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Special Insert:

CLE AT-A-GLANCE
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*The NM Rules of Professional Conduct (Rule 16-803) and the NM Code of Judicial Conduct (Rule 21-300) provide for strict confidentiality.
SEMINAR REGISTRATION FORM
CLE PROGRAMS - State Bar Center

SEPTEMBER - VIDEO REPLAY TUESDAYS

19

Third Annual Elder Law Seminar
State Bar Center
Albuquerque
Tuesday, September 19
8 a.m.
2.7 General and 1.0 Ethics CLE Credits
☑ $149

Seven Deadly Sins of Employment Law
State Bar Center
Albuquerque
Tuesday, September 19
1 p.m.
2.7 General CLE Credits
☑ $109

Pro Se Can You See: Navigating the Fog of the Pro Se Litigant
State Bar Center
Albuquerque
Tuesday, September 19
10 a.m. AND 1 p.m.
1.0 Ethics and 1.0 Professionalism CLE Credits
☑ $79

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MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

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E-mail
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Professionalism Tip

With respect to the public and to other persons involved in the legal system:
I will strive to set a high standard of professional conduct for others to follow.

Meetings

September
11 Taxation Section Board of Directors, noon, via teleconference
11 Attorney Support Group, 5:30 p.m., First United Methodist Church
13 Membership Services Committee, noon, State Bar Center
13 Children’s Law Section Board of Directors, noon, Juvenile Justice Center
14 Public Law Section Board of Directors, noon, Risk Management Division, Santa Fe
14 Business Law Section Board of Directors, 3 p.m., State Bar Center
15 Family Law Section Board of Directors, 9 a.m., via teleconference
15 Indian Law Section Board of Directors, 9 a.m., State Bar Center
15 Alternative Methods of Dispute Resolution Committee, noon, Second Judicial District Court
15 Board of Bar Commissioners Meeting, 10 a.m., Tucumcari

State Bar Workshops

September
21 Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces
27 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

October
25 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque
26 Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

December
6 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque
7 Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

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

COURT NEWS
N.M. Supreme Court
Judicial Performance Evaluation Commission
Press Conference

The Judicial Performance Evaluation Commission (JPEC) will hold a news conference to release JPEC’s recommendations on four Appellate Court judges and 13 Bernalillo County Metropolitan Court judges standing for retention in November 2006. The news conference will be held at 10 a.m., Sept. 15, at the 2nd Judicial District Court, 400 Lomas Blvd. NW, 3rd Floor Conference Center, Albuquerque. For more information call, Louise Baca-Sena, (505) 827-4960.

See page 10 for further information on JPEC evaluations, goals and procedures.

Law Library
September Library Hours:
Monday–Friday, 8 a.m.–6 p.m.
Closed Saturdays and Sundays
Phone: (505) 827-4850; fax: (505) 827-4852; e-mail: libref@nmcourts.com; Web site: www.supremecourtlawlibrary.com.

Minimum Continuing Legal Education Board
Notice of Vacancy

One attorney vacancy exists on the Minimum Continuing Legal Education Board due to a recent resignation. Attorneys interested in volunteering time on this board may send a letter of interest and/or resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for letters/resumes is Sept. 18.

Proposed Revisions to the Rules of Criminal Procedure for the Metropolitan Courts

The Supreme Court is considering proposed revisions to the Rules of Criminal Procedure for the Metropolitan Courts. Written comments on the proposed amendments may be sent to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, New Mexico 87504-0848, by Sept. 18. For reference, see the Aug. 28, (Vol. 45, No. 35) Bar Bulletin.

First Judicial District Court
Criminal Bench and Bar
Brown-Bag Meeting

The 1st Judicial District Court Criminal Bench and Bar will have a brown-bag meeting at noon, Sept. 19, in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to Sally or Kim, (505) 827-5047.

Family Law Brown-Bag Meeting

The 1st Judicial District Court will host its family law brown-bag meeting at noon, Sept. 12, in the Grand Jury Room, second floor of the Steve Herrera Judicial Complex in Santa Fe. The meeting will focus on the role of court monitors and GALs. For more information or to suggest agenda items to be discussed, contact Elege Simons Harwood, (505) 988-5600 or esimonsharwood@simonsfirm.com. Provide one dollar, name and bar number and receive 1.0 CLE credit, pending approval.

Third Judicial District Court
Announcement of Vacancy

A vacancy on the 3rd Judicial District Court in Las Cruces exists as of Sept. 4 due to the death of the Honorable Sylvia Cano-Garcia. The chair of the 3rd Judicial District Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site: http://lawschool.unm.edu/judsel/application.php, or e-mailed/faxed/mailed by calling Sandra Bauman, (505) 277-4700. The deadline for applications has been set for 5 p.m., Sept. 19. Applications received after that date are not considered. The District Judicial Nominating Commission will meet at 9 a.m., Oct. 2, at the 3rd Judicial District Courthouse, 201 W. Picacho, Las Cruces, to evaluate the applicants for this position.

Judicial Selection Commission

Judicial Nominating Commission information is available at http://lawschool.unm.edu/judsel/commissions/index.php. The links will only be viable when a vacancy exists and a commission meeting is pending in the respective court. Information will be updated on the Web site as it becomes available.

Fifth Judicial District Court
Lea County
New Office Hours

Effective Sept. 5, the office of the district court clerk in Lea County, Lovington, will no longer be open during the lunch hour. Office hours are 8 a.m. to noon and 1 to 5 p.m.

Swearing-In Ceremony

Members of the Bar and legal community are invited to the swearing-in ceremony of J. Richard Brown as district court judge in the 5th Judicial District, Division IX, at 4 p.m., Sept. 15, Eddy County Courthouse, 102 N. Canal, Third Floor, Carlsbad. A reception will immediately follow the ceremony.

Thirteenth Judicial District Court
Case Reassignments

Judge Violet C. Otero, Division VI, will be transferring cases from the Domestic Relations Court to the newly appointed position at the 13th Judicial District Court, Bernalillo. Effective Sept. 12, Judge John F. Davis will assume Domestic Relations Court cases assigned to Judge Violet C. Otero. Parties who have not previously exercised their right to challenge or excuse will have ten days from Sept. 12 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

Swearing-In Ceremony

Members of the Bar and legal community are invited to the swearing-in ceremony of John F. Davis as district court judge in the 13th Judicial District, Division VII, at 4:45 p.m., Sept. 14, at the Sandoval County Judicial Complex, 1500 Idalia Road, Building A, Bernalillo. Chief Judge Louis P. McDonald wishes to invite all to join in this event. A reception will immediately follow the ceremony.

STATE BAR NEWS
2006 Elections
Section Elections

In accordance with the section bylaws, each State Bar section is required to appoint a nominating committee for its annual election and provide notice of the election.
so that any section member may indicate to the committee his or her interest in serving on the board of directors. Section members interested in serving on their board of directors should contact a member of the nominating committee by Sept. 22. See the Aug. 7, Aug. 21, Aug. 28 and Sept. 4 issues of the Bar Bulletin or visit the State Bar Web site (Divisions/Sections/Committees, Section Election) for previously published nominating committees and a complete list of positions to be elected.

Bankruptcy Law Section
Nominating Committee:
Thomas D. Walker, Chair
(505) 766-9272
tdwalker@jtwlawfirm.com
Linda S. Bloom
(505) 764-9600
lbloom@spinn.net
James C. Jacobsen
(505) 222-9085
jcjacobsen@ago.state.nm.us
Richard J. Parmley
(505) 327-0496
Gerald R. Velarde
(505) 248-1828
jerryvelarde@hotmail.com

Elder Law Section
Nominating Committee:
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ahartmann4@comcast.net
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(505) 541-0212
joyce@tumut.com
Fletcher R. Catron
(505) 982-1947
fcatron@catronlaw.com
Robert F. Rosebrough
(505) 722-9121
bob@jrlawyers.com
Patricia J. Wagner
(505) 265-2300
pwagner@sclo.net

Health Law Section
Nominating Committee:
Barbara C. Quissell, Chair
(505) 816-4224
Barbara_Quissell@bcbsnm.com
J. Douglas Compton
(505) 331-8426
Jeffrey C. Gilmore
(505) 272-9792
jgillmore@salud.unm.edu
Gabriel M. Parra
(505) 923-6505
gparra@phs.org
Rod M. Schumacher
(505) 622-6221
rschumacher@atwoodmalone.com

Indian Law Section
Nominating Committee:
Helen Bernadette Padilla, Chair
(505) 955-7714
hpadilla@pueblooftesuque.com
Steffani A. Cochran
(505) 455-2271
scochran@puebloofpojoaque.com
Melanie P. Fritzsche
(505) 238-2220
mel@hotmail.com
Robert Francis Gruenig
(505) 242-2175
bgruenig@ntec.org
Lynn A. Trujillo
(505) 867-3317
ltrujillo@sandiapueblo.nsn.us

Taxation Section
Nominating Committee:
R. Tracy Sprouls, Chair
(505) 768-7355
tsprouls@rodey.com
Frank Kenneth Bateman
(505) 988-9646
kbateman@gblawsantafe.com
Joel M. Carson
(505) 746-3505
lchclaw@pvtnetworks.net
Dean B. Cross
(505) 526-2101
dc@lclaw-nm.com
Kurt A. Sommer
(505) 982-4676
kas@somlawfirm.com

Attorney Support Group
Change in Sept. Meeting
Due to the Labor Day holiday, the next Attorney Support Group meeting will be held at 5:30 p.m., Sept. 11, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. In October, the group will return to its regular schedule, meeting on the first Monday of the month.

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

Bench and Bar Relations Committee
The State Bar of New Mexico will honor four New Mexico attorneys for their "commitment to pro bono representation and Equal Access to Justice." The honorees are Kenneth Egan of Las Cruces, Albert Schimmel III of Albuquerque, Robert Turner of Deming and Laurie Hedrich of Albuquerque. They will be honored at the opening ceremony of the Bench and Bar Conference, 5 to 6:30 p.m., Nov. 2, at the Hampton Inn in Roswell.

Board Of Bar Commissioners Meeting Agenda
10 a.m., Sept. 15
Pow Wow Inn, Tucumcari
1. Approval of July 20, 2006 meeting minutes
2. Finance Committee report
3. Acceptance of July financials
4. Approval of 2007 budget worksheet
5. Approval of Bylaws/Policies Committee report
   A. Amendments to the Travel Policy
   B. New Proposed American Express Usage Policy
   C. New Proposed Vehicle Usage Policy
   D. Amendments to State Bar Bylaws Article IX, Section 9.4, Review of Sections and Committees
6. Nomination of 2007 Board of Bar Commissioners officers
7. Fair Judicial Elections Committee request
8. President's report
   A. Appoint new chair of Personnel Committee
   B. Appoint Membership Survey Sub-Committee
   C. Other
9. Executive director's report
10. Division reports
11. 2007 Board of Bar Commissioners meeting schedule
12. Board of Bar Commissioners election schedule
13. New business
Casemaker
Free Legal Research is Here
Casemaker is now live and accessible on the State Bar Web site at www.nmbar.org. Casemaker is free online legal research made available to State Bar members. Contact Veronica Cordova, vcordova@nmbar.org, or (505) 797-6039, for technical assistance or questions.

Children’s Law Section
Annual Art Contest
The Children’s Law Section is sponsoring its fourth annual poster and writing contest. This event is a great way for organizations and attorneys and their firms to assist in changing the lives of New Mexico’s troubled youth by supporting children’s artistic talent. The contest is for children who are currently detained or who are involved in programs such as the Youth Reporting Center, Drug Court and anti-domestic violence programs. Contestants in Bernalillo, Sandoval, Valencia and Santa Fe counties will be asked to create a work based on the theme, “Walk a Mile in My Shoes,” using tennis shoes as the medium for displaying their art.

Donations are solicited to fund contest supplies and prizes for the children whose work will be recognized and celebrated at the Bernalillo County awards ceremony to be held Nov. 3 at the Children’s Court. Tax-deductible monetary donations may be made by Sept. 15 to:

- Children’s Law Section
- State Bar of New Mexico
- PO Box 92860
- Albuquerque, NM 87199-2860.

Donations are tax-deductible through the New Mexico State Bar Foundation. Contact Sara Crecca, (505) 385-6517 or saracrecca@creccalaw.com, for more information.

Employment and Labor Law Section
Annual Meeting
The Employment and Labor Law Section will hold its annual meeting at noon, Oct. 13, in conjunction with the 2006 Employment and Labor Law Institute at the State Bar Center. Agenda items should be sent to Chair Carlos Quiñones, cquiiones@narvaezlawfirm.com or (505) 248-0500.

- The cost of the CLE program is $169 ($159 for section members, government attorneys and paralegals). Lunch will be provided. See the CLE At-A-Glance insert in this issue for more information. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Health Law Section
Annual Meeting and CLE
The Public Law Section will hold its annual meeting at 4:30 p.m., Oct. 12, in conjunction with the 2006 Health Law Symposium at the State Bar Center. Contact Chair Doug Compton at (505) 331-8426 to add agenda items. The cost of the CLE program is $179, and $169 for section members, government attorneys and paralegals. Lunch will be provided and attendees will earn 5.4 general and 1.0 professionalism CLE credits. See the CLE At-A-Glance insert in this issue of the Bar Bulletin for more information. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Paralegal Division
Monthly Brown-Bag CLE for Attorneys and Paralegals
The Paralegal Division invites members of the legal community to bring a lunch and attend Introduction to the Judicial Standards Commission, presented by James Noel, Attorney at Law. The program will be held from noon to 1 p.m., Sept. 13, at the State Bar Center and offers 1.0 general CLE credits. Registration begins at the door at 11:30 a.m. and costs $16 for attorneys and $15 for paralegals, legal assistants and secretaries. For more information, contact Cheryl Passalaqua at Butt, Thornton & Baehr, P.C., (505) 884-0777.

Public Law Section
Annual Meeting and CLE
The Public Law Section will hold its annual meeting at 12:30 p.m., Sept. 22, in conjunction with the New Mexico Administrative Law Institute. All section members are encouraged to attend. Agenda items should be sent to Chair Al Lama, Al.Lama@state.nm.us or (505) 827-0475.

- The cost of the CLE program is $189 ($169 for section members, government attorneys and paralegals). Lunch will be provided. See the CLE At-A-Glance insert in this issue for more information. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

OTHER BARS
New Mexico Women's Bar Association
Annual Gala
The New Mexico Women’s Bar Association will hold its annual gala from 5:30 to 10 p.m. Sept. 15, at the Albuquerque Marriott Hotel, located at Louisiana and I-40. The event will feature the musical machinations of Vanilla Pop. In honor of the 2006 Year of the Child, the Henrietta Pettijohn Award will be presented to Tara Ford and Elizabeth McGrath of the Pegasus Legal Services for Children. A UNM law student will be awarded a scholarship. Enjoy hors d’oeuvres, cocktail fare and live and silent auctions. Contact pbj@sutinfirm.com or (505) 883-3382.

Bi-Monthly Networking Lunch
The next networking luncheon of the New Mexico Women’s Bar Association will be held from noon to 1:30 p.m., Sept. 13, at NYPD Pizza, 215 Central Avenue NW, Albuquerque. Guest speakers are the Honorable Clay P. Campbell, 2nd Judicial District Court; the Honorable M. Monica Zamora, 2nd Judicial District Court; the Honorable Carl J. Butkus, 2nd Judicial District Court; and Adrian Penni, independent candidate running against Judge Butkus. Each speaker will give a brief presentation and respond to questions from the floor.

Lunch is ordered off the restaurant menu with payment made directly to NYPD Pizza. Register for the luncheon no later than Sept. 8 with Patricia Baca at pbj@sutinfirm.com. The luncheons are open to all interested persons.

UNM School of Law
7th Annual MALSA Golf Tournament
The Mexican-American Law Student Association (MALSA) invites members of the legal community to play in MALSA’s 7th Annual Golf Tournament at 8 a.m., Sept. 30, at the Sandia Golf Club. Sponsored by the New Mexico Hispanic Bar Association, the tournament is MALSA’s largest fundraiser of the year and allows the association to provide services to its members and the community. MALSA is dedicated to the advancement of Hispanics in higher education. Each year MALSA conducts practice LSATS
and admission workshops and mentors incoming law students as well as high school students through Engaging Latin American Communities for Education (ENLACE). The money raised also provides funding to offset student travel for job interviews, moot court competitions and Bar exam preparation courses. To register for the golf tournament, go to http://lawschool.unm.edu/announcements/malsa/golf/index.php or e-mail Nicholas, marshani@law.unm.edu.

**Library Fall Hours**

**Building & Circulation:**
- Monday–Thursday: 8 a.m. to 11 p.m.
- Friday: 8 a.m. to 6 p.m.
- Saturday: 9 a.m. to 6 p.m.
- Sunday: noon to 11 p.m.

**Reference:**
- Monday–Thursday: 9 a.m. to 9 p.m.
- Friday: 8 a.m. to 6 p.m.
- Saturday: 9 a.m. to 6 p.m.
- Sunday: No Reference

**New Employers Workshops**

The New Mexico Taxation and Revenue Department and the Internal Revenue Service are offering free, one-day workshops in Albuquerque for businesses with or without employees. These workshops are designed to address the tax requirements for new and existing businesses.

The New Business Workshops are for all new business owners. Items to be covered include New Mexico gross receipts tax, IRS filing requirements and a brief summary of other new business issues. New Business Workshops are offered the first, second and third Tuesday of each month.

The New Employer Workshops are for small businesses that have employees or plan to have employees. Regulatory and tax filing requirements from six different federal and state agencies will be covered. New Employer Workshops are offered the fourth Tuesday of each month.

All workshops will be held at the New Mexico Taxation and Revenue Department, 5301 Central, NE (Bank of the West building), 10th Floor, Conference Room A, 8:15 a.m. to 3:45 p.m., with a one-hour lunch.

New Business Workshops:
- Sept. 12 and 19; Oct. 3, 10 and 17; Nov. 7, 14 and 21; Dec. 5, 12 and 19.

New Employers Workshops:
- Sept. 26; Oct. 24; Nov. 28; and Dec. 26.

For additional information, contact the State of New Mexico Taxation and Revenue Department, (505) 841-6200.

**Children’s Law Summit on Serving Former Foster Youth**

A number of child welfare system stakeholders have come together to develop a plan for serving 18- to 21-year-old youth who have exited the foster care system. As part of this planning, the Court Improvement Project of the New Mexico Supreme Court; the Children, Youth, and Families Department (CYFD); the Corrine Wolfe Children’s Law Center; the UNM School of Law; the New Mexico Citizen Review Board; the New Mexico CASA Network; and Red Mountain Family Services are sponsoring an one-day summit. Preserving Connections/Promoting Independence will explore how we can maximize independence and create the skills, supports and resources young people need to live on their own. With assistance from national legal experts, we will look at the optimal role for the court, CYFD, the youth attorney, and others.

The summit will be held from 8:30 a.m. to 4 p.m., Sept. 15, at the Hotel Albuquerque in Old Town. The registration fee of $35 includes materials and a working lunch; no CLE credits are being offered. To register, download a registration form from http://ipl.unm.edu/childlaw or contact Hilari Lipton, (505) 277-1652.

**New Mexico Christian Legal Aid**

New Mexico Christian Legal Aid (NMCLA) will hold its annual training session from 11:30 a.m. to 5 p.m., Sept. 22, at the State Bar Center. The training, which will be eligible for CLE credit, will cover the unique pro bono services that NMCLA provides to the homeless. Learn how to be a part of NMCLA and make a difference in our community. Free lunch will be provided. Call Denise Trujillo or Jim Roach, (505) 243-4419, for reservations and/or questions.

**New Mexico Sentencing Commission**

**Indigent Defendants Study**

There is a broad perception that a lack of adequate resources severely hampers the ability of the State of New Mexico to meet its constitutional mandate to provide effective assistance of counsel through public defenders and contract attorneys to indigent defendants. Accordingly, the New Mexico Sentencing Commission has contracted with the National Center for State Courts (NCSC) to develop a clear measure of the number of attorneys (both department and contract) and support staff needed to provide effective and competent defense for all cases as part of a broad workload study that will also include judges and district attorneys. During the month of October, NMPDD attorneys and staff, as well as all contract attorneys in the state, are asked to participate in a time study by tracking how they spent their time at work on cases with indigent defendants. So that the study will accurately reflect the contribution that contract attorneys make on behalf of indigent defendants in New Mexico, it is essential that all contract attorneys attend a training session and participate fully throughout the entire period of the time study. To make that possible, it is absolutely critical that each contract attorney fill out a short Web-based survey, which may be found at http://www.ncsconline.org/nmcontract_atty. Efforts are currently being made for attorneys who participate in training and the time study to receive one hour’s CLE credit for professionalism. Any attorney with questions about this study is asked to contact Dr. Matthew Kleiman (NCSC), (757) 259-1535, or Linda Freeman, (505) 277-4263. [For reference, see the Sept. 4 (Vol. 45, No. 36) Bar Bulletin.]

**Workers’ Compensation Administration**

The judges and mediators of the Workers’ Compensation Administration are holding a brown-bag lunch at noon, Sept. 15, at the Workers’ Compensation Administration, 2410 Centre SE, Albuquerque. Anyone from outside the Albuquerque area can attend by video conference at any of the Administration’s area offices.
New Mexico Judicial Performance Evaluation Commission To Release Recommendations

By Felix Briones, Chair
Judicial Performance Evaluation Commission

On Sept. 15 the New Mexico Judicial Performance Evaluation Commission (JPEC) will release its recommendations on whether one Supreme Court justice, three Court of Appeals judges, and 13 Bernalillo County Metropolitan Court judges should be retained by voters in the upcoming November election. Under the New Mexico State Constitution, judges and justices must receive at least 57 percent voter approval to remain on the bench.

JPEC evaluates judges standing for retention who have served on the bench for at least two years and have been elected in one partisan election. The commission's goals are to improve the performance of judges and justices and to provide useful, credible information to the state's voters on justices and judges standing for retention.

"By providing this information, we hope to encourage all voters to vote in every election for which they are eligible—including the judicial retention elections—and provide them with information upon which to base their vote," explained Felix Briones, Jr., a Farmington attorney who serves as chair of JPEC.

The commission compiles its evaluations based on confidential surveys from attorneys who have had direct experience with a judge or justice being evaluated as well as confidential surveys from court staff, resource staff (mainly law enforcement officers), professional staff, fellow judges and jurors.

In addition, JPEC conducts personal interviews with each judge and justice being evaluated to share results of the surveys and review their self-assessment of performance. Possible recommendations include retain, do not retain, no opinion or no recommendation.

JPEC is comprised of 15 volunteer members (seven lawyers and eight non-lawyers), who are appointed by the Supreme Court to staggered terms. These individuals are selected from nominations made by the governor, chief justice of the Supreme Court, speaker of the House, president pro tem, House minority leader, Senate minority leader and president of the State Bar.

The evaluation will be released to the public through the commission's Web site (www.nmjpec.org), through a news conference on Sept. 15 at the 2nd Judicial District Courthouse in Albuquerque (see page 6 for more information) and through informational reports and ads in the state's newspapers in early October.

For more information about the Judicial Performance Evaluation Program or to request a copy of JPEC's 2006 Report to Voters, interested individuals may call Louise Baca-Sena, project manager, (505) 827-4960, or e-mail aoicmb@nmcourts.com.
## SEPTEMBER

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Program Location</th>
<th>G</th>
<th>P</th>
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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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**Additional Events:**
- [Regional Seminar](#)  
- [Pro Se Can You See: Navigating the Fog of the Pro Se Litigant](#)  
- [Anatomy of Court-Annexed Arbitration](#)  
- [An Employer’s Obligation Under FMLA, ADA and WCA](#)  
- [How to Maintain an Effective Human Resources Department](#)  
- [Major Issues in Arbitration](#)  
- [Effective Jury Persuasion](#)  
- [Moral Character Test: Its Affect on Admissions and Retention](#)  
- [New Challenges of Professional Liability Insurance](#)  
- [New Environmental Liability Protections](#)  
- [Regional Seminar](#)
## Writs of Certiorari

**Effective September 11, 2006**

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OPINIONS

AS UPDATED BY THE CLERK OF THE NEW MEXICO COURT OF APPEALS
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EFFECTIVE SEPTEMBER 1, 2006

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Slip Opinions for Published Opinions may be read on the Court’s website:
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In This Issue

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An Invitation from
Chief Judge William F. Lang
Second Judicial District Court

“Anatomy of Court-Annexed Arbitration”
Ceremonial Courtroom, Third Floor, Bernalillo County Courthouse
Thursday, September 21, 2006
1.0 Professionalism CLE Credit

Standard Fee $45

Registration Form

11:30 Registration & Lunch
Noon CLE
1:00 Adjourn

Remember you are an arbitrator! If you are an active member of the State Bar of New Mexico, have been licensed to practice law for five (5) or more years and are a resident of or have an office in Bernalillo County.

For further information, please contact:
David Levin - Director, Court Alternatives - Second Judicial District Court
(505) 841-7475 • albell@nmcourts.com

New Mexico Administrative
Law Institute
State Bar Center, Albuquerque • Friday, September 22, 2006
5.2 General & 1.5 Ethics CLE Credits

Join the Public Law Section as we discuss the various complexities of administrative law in New Mexico. In this full-day seminar, an overview will be presented followed by a panel discussion on adjudicatory and rulemaking proceedings before small and large state agencies, a dialogue on the need for a central panel of judges and hearing officers in New Mexico, as well as sessions on administrative appeals, emerging issues, and a look at administrative proceedings and the application of ethical rules.

8:00 a.m. Registration
8:25 a.m. Welcome - Al Lama, Chair, Public Law Section
8:30 a.m. Overview of New Mexico Administrative Law: Constitutional, Statutory, Case Law Framework
Professor Michael B. Browde, UNM School of Law
9:30 a.m. Panel Discussion: Adjudicatory and Rulemaking Proceedings Before Different Agencies
Panelists: Bob White, City of Albuquerque
Pamelya Herndon, NM Reg. and Licensing Dept.
Felicia Orth, NM Environment Department Corliss Thalley, NM Attorney General’s Office

ATTENTION: Look for an expanded display of American Bar Association publications at our seminars.

NOTE: Programs subject to change without notice.

continued on page 2
NOVEMBER

Bench and Bar (continued)
5:00 p.m. Adjourn and Exhibits Close
5:50 p.m. Light Reception and Entertainment by Ralph Dowden, Esq.
Roswell Museum and Art Center (adjacent to Roswell Convention & Civic Center)
6:30 p.m. Winter Bar Party, Chaves County Bar (ticketed event) - Roswell Convention & Civic Center

SATURDAY
7:30 – Noon Registration
7:30 – 8:30 a.m. Breakfast Buffet
7:30 a.m. Exhibits Open
8:30 a.m. Report from New Mexico ATJ Self-Represented Working Group Making Recommendations on Self-Represented Litigant Access - Presenters: TBA
9:00 a.m. Presentation of Recommendations from NM access to Justice Commission and Court Adoption
Sarah Singleton and/or Hon. Petra Jimenez Mues
9:55 a.m. Break
10:15 a.m. Breakout Session 2: Taking Action
Increase Funding
Legislative Funding, Senator Michael Sanchez
Other Funding, Meredith McBurney
Improve Pro Bono, Robert Echols
Increase Access for Self-Represented, Hon. Lora Livingston
Systemic Changes, Hon. Howard Dana
Break
11:30 a.m. Reports from Breakout Session 3 (Group Setting)
12:00 p.m. Summing Up and Send-Off / Audience Impressions
12:30 p.m. Lunch
1:30 p.m. Conference Conclusion

Bridge The Gap 2006
Friday, November 17, 2006 • State Bar Center, Albuquerque
5.5 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits
Co-Sponsor: Young Lawyers Division
Standard Fee $209 • Government & Paralegal $199 • YLD Member $109
7:30 a.m. Registration
8:00 a.m. Do’s & Don’ts from the Bench - Moderator, Hon. Monica Zamora, 2nd Judicial District Court
Hon. Gary Clingman, 5th Judicial District Court, Hon. Carmen E. Garza, Magistrate Judge, U.S. District Court,
Hon. Daniel E. Ramczyk, Albuquerque Metro Court
S. Carolyn Ramos, Esq., Butt Thornton & Baehr, PC
9:30 a.m. Written Discovery - S. Carolyn Ramos, Esq., But Thornton & Baehe, PC
10:45 a.m. Deposition Discovery - Trent A. Howell, Esq., Holland & Hart LLP
11:45 a.m. Lunch (provided at the State Bar Center)
12:45 a.m. Bridging The Gaps (1.0 Professionalism)
Moderators: John T. Feldman, Esq. and Bonnie M. Stepleton, Esq., UNM School of Law
1:45 p.m. Break
2:00 p.m. BREAKOUT SESSIONS
How to Do Your First Civil Case - Norman Lee Gagne, Butt Thornton & Bache PC
Collections for the Solo Practitioner - Allan L. Wainwright, Esq.
3:00 p.m. Break
3:15 p.m. BREAKOUT SESSIONS
How to Defend Your First Criminal Case - LaDonna Giron, Giron Law Offices
How to Do Your First Family Law Case - Maria Montoya Chavez, Esq., Sutin Thayer & Browne
4:15 p.m. Break
4:30 p.m. Practical Considerations In The Disciplinary System (1.0 Ethics) - Hon. Edward L. Chavez, NM Supreme Court
5:30 p.m. Adjourn and Reception (State Bar Lobby)

JUNE

5 Visions of the Future: The New Workplace
State Bar Center, Albuquerque • Thursday, September 28, 2006 • 1.5 General CLE Credits
Co-Sponsor: New Mexico Bar Association - Law Office Management Division
Standard Fee $105
9:00 a.m. The Future of The Workplace: The View from And Around the World
S. Carolyn Ramos, Esq., Butt Thornton & Baehr, PC
10:15 a.m. The Future of The Workplace: The View from New Mexico
Michael T. Googe, Of Counsel, Holland & Hart LLP
12:00 p.m. Break
12:30 p.m. Lunch (provided at the State Bar Center)
1:30 p.m. The Future of The Workplace: The View from Other States
Ronald L. Crossman, Esq., Bozman, Smith & Crossman
2:30 p.m. The Future of The Workplace: The View from Other Countries
Richard J. Leach, Esq., Citicorp Legal Services
3:30 p.m. Break
3:45 p.m. Adjourn

OCTOBER

Grandparents (And Others) Raising Children: Helping Your Client Get Guardianship When It Really Matters
State Bar Center, Albuquerque • Thursday, October 5, 2006 • 6.5 General CLE Credits
Co-Sponsors: Law Access of New Mexico and Pegasus Legal Services for Children
Standard Fee $179
Government & Paralegal $169
8:30 a.m. Registration
9:00 a.m. Grandparents Raising Grandchildren in New Mexico: The Shadow Foster Care System
Liz McGrath, Esq.
12:30 p.m. Lunch (provided at the State Bar Center)
1:30 p.m. Parental Preference vs. Best Interests of the Child: The Legal Foundation of Guardianship in New Mexico
Liz McGrath, Esq.
2:30 p.m. Representing a Client in a Kinship Guardianship Case: The KGA from A to Z
Carol Garner, Esq. and Liz McGrath, Esq.
3:30 p.m. Case Examples
Carol Garner, Esq. and Liz McGrath, Esq.
10:00 a.m. The Kinship Care Giver Legal Assistance Network: Opportunities to Expand Your Practice While Doing Good
Carol Garner, Esq. and Liz McGrath, Esq.
10:45 a.m. Break
11:00 a.m. Representing a Client in a Kinship Guardianship Case, continued
Carol Garner, Esq. and Liz McGrath, Esq.
11:45 a.m. Case Examples
Carol Garner, Esq. and Liz McGrath, Esq.
12:30 p.m. Taking a Stand: Social and Emotional Aspects of Kinship Care Giving for Children and Care Givers
Cindy Anderson, Program Coordinator, Outcomes, Inc.
Other Legal Issues Affecting Care Givers and Children in Kinship Families
Carol Garner, Esq. and Liz McGrath, Esq.
12:45 p.m. Bridging The Gaps (1.0 Professionalism)
Moderators: John T. Feldman, Esq. and Bonnie M. Stepleton, Esq., UNM School of Law
Panelists include Andrew G. Schultz, Esq., Managing Director, Rodery Law Firm

Cle At-A-Glance - 2
Mediation Skills for Lawyers

A 40-Hour Skills Course

State Bar Center, Albuquerque
Monday, October 9 - Friday, October 13, 2006 • 8:00 a.m. – 5:00 p.m.
39 General & 1 Professionalism CLE Credits

Co-Sponsors: First and Second Judicial District Courts, through the State Bar, in lieu of the annual Settlement Week training offered by Court Alternatives

Workshop Facilitators: David Levin, Esq. and Cynthia Olson

Special Guests: Arturo L. Jaramillo, Esq., Cabinet Secretary, New Mexico General Services Department; Professor Scott H. Hughes, UNM School of Law

Standard Fee $895

WHERE MEDIATION SKILLS MEETS LEGAL PROCESS

Interested in adding mediation to your practice or learning new skills for enhanced interpersonal communication? Come learn from two experts in this mediation skills training workshop designed specifically for lawyers. This hands-on course will give participants the opportunity to deepen their understanding of mediation and settlement facilitation while also exposing them to the use of emotional intelligence in this field. Through classroom presentations, group discussions, and interactive role-plays and exercises, participants will apply dispute resolution skills in a variety of settings.

continued on page 7
**2006 Health Law Symposium**
State Bar Center, Albuquerque • Thursday, October 12, 2006
5.4 General and 1.0 Professionalism CLE Credits

Co-Sponsor: Health Law Section
Standard Fee $179
Health Law Section Member, Government and Paralegal $169

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>8:00 a.m.</td>
<td>Registration</td>
</tr>
<tr>
<td>8:20 a.m.</td>
<td>Introductory Remarks</td>
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<tr>
<td>8:30 a.m.</td>
<td>Health Care Industry Update</td>
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<td>Reception (provided at the State Bar Center)</td>
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<td>8:45 a.m.</td>
<td>Lunch (provided at the State Bar Center)</td>
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<td>10:00 a.m.</td>
<td>Break</td>
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<td>10:15 a.m.</td>
<td>Lessons from Rita/Katrina for Emergency Care</td>
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<td>11:15 a.m.</td>
<td>Avian Flu and the Western U.S.</td>
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<td>12:15 p.m.</td>
<td>Lunch (provided at the State Bar Center)</td>
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**2006 Employment and Labor Law Institute**
State Bar Center, Albuquerque • Friday, October 13, 2006
6.0 General CLE Credits

Co-Sponsor: Employment & Labor Law Section
Standard Fee $169
Employment & Labor Law Section Members, Government, Paralegal $159

<table>
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<tr>
<th>Time</th>
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<tbody>
<tr>
<td>8:30 a.m.</td>
<td>Registration</td>
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<tr>
<td>9:00 a.m.</td>
<td>Religion in the Workplace</td>
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<tr>
<td>10:00 a.m.</td>
<td>Break</td>
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<tr>
<td>10:15 a.m.</td>
<td>First Amendment Retaliation Claims</td>
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<tr>
<td>11:00 a.m.</td>
<td>Employment Law Update</td>
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<td>12:00 noon</td>
<td>Lunch (provided at the State Bar Center)</td>
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**22nd Annual Family Law Institute**
State Bar Center, Albuquerque • Friday and Saturday, October 20-21, 2006
10.0 General and 1.0 Ethics Credits, plus 1.0 Professionalism Credit (optional)

Co-Sponsor: Family Law Section
Standard Fee $309 • Family Law Section Member, Government, Paralegal $289

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<th>Time</th>
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<tbody>
<tr>
<td>8:00 a.m.</td>
<td>Registration</td>
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<tr>
<td>8:20 a.m.</td>
<td>Introductory Remarks</td>
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<tr>
<td>8:30 a.m.</td>
<td>Divorce Taxation</td>
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<td>10:30 a.m.</td>
<td>Break</td>
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<tr>
<td>10:45 a.m.</td>
<td>The New Bankruptcy Act and What It Means for DR Lawyers</td>
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<tr>
<td>12:30 p.m.</td>
<td>Lunch (provided at the State Bar Center)</td>
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<tr>
<td>3:30 p.m.</td>
<td>Break</td>
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<tr>
<td>3:45 p.m.</td>
<td>Panel Discussion</td>
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**Legislative Process Review In New Mexico**
State Bar Center, Albuquerque • Friday, October 27, 2006
6.5 General CLE Credits

Co-Sponsor: Public Law Section
Standard Fee $179
Public Law Section Member, Government and Paralegal $169

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<tbody>
<tr>
<td>8:00 a.m.</td>
<td>Registration</td>
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<tr>
<td>8:30 a.m.</td>
<td>Overview of the New Mexico Legislature</td>
</tr>
<tr>
<td>9:45 a.m.</td>
<td>Break</td>
</tr>
<tr>
<td>10:00 a.m.</td>
<td>New Mexico Constitution</td>
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<tr>
<td>11:00 a.m.</td>
<td>Drafting of Legislation</td>
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<tr>
<td>12:00 noon</td>
<td>Lunch (provided at the State Bar Center)</td>
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OPINION

PETRA JIMENEZ MAES, JUSTICE

(1) This is a direct appeal taken from the imposition of a life sentence plus thirteen years for Defendant’s convictions of first degree murder, attempted murder, aggravated battery, tampering with evidence, and possession of a firearm by a felon. Those convictions stem from the shooting death of New Mexico State police officer Damacio Montaño and the non-fatal shooting of Eric Montaño outside the Two Minute Warning bar in Los Lunas, New Mexico. Defendant presents two issues for this Court’s review. First, Defendant argues that the trial court erred when it refused to allow him to present specific conduct evidence to support his contention that the decedent was the first aggressor. Second, Defendant asserts that his convictions for aggravated battery and attempted murder violate double jeopardy protections. Finding no merit in Defendant’s claims, we affirm.

I. Background

(2) Although several conflicting stories detailing the events surrounding the shooting were presented at trial, it is clear that there was a series of altercations throughout the evening at the Two Minute Warning bar. These events culminated in the forcible removal of many individuals from the bar and with the bar owner locking the entrance to the establishment when violence erupted. Defendant was at the bar that night with his friend, Nestor Chavez, and several female companions. Brothers Damacio and Eric Montaño, two off-duty police officers, along with Damacio’s wife, Lisa Montaño, were also at the bar that night. When fighting broke out inside the establishment between various individuals, Damacio and Eric, along with the bar’s bouncers, began removing people from the bar. At some point, Defendant, Nestor Chavez, and their companions either left or were escorted out of the bar.

(3) Once outside, Defendant, Nestor Chavez, and two of the women who were with them that night gathered inside Defendant’s car. Shortly thereafter, Damacio approached the car. Again, there was conflicting testimony regarding why Damacio approached the car and what prompted his interaction with Defendant and Nestor. Eric Montaño testified that he and his brother were approaching yet another fight in the parking lot when they were intercepted by Nestor Chavez, who began punching them. The defense witnesses presented a very different picture, testifying that it was only after Damacio charged toward Defendant’s car that Nestor got out of the car and began struggling with Damacio. While Eric Montaño and others testified that Damacio was merely trying to restrain Nestor in a typical law enforcement fashion, the defense presented witness testimony that Damacio, a large man, was actually beating up Nestor, and that Eric walked up and also began beating Nestor.

(4) In any event, after some period of chaotic altercation between the Montaño brothers, Nestor Chavez, Defendant, and their female companions, Defendant retreated briefly and returned with a gun. Again, there was conflicting testimony regarding whether the Montaño brothers at that point identified themselves as police officers and whether Damacio made any sudden movements toward Defendant. What is clear is that Defendant opened fire, shooting Eric Montaño once and Damacio seven times. While Eric Montaño survived the shooting, Damacio’s wounds were fatal.

(5) Defendant was charged with ten crimes: first degree murder, two counts of conspiracy to commit murder, attempted murder, aggravated battery with a deadly weapon, two counts of tampering with evidence, two counts of conspiracy to commit tampering with evidence, and possession of a firearm by a felon. Two essentially different stories were presented to the jury at Defendant’s trial regarding the interaction between Damacio and Defendant. Defendant maintained that it was Damacio, with the help of his brother Eric, who initiated the altercation and that Defendant armed himself and ultimately shot both men in defense of Defendant’s friend, Nestor Chavez. The State presented testimony that it was Defendant and Nestor Chavez who instigated the altercation and that police officers Damacio and Eric Montaño were merely trying to restrain Defendant...
and Nestor when the violence escalated to the point of the shooting. Defendant was convicted of first degree murder, attempted murder, aggravated battery, tampering with evidence, and possession of a firearm by a felon.

II. Discussion
A. Trial Court’s Exclusion of Victim’s Prior Conduct


[7] Shortly before trial commenced, the State moved to exclude “any evidence of or reference to alleged domestic violence between decedent Damacio Montaño and his widow, Lina Montaño.” That motion was filed in response to co-defendant Nestor Chavez’s request for any documentation filed in the Fifth Judicial District Court related to possible incidences of domestic violence between Damacio Montaño and his wife. In the motion, the State argued that any such evidence was irrelevant under the New Mexico Rules of Evidence and that the prejudicial effect of any such information or its tendency to confuse the issues or mislead the jury would outweigh its possible probative value.

[8] The trial court heard argument from counsel on the issue during a pretrial conference. Defense counsel argued in support of the admission of alleged incidences of domestic violence, stating, “[m]y defense is centered around that, and if I don’t even have that much, then I’ve got even less. I was going to bring up that Damacio Montaño had a propensity for the violence . . . [a]nd I did want to paint Mr. Damacio in the most accurate light as possible, that he was a violent, aggressive man and obviously a drunk, violent, aggressive man who had an alcohol level of 1.4 in him at the time.” The State again argued relevancy and prejudice and questioned the accuracy of Defendant’s assertions. Prior to ruling on the motion, the trial court agreed to conduct a suppression hearing in chambers to accurately determine the substance of Lina Montaño’s possible testimony.

[9] At the suppression hearing, Lina Montaño testified that there were two incidents of domestic violence between her and Damacio, one of which occurred while she was pregnant with her first child, or shortly thereafter, and one of which resulted in the termination of Damacio’s employment with the Artesia Police Department. She described the incidents as involving pushing and slapping. After the second incident, Lina obtained a temporary restraining order against her husband. Lina consistently maintained that Damacio did not have any problems with alcohol and was not intoxicated during either domestic dispute, and that she had never seen her husband fight anyone. She also indicated that she and Damacio had received counseling and had not had any additional domestic disputes since the second incident.

[10] At the conclusion of the hearing, the trial court judge announced that he did not believe that “there [was] a sufficient showing to [the] court of a pertinent trait of the victim in [the] matter, and [he] couldn’t see how it would come up” in accordance with Rule 11-404(A)(2) NMRA. He stated that under Rule 11-403 NMRA balancing, the proposed testimony would not be more prejudicial than probative, but that the admission was nonetheless precluded by Rule 11-404 NMRA.

[11] The New Mexico Rules of Evidence allow for the admission of “[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.” Rule 11-404(A)(2) NMRA. Under Rule 11-405(B) NMRA, “[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person’s conduct,” in addition to proof in the form of reputation or opinion testimony. Rule 11-405 NMRA, therefore, creates an exception to the general rule that only reputation or opinion testimony is permitted on direct examination to prove a character trait. Finally, the Rules of Evidence allow for the exclusion of evidence, even if relevant, “if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 11-403 NMRA.

[12] Defendant argues primarily that he should have been allowed to demonstrate that the victim, Damacio, had a propensity for violence and aggression, through the introduction of specific instances of violent conduct between Damacio and his wife. Defendant argues that such evidence was certainly relevant to his defense, that is, to his contention that Damacio was the first aggressor in the altercation preceding the shooting. In contrast, the State argues that any specific evidence of Damacio’s prior domestic disputes was neither relevant nor probative as to whether Damacio was the first aggressor. The State also argues that, under existing caselaw, no defendant is entitled to offer instances of specific conduct to prove that the victim was the first aggressor.

[13] The apparent confusion regarding whether specific instances of a victim’s conduct may be offered to demonstrate that he or she was the first aggressor appears to have arisen from two identically-captioned cases, *State v. Baca*, 114 N.M. 668, 845 P.2d 762 (1992) (“Baca I”) and *State v. Baca*, 115 N.M. 536, 854 P.2d 363 (N.M. Ct. App. 1993) (“Baca II”).

[14] In Baca I, this Court addressed the trial court’s refusal to admit specific instances of the victim’s prior violent conduct. The defendant was on trial for the first degree murder of a fellow prison inmate. The defendant proffered testimony from himself and from another inmate regarding specific instances of prior violent conduct committed by the victim. The trial court refused to admit the evidence. This Court stated that the trial court retains discretion to determine admissibility, and “an abuse of discretion may be found only if the exclusion of the evidence precluded the criminal defendant from proving an element of his defense.” 114 N.M. at 672, 845 P.2d at 766 (citing *State v. Gallegos*, 104 N.M. 247, 253-54, 719 P.2d 1268, 1274-75 (N.M. Ct. App. 1986)). The issue was whether the trial court was proper in excluding the requested evidence. This Court held that it was because the exclusion did not prevent the defendant from proving an element of his defense. *Id.* at 672-73, 845 P.2d at 766-67.

[15] Baca II involved the consolidated appeal of two defendants who stabbed another resident while he was asleep at the Springer Boys’ School. To support their

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contention that the victim was the first aggressor, the defendants sought discovery of the victim’s “master file” held by the detention facility, stating that the file contained evidence of the victim’s prior violent behavior, including “any psychiatrists done, all previous arrests, any forensics that may have been done, any adjudications, any problems he’s had at the Boys’ School, any problems elsewhere, family’s history. It’s a complete background of the person.”

*Baca II*, 115 N.M. at 538, 854 P.2d at 365 (internal quotation marks omitted). Defense counsel maintained that he did not know precisely what was in the file that could aid his clients’ defense, but nonetheless sought discovery of the entire file. *Id.* The district court ordered the release of many of the documents requested, explaining that the victim’s character was at issue due to the defendants’ claim of self-defense. However, the district court did not allow the defendants access to documents in the master file “that detailed specific instances of the victim’s prior conduct in which [d]efendants were not implicated.” *Id.*

{16} On appeal, the defendants asked the Court of Appeals to consider whether the trial court erred in denying their motion for release of the victim’s complete master file, despite the access they received to many of the documents contained therein. The Court of Appeals framed the issue as “whether specific instances of a victim’s prior conduct of which the [d]efendants were not aware would have been admissible to support [d]efendants’ theory of the case.” *Id.* at 539, 854 P.2d at 366. The Court stated, “[w]e believe the answer depends on whether [d]efendants would have been entitled to offer such evidence to prove the victim was the first aggressor in the incident material to this appeal.” *Id.* The Court, although noting that both the State and the defendants had construed *Baca I* as allowing for the admission of specific instances of conduct to show that the victim was the first aggressor, nonetheless stated that it did not read *Baca I* as so permitting. *Id.* at 540, 854 P.2d at 367. The *Baca II* court recognized that the discussion in *Baca I* concerning the issue was dicta, and therefore not binding. The *Baca II* court also stated that *Baca I* “clarif[ied]” New Mexico law on the issue of whether, when evidence of reputation or opinion is offered under [Rule 11-405] to show that the victim was the first aggressor, a defendant must have been aware of that reputation or opinion.” *Id.*

{17} We agree with the Court of Appeals’ interpretation of *Baca I* and hereby clarify that evidence of specific instances of a victim’s prior violent conduct may not be admitted to show that the victim was the first aggressor when the defendant is claiming self-defense. The New Mexico Rules of Evidence only allow evidence of specific instances of a person’s conduct when the character or character trait of that person is an essential element of a charge, claim, or defense. Rule 11-405(B) NMRA. The elements of self-defense are: (1) there was an appearance of immediate danger of death or great bodily harm to the defendant; (2) the defendant was in fact put in fear by the apparent danger of immediate death or great bodily harm and killed the victim because of that fear; and (3) a reasonable person in the same circumstances would have acted as the defendant did. UJI 14-5171 NMRA. When a defendant is claiming self-defense, his or her apprehension of the victim is an essential element of his or her claim. Therefore, under Rule 11-405(B), evidence of specific instances of the victim’s prior violent conduct of which the defendant was aware may be admitted to show the defendant’s fear of the victim. However, a victim’s violent character is not an essential element of a defendant’s claim of self-defense, but rather circumstantial evidence that tends to show that the victim acted in conformity with his or her character on a particular occasion. Thus, under Rule 11-405(B) NMRA, only reputation or opinion evidence should be admitted to show that the victim was the first aggressor. The discussion in *Baca I* that indicates otherwise was not necessary to the holding in that case.

{18} Therefore, we hold that the district court in the case at bar did not abuse its discretion in excluding the evidence of specific instances of prior domestic violence between Damacio and his wife. Further, we do not believe that the exclusion prevented Defendant from presenting an essential element of his defense. To the contrary, there was ample testimonial evidence presented at trial to support Defendant’s contention that Damacio initiated the altercation, that Defendant was put in fear by Damacio, and that Defendant acted in self-defense. Specifically, several witnesses testified that it was Damacio who first approached and began fighting with Defendant and Nestor Chavez in the bar’s parking lot.

**B. Double Jeopardy**

{19} Defendant argues that his convictions for aggravated battery with a deadly weapon and attempted murder violate the principles of double jeopardy. The New Mexico and United States Constitutions each contain a prohibition that no person “be twice put in jeopardy” for the same offense. N.M. CONST. art. II, § 15; U.S. CONST. amend. V. Because the issue of whether there has been a double jeopardy violation is a constitutional one, we review de novo. See *State v. Attaway*, 117 N.M. 141, 145-46, 870 P.2d 103, 107-08 (1994); see generally *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991).

{20} Our courts have delineated three separate protections afforded by the double jeopardy prohibition: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *Swafford*, 112 N.M. at 7, 810 P.2d at 1227 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794 (1989)). Within the multiple punishment context, there are two types of cases: (1) multiple violations of the same statute, referred to as “unit of prosecution” cases; and (2) violations of multiple statutes, referred to as “double-description” cases. *Id.* at 8, 810 P.2d at 1228. Due to the fact that there are different values implicated for double jeopardy depending on the context and the type of case, different standards and tests have evolved. “New Mexico multiple punishment theory is marked by a profusion of terms and tests—each with its own formulaic approach—purportedly serving different double jeopardy or policy interests.” *Id.* at 10, 810 P.2d at 1230. These tests were thoroughly discussed in *Swafford*, with this Court adopting a two-part test for double-description multiple punishment cases (the “Swafford test”). *Id.* at 13, 810 P.2d at 1233. The case at bar is a double-description multiple punishment case, and therefore the proper analysis to determine whether a double jeopardy violation has occurred is the *Swafford* test.

{21} The first part of the test requires the determination of whether the conduct underlying the offenses is unitary. *Id.* If it is, we proceed to the second part of the test, which requires us to examine the relevant statutes to determine whether the Legislature intended to create separately punishable offenses. *Id.* Absent clear legislative intent, we follow the rule of statutory construction known as the “Blockburger test,” taken from *Blockburger v. United States*, 284 U.S. 299 (1932). This test focuses strictly upon the elements of the statutes.
“The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” *Id.* at 304. “[T]he evidence and proof offered at trial are immaterial.” *Swafford*, 112 N.M. at 8, 810 P.2d at 1228. See also *Illinois v. Vitale*, 447 U.S. 410, 416 (1980) (“[T]he Blockburger test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial.”); *Brown v. Ohio*, 432 U.S. 161, 166 (1977) (“This test emphasizes the elements of the two crimes. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . .”) (quoting *Iannelli v. United States*, 420 U.S. 770, 785 n. 17 (1975)); *Thigpen v. Roberts*, 468 U.S. 27, 36 (1984) (“[T]his is about as clear a statement as there can be of the principle that the double jeopardy inquiry turns on the statutory elements of the two offenses in question, and not on the actual evidence that may be used by the State to convict in a particular case.”) (Rehnquist, J., dissenting).

(22) Under the Blockburger test, which is simply a canon of construction used to assist in determining legislative intent and not a constitutional rule, if each statute requires an element of proof not required by the other, we presume that the Legislature intended to punish the offenses separately. *Swafford*, 112 N.M. at 9, 14, 810 P.2d at 1229, 1234. We must then turn to other indicia of legislative intent, including the language, history, and subject of the statutes, the social evils sought to be addressed by each statute, and the quantum of punishment prescribed by each statute. *Id.* at 14-15, 810 P.2d at 1234-35. If those factors reinforce the presumption of distinct, punishable offenses, then there is no violation of double jeopardy. See *id.*

(23) Defendant argues that his convictions for both aggravated battery and attempted murder violate double jeopardy protections. He asserts that “under the facts of this case, there is no way in which the offense of Aggravated Battery is not subsumed within the offense of Attempted Murder.” (Emphasis added.) Defendant’s argument, however, is misplaced. This is a double-description multiple punishment case; therefore, the appropriate test is the Swafford test. See *id.* at 13, 810 P.2d at 1233. The State concedes that the conduct underlying the aggravated battery and the attempted murder, Defendant shooting but not killing Eric Montañó, was unitary. Therefore, we can proceed directly to the second step of the Swafford test, examining legislative intent. And, as stated above, determining legislative intent in this context has nothing to do with the facts and evidence presented at trial. It is based upon the statutory elements of the offenses. The issue is whether the Legislature intended multiple punishments when a person commits an act which violates both statutes. “[T]he Double Jeopardy Clause only prevents a court from imposing greater punishment than the Legislature intended.” *State v. Dominguez*, 2005-NMSC-001, ¶ 5, 137 N.M. 1, 106 P.3d 563 (citing *Swafford*, 112 N.M. at 7, 810 P.2d at 1227). There is no clear legislative expression regarding whether or not to impose multiple punishments within the statutes of attempted murder and aggravated battery; therefore, we must first apply the Blockburger test. After doing so, we will examine other indicia of legislative intent.

(24) The elements of attempted murder are: (1) the defendant committed an overt act in furtherance of murder; (2) with the intent to commit murder; and (3) tending but failing to effect its commission. NMSA 1978, § 30-28-1 (1963) and NMSA 1978, § 30-2-1 (1994). The elements of aggravated battery are: (1) unlawful touching or application of force to the person of another; (2) with intent to injure that person or another. NMSA 1978, § 30-3-5 (1969). Attempted murder requires an overt act, an intent to commit murder, and the failure to complete the crime, none of which are elements of aggravated battery. Aggravated battery requires an unlawful touching or application of force, which attempted murder does not. Because the elements of one statute are not subsumed within the other, there is a presumption of legislative intent to punish the offenses separately. *Swafford*, 112 N.M. at 14, 810 P.2d at 1234.

(25) We next examine other indicia of legislative intent regarding the two statutes. “Legislative intent may be gleaned from the statutory schemes by identifying the particular evil addressed by each statute; determining whether the statutes are usually violated together; comparing the amount of punishment inflicted for a violation of each statute; and examining other relevant factors.” *State v. Gonzales*, 113 N.M. 221, 225, 824 P.2d 1023, 1027 (1992) (quoting *Swafford*, 112 N.M. at 14-15, 810 P.2d at 1234-35). The prohibition against attempted murder is directed at protecting a person’s life and the statute is directed at punishing a person’s state of mind, whereas the prohibition against aggravated battery is directed at protecting a person from bodily injury and the statute is directed at punishing actual harm. Although similar, we must construe these harms narrowly. *Swafford*, 112 N.M. at 15, 810 P.2d at 1235. Statutes that are “directed toward protecting different social norms and achieving different policies can be viewed as separate and amenable to multiple punishments.” *Id.* at 14, 810 P.2d at 1234. Also, there is nothing in the language of the statutes that indicates that the Legislature enacted both statutes as alternative ways of committing the same crime. See *State v. Cowden*, 1996-NMCA-051, ¶ 13, 121 N.M. 703, 917 P.2d 972. Further, although the two statutes may be violated together, they are not necessarily violated together. There are countless situations where aggravated battery is committed with only an intent to injure, not an intent to kill. “The fact that each statute may be violated independent of the other will also lend support to the imposition of sentences for each offense.” *State v. Sosa*, 1997-NMSC-032, ¶ 36, 123 N.M. 564, 943 P.2d 1017 (citing *Swafford*, 112 N.M. at 14-15, 810 P.2d at 1234-35).

In comparing the quantum of punishment for each offense, the difference in the amount of punishment is arguably an indication that the Legislature did not intend for aggravated battery and attempted murder to be separately punishable. However, this factor alone is not enough to overcome the other findings of legislative intent. See *State v. Fuentes*, 119 N.M. 104, 109, 888 P.2d 986, 991 (N.M. Ct. App. 1994) (“The fact that punishment for armed robbery is three times the punishment for aggravated battery is one point in favor of [defendant’s] position, but it is not alone persuasive.”). Therefore, after weighing all of the above factors, we hold that Defendant’s convictions for attempted murder and aggravated battery do not violate the prohibition against double jeopardy.

(26) In determining that no double jeopardy violation has occurred in the case at bar, we re-emphasize that “the sole limitation on multiple punishments is legislative intent.” *Swafford*, 112 N.M. at 13, 810 P.2d at 1233. The dissent asserts that our appellate courts have applied the *Swafford* and Blockburger tests in a “formalistic manner” and that “[a]t times it seems as if our appellate courts prefer the ease of looking up statutory elements of a crime, in place
of the hard work of examining separately the policy goals and consequences of each criminal statute to divine legislative intent.” We are well aware that the Blockburger test is simply a tool to use in divining legislative intent. Absent unambiguous language indicating whether the Legislature intended for aggravated battery and attempted murder to be separately punishable when one act violates both statutes, we conclude that the Blockburger test is the appropriate tool in the first step of determining legislative intent. We assume that in enacting the statutes in question, the Legislature was aware of the Blockburger test and could have included language indicating its intent not to punish these two offenses separately when committed as a result of the same act. See Albernaz v. United States, 450 U.S. 333, 341-42 (1981) “[I]f anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the Blockburger rule and legislated with it in mind.” “The plain meaning of the provision is that each offense is subject to the penalty prescribed; and, if that be too harsh, the remedy must be afforded by act of [the Legislature], not by judicial legislation under the guise of construction.” Blockburger v. United States, 284 U.S. at 304. And, as with our above analysis in the case at bar, using the Blockburger test constitutes just a part of the examination of legislative intent.

{27} The dissent, like Defendant, uses the facts of the case at bar to assert that “[w]ithout application of force the Defendant could not have been convicted of aggravated battery and a double jeopardy analysis would not be necessary.” But as previously stated, using the facts in a case to determine legislative intent is improper under Blockburger. The dissent’s analysis is similar to the “DeMary test.” In State v. DeMary, 99 N.M. 177, 655 P.2d 1021 (1982), this Court created a test which analyzes statutory elements in light of the evidence presented at trial. This Court has stated that this test is improper in the context of determining legislative intent. “The evidence adduced at trial has little to do with the central question in multiple punishment cases of the legislature’s intent to authorize multiple punishment. Accordingly, we disagree with application of the DeMary test in the multiple punishment context and confine that test to determining the propriety of jury verdict alternatives.” Swafford, 112 N.M. at 12, 810 P.2d at 1232.

{28} The dissent also states that aggravated battery is a lesser-included offense of attempted murder, citing to State v. Meadors, 121 N.M. 38, 908 P.2d 731 (1995), in support of its contention that the legislature did not intend to punish the two offenses separately. However, reliance on this case is misplaced. In Meadors, this Court held that aggravated battery was a lesser-included offense under the “cognate approach,” which was the proper analysis to apply when the prosecutor requests a jury instruction on a lesser-included offense. Id. at 44, 908 P.2d at 737 (emphasis added). This Court did not create a general rule that aggravated battery is a lesser-included offense of attempted murder. In our discussion of the various analytical approaches of the issue of lesser-included offenses, we stated that New Mexico has embraced a form of the “strict elements” test, under which, when determining legislative intent for double jeopardy purposes, “an offense [is] a lesser-included offense of another only if the statutory elements of the lesser offense are a sub-set of the statutory elements of the greater offense such that it would be impossible ever to commit the greater offense without also committing the lesser offense.” Id. at 42, 908 P.2d at 735. {29} In Meadors, the defendant was charged with attempted murder, aggravated arson, and negligent use of an explosive. At trial, the State requested a jury instruction on aggravated battery as a lesser-included offense of attempted murder. The defendant objected on the ground that aggravated battery is not a lesser-included offense of attempted murder and that the jury instruction would violate his constitutional right to notice of the crime charged. The defendant was convicted of aggravated battery and negligent arson. On appeal, the defendant argued that aggravated battery is not a lesser-included offense of attempted murder and that the trial court denied him due process by allowing the jury instruction. This Court stated that there are at least three different contexts in which the issue arises of whether one offense is a lesser-included offense of another: (1) in the context of double jeopardy; (2) when a defendant requests a jury instruction on a lesser-included offense of the crime charged; and (3) when a prosecutor requests a jury instruction on a lesser-included offense of the crime charged.

{30} The dissent, like Defendant, uses the facts of the case at bar to assert that “New Mexico has embraced a form of the strict elements test, based on Blockburger v. United States . . . as an aid in determining legislative intent for double jeopardy purposes.” Id. (citing Swafford, 112 N.M. at 14, 810 P.2d at 1234) (internal citation omitted). This Court then held that when the prosecutor requests a jury instruction on a lesser-included offense, the appropriate analysis is the DeMary approach. Id. at 44, 908 P.2d at 737. It was not this Court’s intention to create a rule that aggravated battery is always a lesser-included offense of attempted murder.

CONCLUSION

{30} The district court did not abuse its discretion by excluding the evidence of prior domestic abuse between Damacio and his wife. Defendant’s separate convictions for aggravated battery and attempted murder do not violate double jeopardy principles. Therefore, we affirm.

{31} IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:

PAMELA B. MINZNER, Justice

PATRICIO M. SERNA, Justice

RICHARD C. BOSSON, Chief Justice (concurring in part and dissenting in part)

EDWARD L. CHÁVEZ, Justice (concurring in part and dissenting in part)

CHÁVEZ, Justice (concurring in part and dissenting in part).

{32} I concur with Section II(A) of the majority opinion. However, because in my view the legislature did not intend separate punishments for attempted first-degree murder and third-degree aggravated battery when convictions for both offenses arise from a single act of shooting and wounding a victim, I would vacate Defendant’s aggravated battery conviction as a violation of double jeopardy. Therefore, I respectfully dissent from Section II(B).

{33} It is undisputed that Defendant’s single act of shooting and wounding the victim resulted in convictions of both attempted first-degree murder and third-degree aggravated battery. Attempted first-degree murder requires proof that a defendant, with deliberate intent to kill, committed an overt act in furtherance of murder but failed to kill the victim. NMSA 1978, §§ 30-2-1 (1994), 30-28-1 (2006). Aggravated battery requires proof that a defendant, with
intent to injure, touched or applied force to the victim. NMSA 1978, § 30-3-5 (2006). Aggravated battery is a misdemeanor if the touching was committed in a manner whereby great bodily harm or death is not likely to be inflicted. § 30-3-5(B). However, aggravated battery is a third-degree felony when the touching inflicts great bodily harm, is committed in a manner whereby great bodily harm or death can be inflicted, or is committed with a deadly weapon. § 30-3-5(C). Of course, a deadly weapon is an instrument or object that, when used, could cause death or great bodily harm. UJI 14-322 NMRA. In this case, Defendant was charged with aggravated battery constituting a third-degree felony.

{34} To support a conviction for both attempted first-degree murder and third-degree aggravated battery, the overt act required for attempted first-degree murder must be an application of force in a manner whereby great bodily harm or death can be inflicted. Otherwise, if the overt act did not involve the application of force (i.e. the defendant missed in his attempt to apply deadly force) the single act could not also support a conviction for aggravated battery. This is because aggravated battery requires proof that Defendant applied force to the victim. Shooting and wounding the victim satisfied the actus reus requirement under both statutes. Similarly, since the jury found that Defendant intended to kill the victim, the jury could also find that Defendant intended to injure the victim. Thus, the single act of shooting at the victim and wounding the victim constitutes unitary conduct. Had the conduct not been unitary, the inquiry regarding double jeopardy would end, and the Defendant could be subjected to multiple punishments. However, because the conduct was unitary and resulted in two offenses, we must determine “whether the legislature intended multiple punishments for unitary conduct.” Swafford v. State, 112 N.M. 3, 14, 810 P.2d 1223, 1234 (1991).

{35} My disagreement with the majority opinion arises from its formalistic application of the Swafford test. I agree with the majority that the Legislature has not expressly provided for double punishment for attempted first-degree murder and third-degree aggravated battery, and that we must therefore proceed to the Blockburger test. Id. at 14, 810 P.2d at 1234. Under Blockburger, we must begin the analysis by determining whether the elements of one of the statutes at issue are subsumed within the other. Id.; see Blockburger v. United States, 284 U.S. 299, 304 (1932) (the test to determine whether the same act constitutes two offenses, or only one, is whether each statute requires proof of a fact which the other does not). Yet, even if we were to conclude that attempted first-degree murder does not subsume the elements of third-degree aggravated battery, the Blockburger test only raises a presumption that the Legislature intended multiple punishments for the single act. This presumption may be overcome by other indicia of legislative intent. Swafford, 122 N.M. at 14, 810 P.2d at 1234.

{36} To support its conclusion that Defendant’s dual convictions do not constitute double jeopardy the majority compares the elements of attempted murder with the elements of a misdemeanor aggravated battery. Maj. Op. ¶ 24. I would take a less formalistic approach than the majority and hold that attempted murder subsumes the elements of third-degree aggravated battery, since these are the crimes at issue in this case. The majority rejects this approach because they believe such an approach requires a court to look at the facts of the case which is more a DeMary analysis than a Swafford analysis. Maj. Op. ¶ 27. Considering the crimes actually charged, and thus the statutes actually at issue, is not the same as looking at the facts. This approach simply requires a court to consider the elements of the crimes as charged as opposed to crimes that were not charged. The approach also requires the court to be mindful that it was unitary conduct that gave rise to multiple convictions. In my opinion, such an approach is called for by Swafford and Blockburger. See Swafford, 112 N.M. at 8, 810 P.2d at 1228 (stating that the traditional Blockburger test for legislative intent focuses “upon the elements of the statutes at issue” and that “the proper inquiry focuses upon the elements of the statutes in question”).

{37} For a single act to result in the conviction of attempted first-degree murder and third-degree aggravated battery the actus reus must be the same. Both require a showing of application of force. Without application of force the Defendant could not have been convicted of aggravated battery and a double jeopardy analysis would not be necessary. Moreover, the mens rea requirement of attempted murder, intent to kill, proves the mens rea requirement for aggravated battery, intent to injure. In other words, by convicting a defendant of attempted first-degree murder and third-degree aggravated battery based on unitary conduct, a jury has essentially stated, “The defendant is guilty of attempted first degree murder because he or she committed aggravated battery with the intent to kill.” Although the mens rea element admittedly makes this a close case, in my opinion the elements of third-degree aggravated battery are subsumed within the elements of attempted first-degree murder. This is particularly true since aggravated battery is a lesser included offense of attempted murder. See State v. Meadors, 121 N.M. 38, 908 P.2d 731 (1995); see also People v. Boidule, 355 N.W.2d 592, 597 (Mich. 1984) (“When one of the two statutes involved is a necessarily lesser included offense of the other, application of the Blockburger test will always raise the presumption that the two statutes involve the ‘same offense’.”)

As such, I would conclude that the Legislature did not intend multiple punishments for such unitary conduct. Swafford, 112 N.M. at 14, 810 P.2d at 1234. “[T]he inquiry is over and the statutes are the same for double jeopardy purposes – punishment cannot be had for both.” Id.

{38} Even if attempted murder does not subsume the elements of aggravated battery, this court in Swafford requires a continued search for legislative intent which may overcome the presumption that the two statutes punish distinct offenses. Id. In my judgment, the most compelling statutory construction principle which mandates a finding of a double jeopardy violation in this case was stated by the Swafford court as follows:

“The quantum of punishment also is probative of legislative intent to punish. Where one statutory provision incorporates many of the elements of a base statute, and extracts a greater penalty than the base statute, it may be inferred that the legislature did not intend punishment under both statutes.” Swafford, 112 N.M. at 15, 810 P.2d at 1235. The disparate sentences for attempted first-degree murder and aggravated battery offer further support for my conclusion that the

2Had the jury found that Defendant intended only to injure the victim and not intended to kill the victim, the jury could not have convicted Defendant of attempted first-degree murder.
legislature did not intend to punish the offenses separately. Aggravated battery inflicting great bodily harm, committed with a deadly weapon, or committed in a manner whereby great bodily harm or death can be inflicted is a third-degree felony. § 30-3-5(C). A third-degree felony not resulting in the death of a human being is punishable by three years in prison. NMSA 1978, § 31-18-15(A)(8) (2005). Attempted first-degree murder is a second degree felony. § 30-28-1(A). A second-degree felony not resulting in death is punishable by nine years in prison. § 31-18-15(A)(5).

Tripling the sentence when a defendant applies force with intent to kill as opposed to applying force with only an intent to injure is indicia of legislative intent to not punish each offense separately. As the Swafford Court explained: “If the punishment attached to an offense is enhanced to allow for kindred crimes, these related offenses may be presumed to be punished as a single offense.” 112 N.M. at 15, 810 P.2d at 1235. Aggravated battery committed with the intent to injure is punishable by three years in prison. When the aggravated battery is done with an intent to kill, the legislature has enhanced the punishment to nine years and titled this kindred offense “attempted murder.” This analysis comports with language in Robideau, relied on by this court in Swafford.

Our criminal statutes often build upon one another. Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. The Legislature has taken conduct from the base statute, decided that aggravating conduct deserves additional punishment, and imposed it accordingly, instead of imposing dual convictions.

Robideau 355 N.W.2d at 604. I would not summarily reject this important statutory construction principle as has the majority. Maj. Op. ¶ 25. At the very minimum, the doctrine of lenity requires us to presume that the Legislature did not intend to pyramid punishments for the same offense. Swafford, 112 N.M. at 15, 810 P.2d at 1235.

{39} Defendant’s dual convictions for attempted first-degree murder and third-degree aggravated battery violate the prohibition against double jeopardy, and the aggravated battery conviction must be vacated. For the foregoing reasons, I respectfully dissent from Section II(B) of the majority opinion.

EDWARD L. CHÁVEZ, Justice

BOSSON, Chief Justice (concurring in part and dissenting in part)

{40} I concur in Justice Chavez’s thoughtful dissent on double jeopardy, and write separately only because, as a signatory to State v. Vallejos, 2000-NMCA-075, 129 N.M. 424, 9 P.3d 668 (holding that convictions under these same two criminal statutes did not violate double jeopardy), I find myself in the awkward position of reversing fields. I agree with my colleague that for too long our appellate courts have tended to apply Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991) and Blockburger v. United States, 284 U.S. 299 (1932) in a formalistic manner. At times it seems as if our appellate courts prefer the ease of looking up statutory elements of a crime, in place of the hard work of examining separately the policy goals and consequences of each criminal statute to divine legislative intent. In my view, in crafting Swafford former Chief Justice Ransom intended the Blockburger formula as but a step on the way, not the destination. My colleague, Justice Maes, has written an excellent opinion faithful to the direction of our precedent, post-Swafford. What we need, perhaps, is a change in direction, and I am grateful to Justice Chavez for providing its initial sketch.

RICHARD C. BOSSON, Chief Justice
OPINION
A. JOSEPH ALARID, Judge

{1} Defendant-Petitioner Public Employees Retirement Board (the PERB) appeals from an order of the district court directing the PERB to calculate the pension benefits due Plaintiff-Respondent Donna Garcia-Montoya (Employee) under general member coverage plan 3 of the Public Employee’s Retirement Act (the PERA), NMSA 1978, ch. 10, art. 11. We affirm the decision of the district court.

BACKGROUND

{2} The operative historical facts are not disputed. Employee became a member of the Public Employees Retirement Association in August 1983. The PERA general member coverage plan 2 became applicable to state general members after September 30, 1987. NMSA 1978, § 10-11-21 (1987). The PERA general coverage plan 3 became applicable to state general members in the first full pay period after July 1, 1995. NMSA 1978, § 10-11-26.1 (1994). There is no dispute that Employee was a contributing member on the dates that both plan 2 and plan 3 became applicable. After plan 3 became effective, Employee made contributions under plan 3. Employee’s last contributions were made in March 1996.

{3} In September 1995, Employee took sick leave. When Employee’s sick leave was depleted in March 1996, Employee requested and was granted Family Medical Leave. Upon expiration of her Family Medical Leave in June 1996, Employee did not return to work. Employee applied for disability retirement, and in December 2002, was determined to be eligible for a duty-related retirement pension.

{4} A dispute arose between Employee and the PERB over the amount of her pension. Employee took the position that she was entitled to benefits calculated under plan 3. The PERB took the position that Employee’s benefits were to be calculated under plan 2. Employee requested an administrative hearing. A hearing officer determined that Employee was entitled to benefits calculated under plan 2. The PERB adopted the hearing officer’s decision.

{5} Employee appealed to the district court. The district court reversed the PERB’s decision, ordering the PERB to calculate Employee’s benefits under plan 3. The PERB appeals.

DISCUSSION

{6} The PERA contains numerous coverage plans. All plans share definitional and housekeeping provisions. E.g., NMSA 1978, §§ 10-11-2(N) (2005) (defining membership); 10-11-8 (2004) (defining normal retirement); 10-11-10.1 (1993) (defining disability retirement). Each plan separately specifies (1) the date the plan becomes applicable, (2) the contribution rates for employees and employers for the particular plan, (3) the age and service credit requirements for normal retirement under the plan, and (4) the pension factor that is used to calculate the amount of the member’s pension under the particular plan.

{7} Under coverage plan 2, the amount of a pension is calculated using a pension multiplier equal to two and one-half percent of the employee’s final average salary. NMSA 1978, § 10-11-23 (1987). Under plan 3, the amount of a pension is calculated using a pension multiplier equal to three percent of the employee’s final average salary. NMSA 1978, § 10-11-26.3 (1994). The amount of a pension calculated using the three percent multiplier of plan 3 will be 120 percent (six fifths) of a pension calculated using the two and one-half percent multiplier of plan 2.

{8} Plan 3 contains the following provision, which the PERB relied upon in denying Employee benefits calculated under plan 3:

Notwithstanding the provisions of Section 3[NMSA 1978, § 10-11-26.2 (1994)] of this act, to qualify for payment under state general member coverage plan 3, a member shall have one and one-half years of service credit earned under the general member coverage plan 3 subsequent to July 1, 1995.

NMSA 1978, § 10-11-26.7 (1994) (emphasis added). The PERB argues that Employee cannot “qualify for payment” under plan 3 because Employee did not earn one and one-half years of service credit under coverage plan 3 subsequent to July 1, 1995, as required by Section 10-11-26.7. Employee, who left her employment in June 1996, concedes that she earned less than one and one-half years service credit under plan 3.

As we explain below, the one and one-half years earned service credit requirement of Section 10-11-26.7 supplements the service credit requirements for normal retirement; retirees such as Employee, who have applied for early retirement due to a disability, are not subject to Section 10-11-26.7.

{9} Section 10-11-26.7 consists of an introductory phrase, “[n]otwithstanding
the provisions of Section 3 [Section 10-11-26.2] of this act,” and a principal clause beginning with “to qualify for payment.” The underlying structure of Section 10-11-26.7 is a statement in the form “notwithstanding x, y,” in which the outcome dictated by “y” qualifies the outcome that otherwise would obtain under “x.” Section 10-11-26.2 is the “x” upon which the “y” of the main clause of Section 10-11-26.7 operates. We think that the natural manner of giving effect to a statement in the form of “notwithstanding x, y” is by limiting application of “y” to only those instances that otherwise would be governed by “x.” Applied to Section 10-11-26.7, this means that only those members whose qualification for payment under plan 3 depends upon Section 10-11-26.2 in the first place are subject to Section 10-11-26.7’s requirement of one and one-half years of service credit earned subsequent to July 1, 1995.

{10} Our analysis comports with the well-established rule of statutory construction requiring courts to give effect to all the language enacted by the Legislature. See Vaught v. State Taxation & Revenue Dep’t, 98 N.M. 362, 365-66, 648 P.2d 820, 823-24 (Ct. App. 1982) (construing the Educational Retirement Act; observing “that the legislature is presumed to have used no surplus words, and that a statute must be construed so that no word and no part of the statute is rendered surplusage”), superseded by statute as stated in Pierce v. State, 121 N.M. 212, 226 n.14, 910 P.2d 288, 302 n.14 (1995). If we applied Section 10-11-26.7 to members whose qualification for retirement benefits was not dependent upon Section 10-11-26.2, we would be enforcing Section 10-11-26.7 as if it read: [T]o qualify for payment under state general member coverage plan 3, a member shall have one and one-half years of service credit earned under the general member coverage plan 3 subsequent to July 1, 1995. Such a reading would require us to ignore the phrase “[notwithstanding the provisions of Section [10-11-26.2]]” enacted by the Legislature and would violate the established rule of construction that requires us to give effect to all the language enacted by the Legislature. Unlike the PERB’s proposed construction, our reading of Section 10-11-26.7 gives effect to the entire statute enacted by the Legislature.

{11} We next consider whether Employee’s qualification for payment of a disability pension depended upon Section 10-11-26.2. Eligibility for normal retirement is governed by Subsection 10-11-8(A). Subsection 10-11-8(A)(4) incorporates by reference the age and service requirements of the applicable plan. A member cannot qualify for normal retirement under plan 3 without meeting the age and service requirements set out in Section 10-11-26.2. Employee applied for early retirement due to a disability, not for normal retirement. Eligibility for early retirement due to disability is governed by Section 10-11-10.1, not Subsection 10-11-8(A). Unlike Subsection 10-11-8(A), Section 10-11-10.1 does not incorporate the age and service requirements of the applicable plan in determining whether a member qualifies for a disability retirement pension. Subsection 10-11-10.1(A)(4). A member seeking to qualify for early retirement due to a duty-related disability is not subject to any minimum age or service requirements. Subsection 10-11-10.1(A)(4)(b). Section 10-11-26.2 plays no part in the determination of a member’s qualification for early retirement due to a duty-related disability. Because Employee’s qualification for early retirement due to a duty-related disability does not depend upon Section 10-11-26.2 in the first place, Section 10-11-26.7 has no effect on Employee’s eligibility for retirement benefits.

{12} Our conclusion that the Legislature did not intend for Section 10-11-26.7 to apply to disability retirees is reinforced by considering the effect that the PERB’s interpretation of Section 10-11-26.7 would have on members hired after July 1, 1995, who become disabled. Under the PERB’s interpretation, no public employee qualifies for payment of benefits under plan 3 unless he or she has earned eighteen months of service credit subsequent to July 1, 1995. Thus, for example, under the PERB’s interpretation, a public employee who was hired in 2005 and who made contributions under plan 3 throughout the entire period of his or her employment would not qualify for a disability pension under plan 3 if the employee had the misfortune to suffer a duty-related disability during the first one and one-half years of his employment because such an employee would not have “one and one-half years of service credit earned under the general member coverage plan 3 subsequent to July 1, 1995.” Section 10-11-26.7. Applying the PERB’s interpretation, the employee’s benefits would be calculated under plan 2, even though plan 3 was applicable during the entire period of employment and even though the employee and employer had made contributions under plan 3. We do not believe that the Legislature intended such a result.

{13} As noted above, both plan 2 and plan 3 are applicable to Employee. Where two or more plans are applicable to a member, the PERA provides as follows:

The pension of a member who has three or more years of service credit under each of two or more coverage plans shall be determined in accordance with the coverage plan that produces the highest pension. The pension of a member who has service credit under two or more coverage plans but who has three or more years of service credit under only one of those coverage plans shall be determined in accordance with the coverage plan in which the member has three or more years of service credit. If the service credit is acquired under two different coverage plans applied to the same affiliated public employer as a consequence of . . . a change in the law that results in the application of a coverage plan with a greater pension, the greater pension shall be paid a member retiring from the affiliated public employer under which the change in coverage plan took place regardless of the amount of service credit under the coverage plan producing the greater pension; provided the member has three or more years of continuous employment with that affiliated public employer immediately preceding or immediately preceding and immediately following the date the coverage plan changed. Section 10-11-8(F) (emphasis added). Plan 3 became applicable to Employee due to “a change in the law that results in the application of a coverage plan with a greater pension.” Id. The record establishes that Employee had three or more years of continuous employment immediately preceding the date that plan 3 became applicable to Employee. Applying the italicized portion of Subsection 10-11-8(F), Employee is entitled to have her pension calculated under plan 3, which has the greater pension factor.

{14} The PERB argues that we must apply Section 10-11-26.7 to disability retirees in order to insure adequate funding of the enhanced benefits provided by plan 3. In making this argument, the PERB has not
provided us with any information about the actual actuarial assumptions used in setting the contribution rates for plan 3 set out in NMSA 1978, §§ 10-11-26.5 and 10-11-26.6 (1994). The possibility that some percentage of members will retire due to a disability without having paid contributions commensurate with the benefits the member receives through a disability pension is an inherent risk in a pension scheme that includes both disability and retirement benefits. If, as we have held, the Legislature did not intend Section 10-11-26.7 to apply to disability retirees, then the Legislature presumably took into account the burden on plan funds due to disability retirements occurring during the one and one-half year period following July 1, 1995, when it fixed the contribution rates under plan 3.

{15} The order of the district court directing the PERB to calculate Employee’s benefits using the three percent multiplier of plan 3 is affirmed.

{16} IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

JAMES J. WECHSLER, Judge (specially concurring).

JONATHAN B. SUTIN, Judge (specially concurring).

WECHSLER, Judge (specially concurring).

{17} I concur in the result of Judge Alarid’s opinion, but I believe the governing statute is Section 10-11-10.1(N). That argument was presented to the district court and formed a part of that court’s conclusions. It has also been fully briefed to this Court.

{18} Section 10-11-10.1(N) specifically addresses which plan should be used to calculate the pension of a disability retiree such as Employee:

The amount of a disability retirement pension shall be calculated according to the provisions of the coverage plan applicable to the member, imputing the amount of service credit necessary to meet the minimum service credit requirements for normal retirement. The first clause of the first sentence applies to all disability retirees and requires that the pension use the “provisions of the coverage plan applicable to the member at the time of application.” Id. The second clause does two things: first, it waives the amount of service credit required under Section 10-11-26.7, and second, it requires calculation using the actual amount of service credit earned. The second sentence modifies that last requirement for disability retirees such as Employee, who suffer a work-related disability, and requires calculation using imputed service credit. The plain language of the first sentence applies to all disability retirees, including Employee. See Sims v. Sims, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153 (“The plain meaning rule of statutory construction states that ‘[w]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.’”) (alteration in original) (citation omitted).

{19} The coverage plan applicable to Employee at the time of her application was plan 3. See § 10-11-26.1 (“State general member coverage plan 3 is applicable to state general members in the first full pay period after July 1, 1995 . . . .”). The argument that Employee did not earn sufficient service credit under Section 10-11-26.7 is irrelevant because the service credit requirement was waived by Section 10-11-10.1(N).

{20} The PERB argues that “[t]he service imputed under § 10-11-10.1 (N) does not equate with ‘earned’ service credit as that term is used in § 10-11-26.7.” It is true that Section 10-11-10.1(N) uses the phrase “service credit requirement” whereas Section 10-11-26.7 uses the phrase “service credit earned.” However, the PERB does not point to an alternative meaning of “service credit requirement” in Section 10-11-10.1(N) other than that the “service credit requirement” is that required for normal retirement under Section 10-11-26.2. But the service credit required by Section 10-11-26.2 explicitly applies only to normal retirees and does not govern the plan under which an employee may retire. It therefore has no impact on the subject matter of Section 10-11-10.1(N). Section 10-11-10.1(B) is the provision that governs eligibility for disability retirement. Section 10-11-10.1(N) has no bearing on whether an employee is eligible; rather it addresses the plan that applies. It would be illogical for Subsection (N) to waive the service credit required under Section 10-11-26.2 when Section 10-11-26.2 does not address the plan that applies. We read statutes bearing on the same subject matter together. See Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm’n, 1999-NMSC-040, ¶ 23, 128 N.M. 309, 992 P.2d 860 (“In ascertaining legislative intent, the provisions of a statute must be read together with other statutes in pari materia under the presumption that the legislature acted with full knowledge of relevant statutory and common law. . . . Thus, two statutes covering the same subject matter should be harmonized and construed together when possible, in a way that facilitates their operation and the achievement of their goals.”) (emphasis omitted) (internal quotation marks and citations omitted).

{21} The PERB also argues that because Section 10-11-10.1(N) was enacted before plan 3 was created, Section 10-11-10.1(N) cannot be intended to affect any of the provisions of plan 3. But this Court does not assume that the legislature was unaware of the provisions of Section 10-11-10.1(N) at the time it enacted plan 3. See Jicarilla Apache Nation v. Rodarte, 2004-NMSC-035, ¶ 15, 136 N.M. 630, 103 P.3d 554 (“We presume that the Legislature acts with full knowledge of, and consistent with, existing legislation.”). Rather, we impute to the legislature knowledge of the disability retirement provisions of PERA when it enacts new plans that will be governed by the disability retirement provisions. I also note that in 2003, the legislature enacted a new plan for municipal detention officers in which it required one and one-half years of service credit “[n]otwithstanding other provisions of the Public Employees Retirement Act.” NMSA 1978, § 10-11-115.7 (2003). That phrase clearly evinces legislative intent that the one and one-half years of service credit not be waived by Section 10-11-10.1(N), Section 10-11-26.7, on the contrary, only requires service credit “[n]otwithstanding the provisions of Section 3.” If the legislature had intended to require one and one-half years of service credit for disability retirees to retire under plan 3, I assume it would have used similar language to that in Section 10-11-115.7. See, e.g., State v. Muniz, 2003-NMSC-021, ¶ 11, 134 N.M. 152, 74 P.3d 86 (“Had the Legislature intended to limit the scope of Section 32A-2-20(F) to lesser-included-of-
SUTIN, Judge (specially concurring).

{23} I agree that we should affirm the district court’s decision based on Section 10-11-10.1(N).

JAMES J. WECHSLER,
Judge

SUTIN, Judge (specially concurring).

{24} We should read the plain language of the statute in a straightforward manner. The “notwithstanding” clause should be read to say that even if a person meets the age and service requirements of NMSA 1978, § 10-11-26.2 (1994) for normal retirement, the person cannot move into plan 3, but must stay with plan 2, if the person does not meet the limitation in NMSA 1978, § 10-11-26.7 (1994). At this point, the clarity of the statute leaves a lot to be desired.

{25} Plan 3 benefits presumably are for both normal retirees and early disability retirees. Although it is by no means clear, it is certainly arguable that Section 10-11-26.7, which is a part of plan 3, essentially says that whoever wants the benefit of plan 3, including early disability retirees, must have met the eligibility requirement in that section. Otherwise, the person remains in plan 2.

{26} What is striking is the scenario in Judge Alarid’s opinion of an employee hired in 2005. This shows a problem with PERB’s position. Further, the statute is plainly unclear in regard to the intertwining of early disability retirement and normal retirement insofar as eligibility, age, and service requirements are concerned. As shown by Judge Alarid’s discussions, it is not altogether clear whether the Legislature wanted early disability retirees to have to overcome age and service requirements in order to move into a plan for which they would otherwise be eligible were it not for the disability. Here, Plaintiff presumably would have been eligible for plan 3 had she not been disabled and had worked.

{27} I view this case as one created by a serious enough lack of legislative guidance and clarity to give the benefit of doubt to the retiree. I therefore agree to affirm the order of the district court.

JONATHAN B. SUTIN, Judge

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**Certiorari Not Applied For**

From the New Mexico Court of Appeals

**Opinion Number: 2006-NMCA-095**

JOHN D. SMYERS,
Petitioner-Appellant,

versus

CITY OF ALBUQUERQUE and
CITY OF ALBUQUERQUE PERSONNEL BOARD,
Respondents-Appellees.

No. 25,774 (filed: June 30, 2006)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

ROBERT L. THOMPSON, District Judge

LESTER C. CANNAIN
Albuquerque, New Mexico
for Appellant

ROBERT M. WHITE
City Attorney

RANDY M. AUTIO
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SHELLEY B. MUND
Assistant City Attorney
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for Appellees

**OPINION**

CELIA FOY CASTILLO, Judge

{1} John Smyers appeals his termination from employment with the City of Albuquerque (City). We affirm.

I. BACKGROUND

{2} Smyers was a technical program manager in the Public Works Department of the City. On three separate occasions in early October 2002, two witnesses saw Smyers in his office exhibiting behavior consistent with that of a person masturbating. On October 9, 2002, Smyers was placed on administrative leave. An external investigator conducted an investigation and interviewed all parties involved. Smyers was terminated from his employment with the City in November 2002 for masturbating in his office, possessing and dubbing pornography at work, and compulsively using the Internet for personal use. Smyers grieved his termination, and a Personnel Hearing Officer (PHO) held a grievance hearing in May 2003. Although the PHO found that Smyers’ personal Internet usage was not detrimental to his job performance, the PHO’s recommendation was to uphold Smyers' termination. Smyers submitted written exceptions to the PHO’s report.

{3} The City of Albuquerque Personnel Board (Board) met twice to consider the Smyers case. At a meeting held on August
20, 2003, three members were present and heard oral arguments on the issues related to Smyers’ grievance hearing, the PHO’s report, and Smyers’ written exceptions to the PHO’s report. The Board voted two to one to uphold the PHO’s recommendation. At a meeting held on September 17, 2003, four members were present. At this meeting, the Board explained that it had adopted the PHO’s conclusions of law when the Board had accepted the PHO’s recommendation at the August 20 meeting. No vote was taken at the September 17 meeting.

{4} Smyers filed a petition for writ of certiorari to the district court for review of the Board’s decision upholding his termination. Smyers argued that the Board acted without authority and that its findings were not supported by substantial evidence. The district court upheld the Board’s decision. We granted certiorari.

II. DISCUSSION

A. Standard of Review

{5} “In reviewing a decision of the Personnel Board, we apply a whole-record standard of review.” Selmeczki v. N.M. Dep’t of Corr., 2006-NMCA-024, ¶ 13, 139 N.M. 122, 129 P.3d 158. In so doing, “[w]e ‘conduct the same review of an administrative decision as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal.’” Gallup Westside Dev., LLC v. City of Gallup, 2004-NMCA-010, ¶ 10, 135 N.M. 30, 84 P.3d 78 (quoting Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm’n, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806). “[W]e independently review the entire record of the administrative hearing to determine whether the Board’s decision was arbitrary and capricious, not supported by substantial evidence, or otherwise not in accordance with law.” Martinez v. N.M. State Eng’r Office, 2000-NMCA-074, ¶ 31, 129 N.M. 413, 9 P.3d 657; see Rule 1-075(Q)(1)-(4) NMRA. “An administrative ruling is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record, and we must avoid substituting our own judgment for that of the agency.” Selmeczki, 2006-NMCA-024, ¶ 13 (internal quotation marks and citation omitted). Whether the Board’s actions were contrary to law is a question reviewed de novo. See id. The party challenging the ruling has the burden to demonstrate grounds for reversal. Id.

B. Action and Composition of the Board

{6} Smyers contests the validity of the Board’s action regarding his appeal. Citing to Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 780-81, 907 P.2d 182, 184-85 (1995), Smyers contends that the City’s merit system ordinance gives him certain contractual and statutory rights, which have been violated. Specifically, Smyers asserts that Section 3-1-25(C)-(D) of the City’s merit system ordinance entitles him to have all five duly appointed members, with unexpired terms of office, review his appeal and render a decision on it. See Albuquerque, N.M., Rev. Ordinances (Alb. Ord.) ch. 3, art. 1, § 25(C)-(D) (1998).

According to Smyers, there were three separate violations of the ordinance, which invalidated any action purported to have been taken by the Board. First, Smyers contends that Section 3-1-25 of the City’s merit system ordinance requires that any action on his appeal be taken by the entire five-member Board. Second, he maintains that at the September 17 meeting, only two of the members present were serving unexpired terms of office. Third, there was only a total of four duly appointed members of the Board on August 20. We begin with Smyers’ contention that the entire Board had to act on his appeal.

{7} The City is a home rule municipality, and the Albuquerque City Council, under its home rule municipal power, enacted a merit system ordinance that governs the hiring, promotion, discharge, and general regulation of City employees. See Alb. Ord. ch. 3, art. 1, §§ 1-27 (1974, as amended through 2005). Section 3-1-4(A) of the City’s merit system ordinance states that the Board “shall be . . . composed of five members.” Section 3-1-4(C) of the merit system ordinance states that “[e]xcept as provided in this article, . . . the organizational structure of the Board shall be governed by [the public board ordinance Sections] 2-6-1-1 et seq.” See Alb. Ord. ch. 2, art. 6, §§ 1-1 to -5 (1974, as amended through 2003). Section 2-6-1-4(B)(5) directs that a majority of all public board members shall constitute a quorum and further provides that final action may be taken by “the majority of the members present at any meeting.” For interpretation of ordinances, we follow the rules of statutory interpretation. Cadena v. Bernalillo County Bd. of County Comm’rs, 2006-NMCA-036, ¶ 7, 139 N.M. 300, 131 P.3d 687. Where there are several sections of an ordinance involved, we read them together to give effect to all sections. High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599. When the words used are plain and unambiguous, we give a statute its literal reading, unless that reading would lead to an injustice, absurdity, or contradiction. Atencio v. Bd. of Educ., 99 N.M. 168, 171, 655 P.2d 1012, 1015 (1982). The ordinances are not ambiguous. Section 3-1-4(C) directs that Section 2-6-1-4(A) supports the conclusion that the Board consists of five members but that only a quorum need be present at a meeting in order to act. A quorum of the Board was present at both meetings, and final action was taken by majority vote of the quorum. The Board complied with the City ordinance. There is no requirement that final action be taken by all five members of the Board; therefore, Smyers’ argument fails.

{8} Next we consider the effect of an expired term on Board membership. We agree with Smyers that the Board consists of five members and that the term of each member is two years. Alb. Ord. § 3-1-4(A). Smyers points to two memoranda of appointment, which indicate that by the time of the meeting held on September 17, the terms of two members of the Board had expired. There is no indication in the record that these members were removed or replaced before the September 17 meeting; in fact, they attended the meeting as members of the Board.

{9} We have two problems with Smyers’ position. First, it does not appear that the Board took any dispositive action at its meeting on September 17. The minutes reflect that the Board merely announced that the PHO’s conclusions of law were previously adopted—at the August 20 meeting, when the Board accepted the PHO’s recommendation. Even if the announcement were to be interpreted as a Board action, Smyers fails to cite authority to support his contention that the acts taken during this holdover period are invalid. He merely asserts that the ordinance requires the Board to consist of five members, and he assumes that a position automatically becomes vacant once the term of a member expires. We disagree.

{10} As pointed out by the City and as we explained above, the organizational structure of the Board is governed by Sections 2-6-1-1 to -5. Smyers argues that the section of the ordinances governing terms, Alb. Ord. § 3-1-4(A), controls over the section of the ordinance that governs holding over, Alb. Ord. § 2-6-1-3(B)(6).
However, a reading of the ordinances together, giving meaning to all parts, does not support Smyers’ argument. See High Ridge Hinkle Joint Venture, 1998-NMSC-050, ¶ 5; Cadena, 2006-NMCA-036, ¶ 7.

{11} We turn to Section 2-6-1-3(B)(6), which provides that except for certain instances that are not pertinent to our case, every public board member shall hold office until a successor has been duly qualified. There is a difference between term of office and tenure in office. Block v. Vigil-Giron, 2004-NMSC-003, ¶ 6, 135 N.M. 24, 84 P.3d 72. A term is a fixed period of time an appointee is authorized to serve in office; the term is established by law and is normally specified in the letter of appointment. Id. Tenure is the time the appointee actually serves in office. Id. The tenure may be shorter or longer than the term. Id. In this case, the tenure of the office of those members with expired terms continued, notwithstanding the length of the terms.

{12} The City also cites to the New Mexico Constitution and case law. See N.M. Const. art. XX, § 2. “[E]very officer, unless removed, holds office until his successor qualifies.” Haymaker v. State ex rel. McCain, 22 N.M. 400, 405, 407, 163 P. 248, 250 (1917) (stating that the holdover provision serves as an important public policy by ensuring that there will always be someone competent to perform the duties belonging to the office). Smyers counters by stating that the constitutional provision regarding holdovers only applies to officers and not to Board members. Although we look to the New Mexico Constitution and case law because they provide the public policy bases for ordinances provisions like Section 2-6-1-3(B)(6), our decision is based on our interpretation of the City’s ordinances. The applicable ordinance plainly states that a Board member remains in office until a successor has been duly qualified. Alm. Ord. § 2-6-1-3(B)(5). Accordingly, we hold that the validity of whatever action the Board took at its September 17 meeting was not affected by the expired terms of two of the members.

{13} We now turn to Smyers’ last argument regarding the composition of the Board. He points to the minutes from the August 20 Board meeting; these minutes list the names of only four Board members. Smyers contends that this is proof that there were only four duly appointed members of the Board when it took action on August 20. Smyers claims that because the City’s merit system ordinance requires a five-member Board, any action taken by the Board with fewer than five duly appointed members is invalid. Again Smyers fails to cite to any legal authority to support his argument and relies on his interpretation of Section 3-1-4(A) of the City’s merit system ordinance, which authorizes a five-member Board.

{14} While we do not agree there is conclusive evidence of a four-member Board, the resolution of this fact question is not necessary to the resolution of the legal issue. Even if we presume that there was a vacancy on the Board at the time of the August 20 meeting, Smyers’ argument fails. “[T]he mere existence of a vacancy or vacancies does not prevent the board from acting . . ., as long as the quorum remains.” E. Poinsett County Sch. Dist. No. 14 v. Massey, 876 S.W.2d 573, 576 (Ark. 1994) (internal quotation marks and citation omitted). It is imperative that the boards responsible for public duties be able to continue to perform, despite a vacancy. See U.S. Vision, Inc. v. Bd. of Exam’rs for Opticians, 545 A.2d 565, 566 (Conn. App. Ct. 1988) (holding that the rulings of two members were legal and binding where there was one vacancy on the three-member board). There is no good reason for denying a public board the right to meet, deliberate, and act, as long as a sufficient number of members, authorized by law to act, are appointed and qualified.

{15} Smyers also contends the Board’s decision is not supported by substantial evidence when the whole record is considered. The termination was based on two grounds: (1) masturbating at work and (2) possessing and dubbing pornography at work. We begin with the first ground. Smyers’ main argument is that absent direct evidence by a person who actually saw Smyers’ hand on his genitals, there was insufficient evidence to support the PHO’s finding that Smyers masturbated at work. We reject this argument.

{16} The PHO found that two other City employees witnessed Smyers masturbating in his office and that this was corroborated by Smyers’ own testimony. These findings are supported by the following evidence in the record. In early October 2002, two witnesses, on separate occasions, observed behavior that they perceived as Smyers masturbating in his office. Specifically, one witness saw Smyers staring oddly at his computer screen as his head rocked back and forth. The next day, a second witness observed similar activity on Smyers’ part. She saw Smyers’ arm and shoulder moving in a rhythmic cadence, and she noticed that he had a glazed look in his eyes as he stared at the front of his desk. Later that day, the second witness entered Smyers’ office. She startled him, and she heard a jerky banging noise on the belly drawer of Smyers’ desk.

Smyers then stood up, and the witness observed that Smyers’ pants were unzipped. Smyers zipped up his pants and left the office. The record also contained the initial investigator’s notes, which stated that Smyers denied masturbating on the alleged dates but that he admitted to masturbating at work on other occasions. Smyers denied making these statements.

{17} Circumstantial or direct evidence can amount to substantial evidence. Consol. Elec. Distrubs., Inc. v. Santa Fe Hotel Group, LLC, 2006-NMCA-005, ¶ 13, 138 N.M. 781, 126 P.3d 1145. Although no one witnessed Smyers’ hand directly on his genitals, reasonable inferences can be made from the activity described by the witnesses. We accept the reasonable inferences made by the fact-finder. See Sheraden v. Black, 107 N.M. 76, 78, 752 P.2d 791, 793 (Ct. App. 1988). These inferences support the PHO’s conclusions. While we understand that Smyers challenged the content of the notes by the initial investigator, it is up to the fact-finder to evaluate this information.

The PHO weighed the evidence, decided who were credible witnesses, and based his recommendation on these assessments. See Apex Lines, Inc. v. Lopez, 112 N.M. 309, 312, 815 P.2d 162, 165 (Ct. App. 1991). We will not substitute our judgment for that of the fact-finder. See Selmecki, 2006-NMCA-024, ¶ 13.

{18} Now we turn to the second ground. The PHO found that Smyers did possess
and dub pornography at the work site. In support of this, the record discloses that Smyers himself admitted that he brought pornographic material to the workplace and used office equipment to dub the material. Additionally, four witnesses stated they had observed pornographic material in Smyers’ office. The record contains sufficient evidence to support the PHO’s recommendation to uphold Smyers’ termination.

III. CONCLUSION
{19} The Board’s decision was neither procedurally nor substantively defective, and there was substantial evidence to support the termination. We therefore affirm.

{20} IT IS SO ORDERED.
CElia FOy CAstillo, judge

We concur:
Jonathan B. Sutin, Judge
Roderick T. Kennedy, Judge
Please join
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• Delicious libations and cocktail fare

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New Harmony Inn & Conference Ctr.
New Harmony, Indiana
November 2-5, 2006

This program will focus on psychodramatic skills for the trial lawyer and will assist lawyers in getting to know their clients, getting into the hide of their clients, witnesses, jurors and even the judge. This seminar can enhance the lawyer’s ability to discover and tell his or her client’s story at trial. This program has been approved by the State of Indiana Supreme Court Indiana Commission for Continuing and Legal Education for a total of 23.3 hours including 2.5 hours for Ethics. Newly admitted attorneys may receive a total of 23.3 hours of new lawyer CLE.

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The Third Judicial District Attorney’s Office has vacancies for Assistant Trial Attorney and Senior Trial Attorney. Qualifications and salary are pursuant to the New Mexico District Attorney’s Personnel & Compensation Plan. Resumes can be faxed to Kelly Kuenstler at (505) 524-6379, or mailed to the Third Judicial District Attorney’s Office, ATTN: Kelly Kuenstler, District Office Manager, 845 N. Motel Blvd., 2nd Floor, Suite D, Las Cruces, NM 88007.

Twelfth Judicial District Prosecutors
The 12th Judicial District Attorney’s Office for Otero and Lincoln Counties, is taking applications and letters of interest to fill positions in both historic Lincoln County and diverse Otero County. Although career prosecutors are specifically sought and encouraged to apply, the office would treasure the opportunity to convert civil law minded attorneys into public servants that protect and serve our communities. Our two offices have several opportunities for exciting positions that allow attorneys to live in beautiful Ruidoso or the cool pines of Cloudcroft. These positions are classified but incentive and advancement opportunity make our positions very competitive with other state attorney positions. Limited licenses can be applied for from the Supreme Court for out-of-state, licensed attorneys. Resumes and letters of interest should be sent to Scot D. Key, District Attorney, Room 301, 1000 New York Ave., Alamogordo, New Mexico 88310.

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Attorney - 30 hrs/wk
Pegasus Legal Services for Children in Albuquerque seeks 3/4 time staff attorney to represent kinship guardianship contested cases. 1-2 years experience in civil litigation; experience with low income clients; bilingual English/Spanish preferred; excellent people and computer skills. Potential in future for fulltime. Send resume to fax # 244-0060. Pegasus is an equal opportunity employer.

Associate Attorney
Gilkey & Stephenson, P.A. confines its practice to employment and labor law. We are presently considering applicants for an associate attorney position. Applicants must have a minimum of five years actual trial experience and must be licensed to practice in New Mexico. A strong academic background and some experience in the employment/labor practice area are preferred. Gilkey & Stephenson’s salary and benefit package is competitive with that of many larger law firms in the city and includes medical and dental insurance, bonuses and a 401k plan. Base salary is commensurate with experience. Please fax your resume and salary history to 242-3145 or via e-mail to stella@gilkeylaw.com.
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**Notice of Faculty Position in Southwest Indian Law Clinic University of New Mexico School of Law**

The University of New Mexico School of Law invites applications and nominations for a faculty position to begin in the fall of 2007. The position will be full-time tenure-track, tenured, or visiting. Salary and terms of employment will depend upon the qualifications of the successful candidate. Candidates must possess a J.D. degree or equivalent legal degree. Preferred qualifications include a record or promise of academic scholarship; teaching experience; demonstrated excellence in the practice of law; experience in clinical teaching; tribal community contacts or experience; training and experience in supervision; and demonstrated excellence or the promise of excellence in the practice of Indian law and/or tribal law. To apply, send a signed letter of interest that addresses your qualifications and teaching interest and/or expertise, a curriculum vitae, and names, addresses and phone numbers of three references to: Professor Barbara Blumenfeld, Chair, Faculty Appointments Committee, School of Law, MSC11 6070, 1 University of New Mexico, Albuquerque, NM 87131-0001. For best consideration, please submit application by September 30, 2006. Recruitment will continue until opening is filled. The University of New Mexico is an Equal Opportunity/Affirmative Action Employer and Educator.

**Attorney Position**

Flexible work schedule, 20 - 35 hours per week. Job involves helping people with domestic relation cases. This includes conducting initial client interviews, drafting pleadings and attending hearings. Please email resumes to Lori Bailey at lori@billgordon.com.

**Legal Research and Writing Instructor**

The University of New Mexico School of Law seeks applications and nominations for a full-time non-tenure track faculty position to begin in August 2007. The Lecturer III will teach in the Law School’s Legal Research and Writing Program. Minimum requirements are a J.D. degree and two years of full-time law practice experience. Desirable qualifications include demonstrated research and writing ability, experience teaching legal writing in a law school, demonstrated ability to work collaboratively with other faculty members, demonstrated ability to diagnose writing problems, and demonstrated ability to work with students from diverse backgrounds. Salary: Commensurate with qualifications. Term: Year to year. To apply, send a signed letter of interest that addresses your qualifications, a resume, names, addresses and phone numbers of three references, and a practice related writing sample to: Professor Barbara Blumenfeld, Chair, Search Committee, UNM School of Law, MSC11 6070, 1 University of New Mexico, Albuquerque, NM 87131-0001. For best consideration, please submit applications by September 30, 2006. Recruitment will continue until opening is filled. The University of New Mexico is an Equal Opportunity/Affirmative Action Employer and Educator.

**New Mexico Legal Aid Staff Attorney Las Cruces, New Mexico**

New Mexico Legal Aid has an opening for a Staff Attorney in its Las Cruces Office. NMLA represents low-income individuals and families in a wide variety of poverty law areas including domestic violence, housing, public benefits and consumer issues. Candidates must be admitted to the State Bar of New Mexico or have admission pending. If, or if admitted to the bar of another state, but not New Mexico, then be willing to take the next available New Mexico bar exam. Candidates must possess excellent writing and oral communication skills, ability to manage a caseload and to build collaborative relationships with the community. Send resume, references and writing sample to: Gloria A. Molinar, New Mexico Legal Aid, 300 N. Downtown Mall, Las Cruces, NM 88001, email: gloriarn@nmlegalaid.org. Salary DOE. NMLA is an EEO/AA Employer. Open until filled.

**Taos County - County Attorney**

Salary: Depending on experience. This is an exempt (Unclassified) position. Definition: Performs managerial and professional duties as required to carry out the efficient and effective litigation of civil or criminal cases and the ongoing legal processes of County government. Serves as the lead County legal advisor in all civil and criminal matters. Minimum Qualifications: Education and Experience: A. A Juris Doctorate degree from an accredited college or university; plus other advanced training in business management, or public administration; AND B. Eight (8) years of progressively responsible legal experience in public government; two (2) years of which must have been in a managerial capacity; OR C. An equivalent combination of education and experience. Knowledge, Skills, and Abilities: Thorough knowledge of federal, state and local laws and ordinances; legal administrative procedures including the rules of civil and criminal procedure and evidence; the principles, methods, materials and practices used in legal research; New Mexico Code, constitutional provisions federal and local ordinances as they apply to County government and its operation; case law related to a variety of County government subjects; criminal law issues. Considerable knowledge of human resource management theory, methods, and practices; the legal environment related to human resource management; benefit, retirement, and compensation laws and guidelines; budget development and fiscal accounting principles, practices and procedures; County department operations including applicable laws and regulations; principles of supervision, including evaluation and motivation; federal and state laws as they apply to personnel management practices. Considerable skill in the art of diplomacy and cooperative problem solving; leadership and organizational behavior management; establishing and maintaining effective working relationships with State, Federal, and other local officials, elected officials, subordinate staff, and County residents. Skill in the operation of Computer and standard office equipment. Ability to understand and interpret complex laws, rules, regulations, policies, and guidelines; direct the work of others; plan, organize, and direct, through subordinate staff, the efficient, effective delivery of County programs, services and functions; develop operating policies and procedures; analyzing and resolving problems arising regarding County programs, services, and function; analyze and draft legal documents and to propose legislation; establish and maintain effective working relationships with County and court officials, employees and the public; communicate effectively, verbally and in writing. Special Qualifications: Must possess a license to practice law in the State of New Mexico. Taos County is an Equal Opportunity Employer. The last day to apply for this position is Friday, September 15, 2006 at 5:00 p.m. The job announcement gives only a brief description of the position. A complete job description can be obtained at the Taos County Administration Office, 105 Albright Street, Suite A, Taos NM 87571 or by calling (505)737-6309.
**Lawyer-O Positions**

New Mexico Human Services Department, NM HSD, Child Support Enforcement Division is seeking to fill three Lawyer-O positions, one in Los Lunas (DOL #203234), one in Farmington (DOL #103230) and one in Albuquerque (DOL #101956); one Lawyer-A position in Las Cruces (DOL #102883); and one Managing Attorney position in Roswell (DOL #102879). All positions require a Juris Doctor and current licensure with the State Bar of New Mexico. In addition, the Lawyer-O requires 1 year of legal experience, the Lawyer-A requires 3 years of domestic relations experience and the Managing Attorney requires 5 years of domestic relations experience. Salary ranges from $18,356 to $32,634 per hour for the Lawyer-O, $20,70 to $36.80 per hour for the Lawyer-A and $23.54 to $41.85 for the Managing Attorney. Interested individuals must apply using the DOL Job Order Number listed at any NM Department of Labor Workforce Center statewide. For DOL information, please call 505-827-7434 or any DOL office statewide. Please bring resume and copy of your NM bar card for application purposes. Upon completion of the NM DOL application process, please send a copy of your resume, bar card, NM DOL Job Referral Form and cover letter to NM HSD, Child Support Enforcement Division, PO Box 25110, Santa Fe, NM 87504, ATTN: Lila Bird, Chief Counsel. Applications will be accepted until the positions are filled. For general information, you may contact Donna Lopez at 505-827-7725 or by e-mail, donna.lopez@state.nm.us. The State of New Mexico is an Equal Opportunity Employer.

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**Request for Applications**

**City of Albuquerque**

**Legal Secretary Position**

Legal Secretary: Legal secretary position available in the Safe City Strike Force Division requiring considerable knowledge of legal terminology, litigation procedures, pleadings and other legal documents. Must have three (3) years experience of secretarial experience; two (2) of those years must be as a Legal Secretary. Please apply online at www.cabq.gov.

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**Part-Time Secretary**

Part-time position available for experienced legal secretary. Three to four hours per day, mornings or afternoons. Must be knowledgeable in Wordperfect, Word, and Excel, and well organized. Prefer experience in business, tax, estate planning and probate, and real estate law. Compensation DOE. Contact Robert Gorman 243-5442.

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The Senior Citizens’ Law Office, a non-profit legal services organization, is seeking a full-time paralegal with strong litigation, research, and organizational skills. Transportation a must; Spanish-speaking a plus. E-mail resume, short writing sample and 2 references to kheyman@sclo.net, or mail to 4317 Lead Avenue SE, Suite A, Albuquerque, NM 87103. EOE.

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2006 Health Law Symposium
State Bar Center, Albuquerque
Thursday, October 12, 2006
5.4 General and 1.0 Professionalism CLE Credits
Co-sponsor: Health Law Section

8:00 a.m. Registration
8:20 a.m. Introductory Remarks
J. Douglas Compton, Esq., Lewis and Roca Jontz Dawe LLP
8:30 a.m. Health Care Industry Update
David Hilgers, Esq., Brown, McCarren, Austin, Texas
10:00 a.m. Break
10:15 a.m. Lessons from Rita/Katrina for Emergency Care
Mary Bearden, Esq., General Counsel, Harris Methodist Hospital, Houston
11:15 a.m. Avian Flu and the Western U.S.
Speaker TBA
12:15 p.m. Lunch
(provided at the State Bar Center)
1:15 p.m. Regulation in the Health / Drug Industries
Dr. Christine Beato,
Associate Commissioner, Food and Drug Administration, Washington, DC
Former Deputy Secretary, Health and Human Services Department
3:00 p.m. Break
3:30 p.m. Engagement Letters:
Their Importance in Handling Health Law Matters
(1.0 Professionalism)
James T. Reist, Esq., Bannerman & Williams PA
4:30 p.m. Annual Meeting, Health Law Section
5:00 p.m. Reception (State Bar Center)

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2006 Employment and Labor Law Institute
State Bar Center, Albuquerque
Friday, October 13, 2006
6.0 General CLE Credits
Co-sponsor: Employment & Labor Law Section

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<tr>
<th>Time</th>
<th>Event</th>
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<tr>
<td>8:30 a.m.</td>
<td>Registration</td>
<td></td>
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<tr>
<td>9:00 a.m.</td>
<td>Religion in the Workplace</td>
<td>David L. Johnson, Esq., Miller &amp; Martin PLLC, Nashville, TN</td>
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<tr>
<td>10:00 a.m.</td>
<td>Break</td>
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<tr>
<td>10:15 a.m.</td>
<td>First Amendment Retaliation Claims following Garcetti v. Ceballos</td>
<td>Bonnie I. Robin-Vergeer, Esq., Public Citizen Litigation Group, Washington, DC</td>
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<tr>
<td>11:00 a.m.</td>
<td>Employment Law Update</td>
<td>S. Charles Archuleta, Esq., Keleher &amp; McLeod, PA, Carlos M. Quinones, Esq., Narvaez Law Firm</td>
</tr>
<tr>
<td>Noon</td>
<td>Lunch</td>
<td>(provided at the State Bar Center)</td>
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<tr>
<td>1:00 p.m.</td>
<td>Update on Discovery Issues in Employment Cases</td>
<td>Hon. Lorenzo F. Garcia, Chief Magistrate Judge, U.S. District Court</td>
</tr>
<tr>
<td>2:00 p.m.</td>
<td>Break</td>
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<tr>
<td>2:15 p.m.</td>
<td>Labor Law Update</td>
<td>Danny Jarrett, Esq., Noeding &amp; Jarrett, PC</td>
</tr>
<tr>
<td>4:30 p.m.</td>
<td>Adjourn</td>
<td>K. Lee Peifer, Esq., University of New Mexico</td>
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REGISTRATION – 2006 Employment and Labor Law Institute
Friday, October 13, 2006 • State Bar Center, Albuquerque
6.0 General CLE Credits

☐ Standard Fee - $169  ☐ Employment & Labor Law Section Members, Government, Paralegal - $159

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- Judge’s name
- Attorney’s name

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Contact Veronica Cordova vcordova@nmbar.org or 797-6039 with questions.