of his relationship with Robbie and providing him with alcohol, was sufficient for the jury to find reckless disregard for Robbie’s health, safety and welfare.”

{21} Outside of New Mexico cases, the State relies on cases from other jurisdictions that have upheld convictions for child abuse arising from filthy conditions in homes. See State v. Piew, 84 P.3d 850 (Utah Ct. App. 2004); Provo City v. Cannon, 994 P.2d 206 (Utah Ct. App. 1999); State v. Deskins, 731 P.2d 104 (Ariz. Ct. App. 1986); State v. Smith, 634 P.2d 1 (Ariz. Ct. App. 1981). As we discuss below in this opinion, we are not persuaded by the State’s arguments that the evidence was sufficient to convict Defendant of criminal child abuse by endangerment under Section 30-6-1(D)(1). Nor are we persuaded by any of the out of state authority on which the State relies. The cases are all significantly distinguishable as to such critical factors as the age of the child, the condition existing in a home where the child lived, or the coverage of the applicable statute.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT

{22} The evidence does not portray a defenseless child too young to protect himself from the filthy and unhealthy conditions in the home. We can understand that there may exist conditions of the home that might create a potential for harm to a child somewhat younger than Robbie—a child that is not old enough to understand or appreciate the health hazard from filth, feces, and stench. But here, Robbie, fifteen years old, was not living in the home or required to live there. He chose to visit, presumably able at his age to understand the health hazard and avoid consuming rotten food or any other sort of animal excrement. The fact there was rotten food in the house was insufficient for conviction. There was no evidence that Robbie himself cooked while at Defendant’s or that Defendant mistook rotten meat for good meat when cooking for Robbie. There was no evidence that Robbie became sick. Nor was there evidence that animal feces would likely cause Robbie any significant health problems or that he was particularly susceptible to a perceived endangerment.

{23} In essence, the State’s case was nothing more than that the child abuse by endangerment statute criminalizes the filthy conditions of a non-controlling caretaker’s home continually made available to a fifteen-year-old boy. Absent evidence showing the particular susceptibility to endangerment of a child who has reached fifteen years of age, we do not believe the evidence was sufficient for a rational jury to conclude from common experience beyond a reasonable doubt that the situation was sufficiently precarious such that Robbie was on a reasonably sure path to harm’s way with unfortunate health consequences reasonably likely to result. See State v. Sanders, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994) (explaining that appellate courts review evidence with deference to the findings of the fact finder and determine whether the evidence viewed in this manner “could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt”).

CONCLUSION

{24} We reverse Defendant’s conviction for child abuse by endangerment.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Chief Judge

CYNTHIA A. FRY, Judge
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