Dear Colleagues:

As you may have read in recent editions of the *Bar Bulletin*, the Supreme Court must fill several vacancies on a variety of Supreme Court boards and committees. Our boards and committees play a critical role by assisting the Supreme Court with regulating the practice and procedure within our courts and the broader legal community. Anyone who has ever served on one of the Court’s boards or committees can attest to how challenging and rewarding the work can be. So in filling these vacancies, the Court strives to appoint attorneys and judges who are able to regularly attend committee meetings and who are committed to generously volunteering of their time, talent and energy to this important work.

*continued on page 2*

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Printed copies are available upon request.

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A Message from Chief Justice Bosson

continued from front cover

Because we rely on volunteer attorneys, the Court strives to solicit volunteers from throughout state who will bring geographical balance to our boards and committees. In making our appointments, the Court also seeks to ensure that each board and committee contains a balanced representation from the various practice segments of our Bar. To achieve these goals, we need volunteers representing the broad spectrum of our Bench and Bar who come from all corners of our great state.

To encourage as many of you as possible to volunteer, we are extending the deadline for submitting letters of interest and resumes until November 9. Please refer to the October 23rd edition of the Bar Bulletin for a complete listing of the existing vacancies that the Court must fill by the end of the year. In your letter of interest, please prioritize up to three boards or committees on which you would like to serve and discuss your qualifications for serving on those boards or committees. Letters of interest and resumes should be submitted by the November 9th deadline to Kathleen Jo Gibson, Chief Clerk, P.O. Box 848, Santa Fe, New Mexico 87504-0848.

On behalf of the entire Supreme Court I extend my sincere appreciation to all of you who are willing to volunteer to be a part of this important function within our legal system.

Sincerely,

Richard C. Bosson
Chief Justice

Casemaker is free and so is the training.

Learn how to use Casemaker — a free online legal research tool

November 13, 2006 • 3:30 to 4:30 p.m.
State Bar Center • 5121 Masthead NE • Albuquerque, NM 87109

Limited seating is available, so please call (505) 797-6000 to reserve your place.

The contents of the New Mexico Library will be accessed, and specific legal research terms will be used to demonstrate search and browse options.

Review of the library will include:
- case law
- statutes and session law
- administrative code
- state court rules
- attorney general opinions
- uniform jury instructions.

Basic and advanced search queries will include:
- phrases
- exclusions
- wildcard
- thesaurus
- proximity settings
- search by groups
- word forms
- order of results

Attendees will also be introduced to the Federal Library and additional library contents.

Casemaker training is approved for 1.0 CLE General Credits
State Bar Lending Library
A Free Membership Service

Visit the State Bar’s Lending Library at the State Bar or online at www.nmbar.org and obtain advice on the following topics:

- Client Materials
- Client Relations
- Law Office Management
- Law Practice
- Legal Career
- Marketing
- Professionalism and Risk Management
- Solo and Small Firm Practice
- Technology

Books and Tapes may be borrowed for two weeks; shipping is available for members who reside outside the Albuquerque area.

Browse Materials alphabetically or by topic on www.nmbar.org. Click on “Attorney Services/Practice Resources” in the top navigation bar and select “Lending Library.”

Place an Order by using the e-mail link membership@nmbar.org, visiting the State Bar Center or calling (505) 797-6033.
SEMINAR REGISTRATION FORM
CLE PROGRAMS - State Bar Center

NOVEMBER 7 - VIDEO REPLAYS

New Mexico Administrative Law Institute
5.2 General & 1.0 Ethics CLE Credits
8:30 a.m. – 3:15 p.m.
$209

Metropolitan Court Civil Procedure And Landlord/Tenant Law
7.1 General CLE Credits
8:30 a.m. - 4:10 p.m.
$209

Pro Se Can You See
1.0 Ethics & 1.0 Professionalism CLE Credits
8:30 a.m. – 10:30 p.m.
$79

The Effective and Efficient Use of Paralegals in New Mexico
1.0 General CLE Credits
11:00 a.m. – Noon
$49

Diversity - Why Bother?
Can We Find Answers in Ethics and Professionalism?
1.0 Ethics & 1.0 Professionalism CLE Credits
2:00 – 4:00 p.m.
$79

Cause and Effect of Arbitration Clauses: What Should You Consider When Drafting an Arbitration Clause for a Contract?
1.0 General CLE Credits
12:45 p.m. – 1:45 p.m.
$49

FOUR WAYS TO REGISTER
PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.
(Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours
INTERNET: www.nmbar.org, click CLE, then area of interest
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Name ____________________________________________
NM Bar # _________________________________________
Street ___________________________________________
City/State/Zip _____________________________________
_________________________________________________
Phone ___________________ Fax ____________________
E-mail ___________________________________________
Program Title ___________________________________
Program Date ___________________________________
Program Location _______________________________
Program Cost ___________________________________
☐ Purchase Order (Must be attached to be registered)
☐ Check enclosed $ ____________________________
Make check payable to: CLE
☐ VISA ☐ MC ☐ American Express ☐ Discover
Credit Card # ___________________________________
Exp. Date _______________________________________
Authorized Signature ______________________________
Contributions and announcements to the Bar Bulletin are welcome but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy is available upon request.

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Professionalism Tip
With respect to parties, lawyers, jurors and witnesses:
I will be mindful of time schedules of lawyers, parties and witnesses.

Meetings
October
30
Public Legal Education Committee, noon, State Bar Center

November
1
Employment and Labor Law Section Board of Directors, noon, State Bar Center
2
Board of Bar Commissioners Meeting, noon, Roswell Convention Center
6
Attorney Support Group, 5:30 p.m., First United Methodist Church
8
Children’s Law Section Board of Directors, noon, Juvenile Justice Center
9
Public Law Section Board of Directors, noon, Risk Management Division
9
Business Law Section Board of Directors, 4 p.m., State Bar Center
10
International and Immigration Law Section Board of Directors, 1:30 p.m., State Bar Center

State Bar Workshops
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.
N.M. Supreme Court Board Governing the Recording of Judicial Proceedings

Reporter/Monitor Problems

The Supreme Court Board Governing the Recording of Judicial Proceedings ensures that outstanding reporting/recording services are provided to members of the Bar and to hearing agencies. If any user of recording services encounters a reporter/monitor problem, the board requests counsel notify it with the following information: the date and type of hearing, the person or service that recorded the hearing and the nature of the problem. E-mail notifications to Board Administrator Linda McGee, ccr@ccrboard.com; mail to PO Box 92648 Albuquerque, NM 87199-2648; or call (505) 821-1440.

Children’s Court Rules Committee Vacancy

One attorney vacancy exists on the Children’s Court Rules Committee due to the resignation of one member. Deadline for letters/resumes is Nov. 20. Attorneys interested in volunteering time may send a letter of interest and/or resume to:

   Kathleen Jo Gibson, Chief Clerk
   PO Box 848
   Santa Fe, NM 87504-0848.

Commission on Access to Justice Vacancy

One attorney vacancy exists on the Commission on Access to Justice due to the resignation of one member. Deadline for letters/resumes is Nov. 13. Attorneys interested in volunteering their time may send a letter of interest and/or resume to:

   Kathleen Jo Gibson, Chief Clerk
   PO Box 848
   Santa Fe, NM 87504-0848.

Law Library

October 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.

First Judicial District Court

Destruction of Exhibits

Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1974 to 1989

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st Judicial District Court will destroy exhibits filed with the court in criminal, civil, children’s court, domestic, incompetence/mental health, adoption and probate cases for years 1974 to 1989, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning Oct. 19 to Dec. 28. Attorneys who have cases with exhibits should verify exhibit information with the Special Services Division, (505) 827-4687, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant(s) exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Second Judicial District Court

Destruction of Exhibits

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy exhibits filed with the Court in the civil cases for the years 1993, including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning Oct. 19 to Dec. 28. Attorneys who have cases with exhibits should verify exhibit information with the Archives and Special Services Division, (505) 841-7596/5452, from 8 a.m. to 12 p.m. and from 1 p.m. to 5 p.m., Monday through Friday. Plaintiff’s exhibits will be released to counsel of record for the plaintiff(s) and defendant’s exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

U.S. District Court, District of New Mexico

Reappointment of Full-Time U.S. Magistrate Judge

The current term of office for incumbent full-time U.S. Magistrate Judge Karen B. Molzen will expire on April 25, 2007. The U.S. District Court has established a panel of citizens, as required by law, to consider the reappointment of Judge Molzen to a new eight-year term. The duties of Judge Molzen are defined in 28 U.S.C. § 636(a) and involve the trial of federal petty and minor offenses as per 18 U.S.C. § 3401; imposition of conditions of release under 18 U.S.C. § 3146; conducting arraignments, non-guilty pleas, and felony guilty pleas; upon designation, conducting hearings and submitting to the judges proposed findings of fact and recommendations for dispositive motions or prisoner petitions; trial and disposition of civil cases upon consent of the litigants; and

Quality of Life Quote

The reward of a thing well done is to have done it.

Ralph Waldo Emerson
performing such other duties as conferred or imposed by law or by the Federal Rules of Criminal Procedure and/or the Rules of the U.S. District Court for the District of New Mexico. The public and members of the Bar are invited to submit comments as to whether the reappointment of Judge Molzen to a new term of office should be considered. All comments will be kept confidential and should be submitted not later than Nov. 30 to:

Mr. William B. Keleher, Chairman
U.S. Magistrate Merit Selection Panel
PO Box AA
Albuquerque, NM 87103

STATE BAR NEWS
Attorney Support Group

The next Attorney Support Group meeting will be held at 5:30 p.m., Nov. 6, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

Board of Bar Commissioners
Appointments to Fair Judicial Elections Committee

The Board of Bar Commissioners has created a Fair Judicial Elections Committee. The functions of the committee are:

1) to monitor judicial election campaigns for compliance with the Code of Judicial Conduct;
2) to assist judges, candidates for judicial office, all citizens, citizen groups, advocacy groups, political action organizations and others to understand the standards and expectations of the Code of Judicial Conduct as they relate to statements and advertising in election campaigns for judicial office; and
3) to receive, review and investigate statements and advertisements emanating from incumbent judges and lawyers who are candidates in elections for judicial offices, made in or made for the purpose of affecting judicial election campaigns, and to comment privately to those candidates and their campaign committees on statements and advertising that are deemed to violate or fall below the requirements of the Code of Judicial Conduct or that are destructive of or inconsistent with the standards of independence, integrity, impartiality, dignity and decorum that are the philosophical, legal and historical heritage of the judicial branch of government. The board will be appointing eight members to the committee for one-year terms to expire Dec. 31, 2007. Anyone interested in serving should send a letter of interest and resume by Nov. 10 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860, or fax to (505) 828-3765.

Meeting Agenda
Noon, Nov. 2, Roswell
Convention Center, Roswell

1. Approval of Sept. 15 minutes
2. Finance Committee report
3. Acceptance of September financials
4. Approval of 2007 dues and licensing form
5. Approval of Bylaws/Policies Committee report
A. Amendments to YLD bylaws, State Bar bylaws, and the Rules Governing the State Bar of New Mexico to address YLD chair aging out
B. Amendments to State Bar Bylaws, Article IX, Section 9.4, “Annual Review of Sections and Committees,” to add a sunset provision
C. Revised vehicle usage policy
D. Discussion regarding board composition and adding an out-of-state member
6. Discussion regarding creation of a new Judicial Independence Committee
7. President’s report
A. Fair Judicial Elections Committee
B. Swearing-in ceremony for new admittees on Sept. 29
8. President-Elect’s report
A. Commission on Lawyers Assistance Programs Conference in San Francisco
B. BBC reception on Dec. 15
C. Officers’ retreat in January
D. 2007 CLE at Sea Alaskan cruise
9. Annual Meeting Planning Committee report
10. Executive director’s report
11. Division reports
12. 2007 BBC meeting schedule
13. New business

Business Law Section
PRC Advisory Committee Comments Solicited

The New Mexico Public Regulation Commission recently established a Corporations Bureau Advisory Committee. The purpose of the committee is to “formulate, receive, analyze, deliberate and recommend changes to the commission regarding the business practices, rules and statutes pertaining to the Corporations Bureau.” Robert D. Gorman, Business Law Section board member, has been appointed to the committee by Commissioner Jason Marks. He is soliciting suggestions, observations and comments from State Bar member to assist him in advising the commission. Members should send suggestions for improving operational efficiency or addressing other areas of concern to Robert D. Gorman, PO Box 25164, Albuquerque, NM 87125-0164 or rgorman@nm.net. Suggestions may include comments concerning turn-around time, forms availability or adequacy, expedited service in emergency situations, electronic or fax filing and similar issues.

Casemaker
Free Training Session

Training on how to use Casemaker, the Bar’s online legal research tool, will take place from 3:30 to 4:30 p.m., Nov. 13, at the State Bar Center. Content will include accessing the New Mexico Library and using search and browse features. Since seating is limited, call (505) 797-6000 to reserve a space. The training is approved for 1.0 CLE general credit.

Employment and Labor
Law Section
Board Meetings Open to Section Members

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, Nov. 1, at the State Bar Center. Lunch is not provided. For information about the section, visit the State Bar Web site, www.nmbar.org, or call Carlos M. Quiñones, section chair, (505) 248-0500.

Indian Law Section
Annual Meeting, Scholarship Awards and CLE

The Indian Law Section will hold its annual meeting at 1 p.m., Nov. 9, in conjunction with Santa Clara Pueblo v. Martinez: Past and Present Day Consequences. During the annual meeting, two law students will be awarded bar preparation scholarships. Each student will receive $2000 to defray the costs of the bar exam and preparation courses. Agenda items for the annual meeting should be sent to Chair Levon Henry, lhenry@ dnalegalservices.org or (928) 871-4151.
The cost of the CLE program is $95; and $90 for section members, government attorneys and paralegals. Attendees will receive 2.7 general CLE credits. Native American cuisine will be provided for lunch. To register call (505) 797-6020; fax (505) 797-6071; or visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

**NREEL Section**

**Annual Meeting and CLE**

The Natural Resources, Energy and Environmental Law Section will hold its annual meeting at 12:15 p.m., Dec. 15, in conjunction with the CLE program, *Climate Change Impacts, Laws and Policies*. Agenda items should be sent to Chair Kyle Harwood, ksharwood@ci.santa-fe.nm.us or call (505) 955-6511. Attendees will earn 3.8 general, 1.0 ethics and 1.0 professionalism CLE credits. The cost of the CLE program is $169 ($159 for section members, government and legal services attorneys and paralegals). Lunch will be provided. See the CLE At-a-Glance insert in the Oct. 23 (Vol 45, No. 43) Bar Bulletin for more information. To register, call (505) 797-6020; fax (505) 797-6071; or 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 *The Nuts and Bolts of the D.A.’s Office*, presented by Kari Brandenburg of the Bernalillo County District Attorney’s Office. The program will be held from noon to 1 p.m., Nov. 8, at the State Bar Center and offers 1.0 general CLE credit. Registration begins at the door at 11:30 a.m. The cost is $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.

**YLD/UNMSOL Mentorship Program**

**Attorney Mentors Needed**

The Young Lawyers Division of the State Bar (YLD) and the University of New Mexico School of Law Student Bar Association Mentorship Program matches New Mexico attorneys with UNM law students to help mentor students in the practice of law. The YLD is currently recruiting New Mexico attorneys to serve as mentors to law students. Attorneys are needed to mentor law students who are interested in a variety of practice areas. Participating attorneys and students will be invited to attend two YLD/UNMSOL-sponsored socials. In addition to attending these socials, attorneys will be expected to meet with their assigned law student at least four times throughout the 2006-2007 academic year.

The fall mentor/mentee social is set to take place from 6 to 9 p.m., Nov. 2, at the Carom Club (located on 3rd and Central).

To volunteer as a mentor, complete the form posted on the State Bar’s Web site, http://www.nmbar.org/Content/NavigationMenu/Divisions_Sections_Committees/Divisions/YLD/YLD_UNM_Law_School_Mentorship/yldunmentor06.pdf, and fax the completed application no later than Oct. 30 to Román Romero, (505) 224-9554. For further information and to R.S.V.P., contact Román Romero, rromero@romerolawfirm.com or (505) 345-9616; or Valerie Reighard, vreighard@guebertlaw.com or (505) 823-2300.

To register:
- E-mail abqbar@abqbar.com
- Call (505) 243-2615 or (505) 842-1151
- Mail request to 400 Gold SW, Suite 620, Albuquerque, NM 87102.

**American Bar Association Center for Professional Responsibility**

**Michael Franck Award**

Applications are now being accepted for the 2007 *Michael Franck Professional Responsibility Award*. The award spotlights individuals whose career commitments in areas such as legal ethics, disciplinary enforcement and lawyer professionalism inspire public confidence in the legal profession. The 2007 award will be presented during the 33rd National Conference on Professional Responsibility, May 31, 2007 in Chicago, Illinois. The deadline for nominations is Dec. 15. Visit http://www.abanet.org/cpr/awards/franck.html for a nomination form and more information about the award and past recipients or e-mail the Center for Professional Responsibility, cpr@abanet.org.

**Commission on Women in the Profession**

The ABA Commission on Women in the Profession is seeking nominations for the 17th Annual Margaret Brent Women Lawyers of Achievement Awards. These awards will be presented at a luncheon on Aug. 5, 2007, during the ABA Annual Meeting in San Francisco. The deadline to submit the nomination form and supporting materials is the close of business, Nov. 27. Previous nominations, which are on file, may be re-submitted. Send a letter stating the renomination and update supporting material. Direct questions to Julia Gillespie, (312) 988-5668 or e-mail gillespj@staff.abanet.org. For more information, go to http://www.abanet.org/women/margaret-brent/nominationinformation.html.

**N.M. Women’s Bar Association**

**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., Nov. 8, at NYPD Pizza, 215 Central Avenue, NW, Albuquerque. Cheryl Fairbanks, Esq., will give a brief presentation about the basics of
Indian law 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 Nov. 6 with Patricia Baca at pb@ sutinfirm.com. The luncheons are open to all interested persons.

**UNM School of Law**

**Library Fall Hours**

<table>
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<tr>
<th>Monday – Thursday</th>
<th>8 a.m. to 11 p.m.</th>
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<td>Friday</td>
<td>8 a.m. to 6 p.m.</td>
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<tr>
<td>Saturday</td>
<td>9 a.m. to 6 p.m.</td>
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<tr>
<td>Sunday</td>
<td>12 noon to 11 p.m.</td>
</tr>
</tbody>
</table>

Nov. 23 and 24: Closed

Phone: (505) 277-6236


**Native American Law Students Association**

**Raffle**
The Native American Law Students Association is raffling a 2007 Harley Davidson Sportster XL. Tickets are one for $25 or five for $100. The raffle will take place at noon, Oct. 31, in the Law School Forum. Proceeds will help send students to moot court competitions, conferences and other student-related activities. For more information, contact NALSA President Shela Young at youngsh@law.unm.edu.

**Other News**

**Business and Employer 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 every 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 every 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: Nov. 7, 14 and 21; Dec. 5, 12 and 19.

New Employers Workshops: Nov. 28; and Dec. 26.

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

**Center for Civic Values**

**IOLTA Grant**

Applications for 2007 IOLTA grant funding are available on the Center for Civic Values’ Web site at www.civicvalues.org/iolta. The total funding available is $225,000. New Mexico 501(c)(3) organizations that provide civil legal services for the poor, law-related education for the public or improvements in the administration of justice are eligible to apply. Contact CCV at (505) 764-9417, extension 14, with questions about the application or for technical difficulties. Applications must be completed and received by November 1.

**Legal FACS**

**Fundraising Event**

Legal FACS is excited to present its first annual fundraising event, A Celestial Celebration: An Evening to Shine. The Friends of Legal FACS invites all to be a part of this very special black tie gala from 6 to 10 p.m., Nov. 4, at the LodeStar Astronomy Center in Albuquerque’s historic Old Town. There will be hors d’oeuvres, a cash bar and live music by the Rodney Bowe Jazz Quartet. For sponsorship and ticket information, contact Legal FACS, (505) 256-0417.

**N.M. High School Mock Trial Program**

**Attorney-Coach Needed**

East Mountain High School needs an attorney to provide legal expertise and coaching for the 2007 New Mexico High School Mock Trial Program. The amount of time invested will be decided by the coach and the teacher advisor, but teams usually meet at least once each week. Regional and state finals are March 16–17, and nationals are May 10–13. Contact Michelle Giger, (505) 764-9417, ext. 11.

**Workers’ Compensation Administration**

**Notice of Public Hearing**

Notice is hereby given that at 1:30 p.m., Nov. 8, the New Mexico Workers’ Compensation Administration will conduct a public hearing on amendments to the in-patient hospital data collection provisions contained in Part 7 of the Workers’ Compensation Rules, the safety rules, the rules governing OCIPs and the individual and group self-insurance rules. The hearing will be conducted at the Workers’ Compensation Administration, 2410 Centre Avenue SE, Albuquerque. Videoconferencing may also be made available in the WCA Field Offices. Contact Renee Blechner, (505) 841-6083, by Nov. 1 to reserve videoconferencing. The proposed rule changes and copies of proposed changes to the fee schedule were made available on Oct. 25. Comments made in writing and at the public hearing will be taken into consideration. Written comments pertaining to these issues will be accepted until the close of business on Nov. 15. Oral comments will be limited to five minutes per speaker. For further information, call (505) 841-6000. Inquire at the WCA Clerk’s Office, 2410 Centre Avenue SE, Albuquerque, NM, 87106, (505) 841-6000, for copies of the fee schedule. For a copy by mail, inquire at the WCA clerk’s office about the postage cost and the envelope size needed. Include a post-paid, self-addressed envelope with each request. Any individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter or any form of auxiliary aid or service to attend or participate in the hearing or meetings should contact Renee Blechner at (505) 841-6083 or inquire about assistance through the New Mexico relay network at (800) 659-8331.
Dear Members:

The Board of Bar Commissioners has approved the following budget for calendar year 2007. The budget is available in its entirety for the benefit of State Bar members and to provide an opportunity for members to object to any proposed expenditure in the budget that is not related to the State Bar’s purposes of regulating the profession or improving the quality of legal services. Members wishing to receive a printed copy of the budget disclosure may do so by calling (505) 797-6035 or (800) 87nmbar (876-6227). Instructions for challenging expenditures believed to be non-germane are set forth on page two of the document. The first pages of the budget provide the total expenditures by categories, while the remaining pages provide explanations and further breakouts of the expenditures by category. The total expenditures for the State Bar in 2007 will be approximately $2,189,995. Of this amount, approximately $785,180 is expected to be supported by non-dues revenue, and approximately $1,404,815 will be funded by dues. The following chart illustrates the total dues-supported budget broken into four main categories.

There were no material non-budgeted items for 2005.

The financial condition of the State Bar is sound, and the Board of Bar Commissioners is proud of the many programs and services the State Bar provides to the membership and the public.

Sincerely,

Henry A. Alaniz
Secretary-Treasurer
Stevan Douglas Looney has been elected shareholder in the firm of Sutin, Thayer & Browne. Looney received his law degree from the University of San Francisco School of Law in 1980. He serves on several boards, including the New Mexico Minimum Continuing Legal Education Board and the board of trustees for the Art Center Design College, Inc. Looney is also a hearing officer for the New Mexico Disciplinary Board. He practices primarily in the area of complex litigation, including commercial, environmental, taxation, contract, insurance, civil rights, employment, construction and real estate matters.

Mary T. Torres has been nominated to serve as secretary to the National Conference of Bar Presidents, which provides programming to current bar leaders on “bread and butter” subjects such as membership expansion, continuing education, access to justice, provision of legal services, community outreach and education, diversity and finance. Presentations are also made on current issues including the death penalty moratorium movement, terrorism and civil liberties, law school debt forgiveness and other issues of current interest to the profession. Torres works primarily in civil litigation matters and has extensive experience in civil rights, employment, education, governmental liability related matters and insurance defense.

Julia V. Jarvis has joined the firm of Cassutt, Hays & Friedman, P.A., as an associate attorney. Jarvis was an assistant district attorney with the 1st Judicial District Attorney’s Office and also worked in the Office of the General Counsel of the New Mexico Environment Department. Jarvis is a 2003 graduate of the University of Oregon School of Law. She is currently on the board of directors of the Cielo Vista Homeowners Association and volunteers as a judge for the Santa Fe County Teen Court. Jarvis will be assisting with the firm’s real estate, business and litigation practices.

Michael J. Golden has joined the Santa Fe office of Sutin Thayer & Browne. He practiced with the firm of Moore & Golden, P.A., in Santa Fe since 1977. He received his law degree from New York University in 1965 and his undergraduate degree from Johns Hopkins in 1962. Golden practices primarily in the areas of family law and general civil litigation. He is listed in the 2007 edition of Best Lawyers in America in the family law category and also has an “AV” rating from Martindale-Hubbell.

Larry Hanna recently graduated from the 2005-06 Leadership New Mexico Core Program, a nonpartisan, non-profit organization founded in 1995 to identify current and emerging leaders throughout New Mexico, enhance their leadership skills and deepen their understanding of the challenges and opportunities facing the state. The Core Program sessions include topics such as health and human services, economic development, education, environment and natural resources, government and crime and justice.

Dan Bryant. Otero County attorney, was recently honored by the New Mexico Association of Counties in appreciation for his dedication and service to New Mexico counties. In a letter to Bryant, the association called him a “great resource” and commended him on his “mastery of county legal issues and his passion and devotion to county government.”

Margaret Romero has joined the Rodey Law Firm as an associate in the business department. Romero’s practice focuses primarily in the areas of real estate, land use and water law. Romero received her undergraduate degree in 2003 from UNM, graduating magna cum laude, and her J.D. from the UNM School of Law in 2006.

David Benavides is this year’s recipient of the Karl Souder Water Protection Award. Benavides is a staff attorney for the Santa Fe office of New Mexico Legal Aid, a private non-profit tax exempt office that provides free legal services for individuals and entities unable to afford private counsel. Presented by the New Mexico Environmental Law Center, the environmental awards honor Karl Souder, a hydrologist who worked with the center as an expert witness until his sudden death in 1991. As a result of an anonymous gift made to the Law Center in Karl’s memory, this award recognizes an individual or organization that has made significant contributions to the protection of New Mexico’s water.

Bernalillo County Metropolitan Court Judge Sharon Walton has been elected president of the H. Y earle Payne Chapter of the American Inns of Court (IOC). The IOC is an organization of judges, attorneys and law students dedicated to improving the skills and ethics of the bench and bar. Judge Walton has been on the Bernalillo County Metropolitan Court bench since 1999 when she was appointed by Governor Gary Johnson. She is a graduate of the UNM School of Law and has also served as a member and chair of the New Mexico Supreme Court Rules Committee for Courts of Limited Jurisdiction.

The University of New Mexico School of Law earned the No. 1 spot in Hispanic Business Magazine’s ”Top 10 Law Schools for Hispanics.” The magazine ranked UNM ahead of several large law schools, including the University of Miami at No. 2, the University of Texas at Austin, No. 3, and Stanford University, ranked fourth. Minorities comprise about half of the law school’s entering class of 120 this fall. UNM’s Mexican American Law Student Association also earned recognition as “Best Law Student Organization” from the Hispanic National Bar Association, the magazine notes.

The Mexican American Legal Defense and Educational Fund, (MALDEF) presented its 2006 Corporate Responsibility Service Award to Patrick Ortiz. PNM Resources senior vice president and general counsel, MALDEF, the nation’s leading Latino legal organization, promotes and protects the rights of Latinos through advocacy, litigation, community education and outreach, leadership
development and higher education scholarships. Ortiz was recognized for his distinguished career in law and community service. Ortiz received his bachelor’s degree from the College of Santa Fe and his law degree from the Georgetown University Law Center in Washington, D.C.

Bernalillo County Metropolitan Court Chief Judge Judith Nakamura was one of 19 people honored by Mothers Against Drunk Driving at the national convention in Anaheim. She was the only judge named in the criminal justice category. Judge Nakamura was recognized for her efforts in the establishment of the Enhanced DWI First Offenders program in Bernalillo County Metropolitan Court which places certain first time DWI offenders under supervised probation and also requires them to install ignition interlocks on their vehicles.

Arturo Jaramillo, past president of the State Bar of New Mexico and co-chair of the Diversity Committee, has received the American Bar Association’s Spirit of Excellence Award for his efforts toward diversity. The award celebrates the efforts and accomplishments of lawyers who work to promote a more racially and ethnically diverse legal profession. Awards are presented to lawyers who excel in their professional settings; who personify excellence on the national, state, or local level; and who have demonstrated a commitment to racial and ethnic diversity in the legal profession. Jaramillo will be honored at a lunch in Miami on Feb. 10.

Robert P. Tinnin, Jr., a principal member of the Tinnin Law Firm, has been selected to be included in the 2007 edition of Best Lawyers in America in the labor and employment law category. Tinnin is one of a select group who has been chosen for listing in every edition of the publication. Tinnin is a recognized specialist in employment and labor law by the New Mexico Board of Legal Specialization.

Julie K. Fritsch and Jacqueline A. Olexy have joined Madison, Harbour & Mroz, P.A., as associates. Fritsch earned her bachelor’s degree in history from the University of Notre Dame in 2000 and her J.D. from Vanderbilt University School of Law in 2003. She clerked for the Honorable Leslie C. Smith, U.S. magistrate judge. Olexy earned dual baccalaureate degrees in health policy and administration and nursing from the Pennsylvania State University in 1996. She earned a master’s degree in nursing from UNM in 2001 and in 2003, a post-master’s certificate in nursing administration. She graduated from the Pennsylvania State University Dickinson School of Law in 2006.

Four attorneys in the Holland and Hart Santa Fe office are listed in the 2007 edition of Best Lawyers in America. Those ranked include: Brad C. Berge, environmental law, natural resources law, personal injury litigation and product liability litigation; Michael B. Campbell, natural resources law and oil and gas law; William F. Carr, energy law, natural resources law and oil and gas law; Mark F. Sheridan, antitrust law. Carr has been selected for more than 10 years.

Lewis and Roca Jontz Dawe is pleased to announce that Thomas R. Dawe is chair-elect of the Senior Lawyer Division of the State Bar of New Mexico, and Jeffrey H. Albright has been re-appointed to serve as a member of the Committee on Women and the Legal Profession. Dawe is a partner with the firm’s commercial and tort litigation groups. Dawe received his J.D. from Stetson University College of Law and his B.A. from UNM. Albright is a partner with the firm’s intellectual property, land use and zoning, telecommunications and utilities, and environmental and natural resources practice groups. He received his J.D. from the UNM School of Law, his M.A. in national security affairs from the Naval War College, his M.S. in electrical engineering from the Naval Postgraduate School and his B.S. in political science from the U.S. Naval Academy.

Amber Creed has joined the Rodey Law Firm as an associate in the litigation department. Creed’s practice focuses primarily in the area of professional liability. Creed received her J.D. from the UNM School of Law in 2006, graduating magna cum laude. She received her undergraduate degree in 2003 from Boston University, graduating cum laude.

Nina Compton, professor of business law at New Mexico State University, has won the 2006 Dennis W. Darnall Faculty Achievement Award. The award is presented each year to a faculty member for achievements in teaching and research and for service to the community and the university. Compton, who teaches law courses in business and commercial litigation, health care, consumer interests and contemporary issues within American civil justice, has been teaching in the undergraduate, graduate and honors programs at NMSU for 26 years.
### Legal Education

#### October

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<td>21st Annual Bankruptcy Year in Review</td>
<td>VR, State Bar Center Center for Legal Education of NMSBF, 6.0 G, 1.0 E, (505) 797-6020, <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>31</td>
<td>Real World Toxicology for the Courtroom: Legal Evaluation Strategies for Forensic, Tort and Environmental Cases</td>
<td>VR, State Bar Center Center for Legal Education of NMSBF, 5.5 G, (505) 797-6020, <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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#### November

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<td>Ethical Forms of Compensation</td>
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<td>6</td>
<td>Internet Sources and Resources</td>
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<td>7</td>
<td>Diversity—Why Bother? Can We Find Answers in Ethics and Professionalism?</td>
<td>VR, State Bar Center Center for Legal Education of NMSBF, 1.0 E, 1.0 P, (505) 797-6020, <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>Effective and Efficient Use of Paralegals in New Mexico</td>
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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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<th>7</th>
<th>Ethical Dilemmas: How to Solve Them</th>
<th>8</th>
<th>Avoiding and Resolving Fee Disputes: What You Must do; What You Should Do</th>
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<td>Pro Se Can You See: Navigating the Fog of the Pro Se Litigant</td>
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**WRITS OF CERTIORARI**

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

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

**Effective October 30, 2006**

**Petitions for Writ of Certiorari Filed and Pending:**

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(please check current edition for updated list)

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**OPINIONS**

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

Gina M. Maestas, Chief Clerk New Mexico Court of Appeals  
PO Box 2008 • Santa Fe, NM 87504-2008 • (505) 827-4925  
**Effective October 20, 2006**

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NMHBA on Solid Foundation

After many years absence from involvement with the New Mexico Hispanic Bar Association, I returned recently to find it in extraordinary shape. In fact, it was the high level of activity that brought me back. From afar, I observed many successful events—the awards banquet, the Holiday scholarship fundraiser, the student law camp, this publication and many, many others.

Having been somewhat involved in the nascent years and then having had intermittent activity since then, I was well aware of the humble beginnings and the many struggles that brought the organization to where it is at today. Having been involved in many grassroots organizations over the years, I was attracted, if not compelled, to become active with an organization that was already functioning at such a high level. Yes, I am a bandwagon jumper—and I don’t mind one bit letting everyone know. In fact, that is a message I would very much like to encourage.

This organization is based on a solid foundation, built over many years with much effort and the determination of many. The NMHBA has been reinvigorated with new blood that is dynamic, if not inspirational. The opportunities to grow and have an impact are endless.

With such a wave of success, what can I offer? That is a question I asked myself and others may as well. With so many exciting projects and so many active and interesting members, the answer, is there is a role for each of us. Some give of their time, some allow us to access their special talents or others share their resources. Some of our members focus on education, others on judicial vacancies and others on developing policy statements that affect the surrounding community. For me, I enjoy being along for the ride. It is only due to age and longevity that I am aware of the history and of the current state of affairs. With this knowledge and awareness of the past and the present, I only hope to serve in some limited capacity helping to keep this ship moving forward in the direction is has begun.

Frank Baca, Esq.
NMHBA President

At the Awards Banquet, which was held on October 27th, we honored and acknowledged many of those who have contributed to the success of the organization over the years and those that are truly responsible for keeping it going. I hope you will consider joining us on our journey as we recognize our history and plan our future.
2006 Law Camp:
Training the Lawyers of Tomorrow

by Tina Cruz, Esq.
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Last fall the Executive Committee of the New Mexico Hispanic Bar Association was informed by Board Secretary Mary Torres about a fellowship opportunity through LexisNexis and Martindale-Hubbell. Mary informed the Executive Committee that, in December of 2005, the LexisNexis Martin-dale-Hubbell Legal Fellowship would be awarded to an individual and/or association that sought to advance education, the practice of public interest law, or diversity in the legal profession. The fellowship award would be granted in the amount of $15,000.

After some brainstorming, Brian Colón and I, with the assistance of UNM School of Law Professor Margaret Montoya, prepared an application on behalf of the New Mexico Hispanic Bar Association. In the application, we cited to statistical data compiled in a report issued by the New Mexico State Bar Association regarding the status of minority attorneys in New Mexico. We also discussed a study prepared by Professor Montoya, William Kidder, and Valerie Romero-Leggott regarding ways within which educational opportunities for under-represented groups could be expanded throughout various stages in the educational pipeline. Based upon the empirical research and various qualitative studies, we argued that providing educational outreach to students in middle school is one way within which to increase the number of minorities who practice law in New Mexico. We petitioned the Fellowship Committee to grant the LexisNexis Martindale-Hubbell Fellowship Award to the New Mexico Hispanic Bar Association to develop and implement a law camp for seventh and eighth grade students. The idea for a law camp was drawn from a successful law camp program which was initiated by the University of New Mexico and Brian Colón in 2004. After considering applications from over thirty applicants nationwide, the Fellowship Committee granted the $15,000 award to the New Mexico Hispanic Bar Association.

In June of this year, the New Mexico Hispanic Bar Association hosted its law camp at the University of New Mexico. Twenty-four students from throughout the state of New Mexico and the Navajo Nation participated in the law camp. Students were selected, regardless of race and/or ethnicity, based upon a review of letters of recommendation and two essays prepared by the applicants. Half of the students were residents of Albuquerque while the other half were drawn from rural communities, including Mora, Tierra Amarilla, Hondo Valley and the Navajo Nation. I had the pleasure of teaching and administering both weeks of the program.

The students stayed in dormitories at UNM for a week. For many it was their first stay away from home. Each morning the students went on a law-related field trip. Lisa Chavez-Ortega, Bryan Davis, and Carmela Starace, of the Rodey Law Firm, hosted an office tour and “Question and Answer” session with the students. The students also visited the Federal Courthouse and Second Judicial District Courthouse. Each afternoon the students prepared for a mock trial in the case of State of New Mexico v. Teo Timber Wolf; the case was loosely based on the story of Little Red Riding Hood. The University of New Mexico School of Law and the Narvaez Law Firm hosted the students during their trial preparation. The students learned how to prepare an opening statement, a direct examination and cross-examination, and a closing argument. In the evenings, the students were provided with information regarding how they could go about preparing for college. Information regarding admissions, financial aid, and student life was imparted by current UNM students. At the end of the week, the students tried their cases before District Court Judges Nan Nash and Clay Campbell. The jury was composed of New Mexico Hispanic Bar Association members Brian Colón, Rosalie Fragoso, Bryan Garcia, Duane Padilla, and Phillip Sapien, along with UNM Law students Antonia Roybal-Mack and Concepcion Quintero.

The law camp was an incredible success and the students all walked away with a better sense of what it means to be a lawyer. More importantly, the students were educated regarding how they can go about obtaining a post-secondary education. Due to the generosity of the University of New Mexico, led by Eliseo Torres (Vice-President of Student Affairs) and Tim Gutierrez (Office of Student Affairs), the New Mexico Hispanic Bar Association was able to host the twenty-four students from the 2006 Law Camp for half the cost which was initially anticipated. Next year, the New Mexico Hispanic Bar Association will again host the law camp. More information regarding the 2007 Law Camp will be provided in the Spring 2007 Res Publica newsletter.

The New Mexico Hispanic Bar Association thanks everyone who helped make this program a success, including U.S. Magistrate Judges Don Svet and Alan Torgerson, District Court Judges Clay Campbell, Kenneth Martinez, Nan Nash, and Ernesto Romero, Magistrate Court Judges Benjamin Chavez and Victor Valdez, the Mexican American Law Student Association, Lydia Piper and Scott Ferguson from the U.S. District Court, and the University of New Mexico!
Members on the Move

- **Morris J. Chavez** has also been included in New Mexico Business Weekly’s 2006 list of “Top 40 Under 40”. He was also recently appointed as Superintendent of Insurance by Governor Richardson.

- **Rosalie Fragoso** was named one of Twenty Elite Women in 2006 by Hispanic Business Magazine.

- **Charles “Chuck” Garcia** was appointed Regional President for the Hispanic National Bar Association.

- **Robert D. Gorman** was appointed to The New Mexico Public Regulation Commission’s recently established Corporations Bureau Advisory Committee.

- **Arturo Jaramillo** was selected by the American Bar Association to receive the 2007 Spirit of Excellence Award.

- **Antonio “Moe” Maestas** won the Democratic Primary Election for House District 16.

- **Mary Ann Romero** received the New Mexico State Bar’s 2006 Outstanding Contribution Award.

- **Brianna Zamora** was appointed as the Hispanic National Bar Association’s National Representative to the ABA/YLD Council.

- **Geno Zamora** has been selected by the Board of Regents of New Mexico Highlands University to serve on its Presidential Search Committee. Geno has also been included in New Mexico Business Weekly’s 2006 list of “Top 40 Under 40”.

Calling All Bar Members!

**BECOME A MEMBER OF …**

New Mexico Hispanic Bar Association

Join one of the most active voluntary bar associations today and get value for a low price! Membership is open to all members of the legal profession. The NMHBA provides its members with Continuing Legal Education Classes and social activities, disperses scholarships to deserving law students at UNM, members also can serve as mentors to UNM law students and much, much more!

The annual dues are $25 for attorneys admitted to practice 5 years or less or $50 for attorneys admitted to practice 6 years or more. To become a member visit www.nmbar.org, click on Other Bars/Legal Groups and click on the NMHBA link to find the membership application.

**HNBA**

HISPANIC NATIONAL BAR ASSOCIATION

HNBA is the national voice of 27,000 Hispanic attorneys, judges, and law professors. We invite all New Mexico attorneys to join, and be part of the talent pool for local, state, national, and international leadership positions. Visit www.hnba.com to learn the benefits of membership. Members of the New Mexico Hispanic Bar Association can now pay a special rate of $20 to join the national association.
Congratulations to the 2006 NMHBA Award Recipients

Frederick M. Hart, Esq. and Robert J. Desiderio, Esq.
Liberty and Justice Award

Benedicto R. Naranjo, Esq.
Attorney of the Year

Thank you to the Modrall Law Firm for their Platinum Sponsorship of the 2006 Award Banquet.

Thank you to Governor Bill Richardson for providing the Keynote Address.

Keep Judge Clay Campbell
District Court • Democrat

The Committee to Keep Judge Campbell is honored to sponsor this issue of Res Publica.

We applaud the New Mexico Hispanic Bar Association’s commitment to the principle of equality while celebrating our state’s rich multi-cultural diversity.

Paid for by the Committee to Keep Judge Campbell
Elicia Montoya & Kathy Love, Treasurers
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New Mexico Hispanic Bar Association’s
Sixth Annual Holiday Scholarship Fundraiser

Each year the NMHBA raises money for scholarships for New Mexico law, college and high school students.

Further details coming

Res Publica - Fall 2006
From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-042

Topic Index:
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Appeal And Error: Appellate Review; Harmless Error; Judicial Review; Record on Appeal; Standard of Review; and Substantial or Sufficient Evidence

Constitutional Law: New Mexico Constitution, General

Evidence: Cumulative Evidence; Evidence, General; and Substantial or Sufficient Evidence

Federal Law: Regulations

Government: Regulatory Authority; and State Agencies

Jurisdiction: Appellate Jurisdiction; and Supreme Court

Public Utilities and Communications: Communications, General; Rate Making; Telecommunications; and Telephone

Statutes: Interpretation; Legislative Intent; Rules of Construction; and Statutes, General


No. 29,228 (filed: June 29, 2006)

APPEAL FROM THE NEW MEXICO PUBLIC REGULATION COMMISSION

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OPINION

PATRICIO SERNA, JUSTICE

{1} The Public Regulation Commission (the PRC) regulates all telecommunication carriers in New Mexico. Pursuant to this authority, the PRC approved a five-year alternative form of regulation (AFOR) plan for Qwest Corporation, one such carrier. Qwest, PRC staff and other parties actively negotiated and endorsed the AFOR plan. During the plan’s third year, the PRC investigated whether Qwest was in compliance with a key component of the AFOR plan: a commitment by Qwest to invest $788 million in its New Mexico telecommunications infrastructure. The PRC found Qwest was not in compliance and ordered Qwest to issue credits or refunds to customers in an amount equal to any shortfall at the end of the five-year plan. Qwest now appeals this order. Qwest argues that the credit or refund order is outside the PRC’s statutory authority, is an improper form of retroactive remedy, is motivated by improper objectives, and is premature and speculative. The PRC avers that it had the statutory authority to approve Qwest’s AFOR plan; the $788 million investment provision was a key compromise in the AFOR plan; Qwest failed to timely object to the investment provision at the time the plan was negotiated and approved, thereby waiving the ability to challenge it later; the Legislature has given the PRC broad authority to enforce its orders; and the credit or refund order is merely an incentive for Qwest to complete its investment commitment before the end of the five-year term.

{2} We agree with the PRC that it had the statutory authority to enter into the AFOR plan and add the credit or refund incentive for Qwest to invest the full $788 million in its telecommunications infrastructure. The credit or refund order is not an impermissible retroactive remedy, was not based on an impermissible purpose, nor was it premature or speculative.

{3} Qwest also argues that the PRC’s order should be set aside because of procedural errors and errors in the PRC’s compliance investigation findings. Because we find no error, we affirm.
I. FACTS
A. Utility Case No. 04-00237-UT: Qwest’s Amended AFOR Plan and the AFOR Order

{4} On March 7, 2000, the Governor of New Mexico signed the Legislature’s amendments to the New Mexico Telecommunications Act, NMSA 1978, §§ 63-9A-1 to -20 (1985, as amended through 2004). One of these purposes of the amendments was to eliminate rate of return regulation and implement an alternative form of regulation for incumbent telecommunications carriers with more than fifty thousand access lines, such as Qwest. See § 63-9A-8.2(C) (2001).

{5} In January 2001, pursuant to the Act, PRC staff, Qwest Corporation, and other parties agreed to an AFOR plan to regulate Qwest for a period of five years from 2001-2006. The plan included a commitment by Qwest to invest a total of $788 million over the five-year term, approximately $157.6 million per year, in its New Mexico infrastructure. This was approximately a 25 percent increase over Qwest’s 1995-1999 investment. Qwest committed to a separate provision that required it to meet yearly quality of service standards, or potentially issue substantial credits to customers if these service standards were not met. The AFOR plan resolved and lead to the dismissal of eight pending PRC cases concerning Qwest: Utility Case Nos. 3007, 3008, 2938, 2939, 3162, 2922, 3147, and 3429. As an incentive, if Qwest met its investment commitments and service standards during the first two years of the plan, then Qwest would be able to increase its price caps for residence basic exchange service, or 1FR.

{6} At hearings, Qwest executives acknowledged the inherent risks in the AFOR plan investment commitment and the distinctiveness of this commitment from the service standards. Charles Ward, then Qwest’s Regional Vice President for the Eastern Region, testified,

[the total $788 million in infrastructure investments over the five-year term of the Plan severely limits Qwest’s options to respond to the changing industry environment. If...the investment package for New Mexico does not realize gains, or if competition increases the company’s exposure to cover its costs of investment, Qwest will be unable to change the amount invested in the state....The AFOR Plan puts Qwest at risk even beyond the $788 million commitment, because the Plan imposes rigorous service quality requirements.

A different Qwest executive testified to the background and status of the pending PRC cases and how the AFOR plan would resolve each one. As a result of the hearings and negotiations among all parties, the PRC issued a final order approving an amended version of Qwest’s suggested AFOR plan, described in an amended joint stipulation, on March 8, 2001.

{7} In the AFOR order, the PRC noted that considerable time at the hearings was devoted to the amended AFOR plan reopener provisions, including section X.B.5.e, which “allows the [PRC] to modify the AFOR to ensure compliance with the AFOR’s service standards or investment commitments if the [PRC] finds that the benefits and credits provided in the plan do not provide sufficient incentives.” While the parties generally agreed that the PRC should retain the ability to reexamine any aspect of the AFOR plan during its five-year term, the PRC order cited the statutory and legal authority for this post-approval ability. The PRC noted the broad statutory authority given to it by the Legislature to determine any issues within its regulatory authority, see NMSA 1978, § 63-7-1.1 (1998), to conduct investigations to carry out its responsibilities, see NMSA 1978, § 8-8-4(B)(7) (1998), and to enforce its orders “by appropriate administrative action and court proceedings,” Section 8-8-4(B)(5).

{8} After actively negotiating in favor of the AFOR plan terms, Qwest did not appeal the amended AFOR plan, the amended joint stipulation, nor the PRC’s final order. See § 63-9A-14 (permitting aggrieved parties to appeal PRC final orders).

B. The PRC’s Investigation Into Qwest’s Infrastructure Investment, Case No. 04-00237-UT

{9} In the first year of the AFOR plan, Qwest invested $275.2 million in infrastructure, $117.6 million above the AFOR yearly average of $157.6 million. Having fulfilled the investment commitment and the service quality standards, Qwest’s price cap for residence basic exchange service was raised from $10.66 to $12.25, under Section V.A.1.b of the AFOR plan. In the AFOR plan’s second year, Qwest invested $68.1 million in its infrastructure. While this was a significant decrease from the previous year, the $343.3 million investment over the first two years was $28.1 million above the $315.2 million required over those two years. Pursuant to Section V.A.1.c, this level of investment and the fulfillment of other service quality standards entitled Qwest to a second residence basic exchange service price cap increase of $1.25. In the third year, Qwest invested $85.4 million, but was $45 million short of the expected cumulative investment of $472.8 million.

{10} PRC staff for the first time expressed concern over the decline in Qwest’s infrastructure investment levels during the filing of Qwest’s annual compliance report for year two and notice regarding the second residence basic exchange service price cap increase. As a result, pursuant to the reopener provision of the AFOR plan, the PRC opened a docket to explore whether Qwest would remain compliant with the AFOR investment obligation and what remedial measures might be necessary to ensure Qwest’s compliance.

{11} Qwest argued that any investigation was premature and speculative, and that a remedial process was unnecessary. It argued that it was in substantial compliance after the third year because it had reached

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1Historically the telecommunications industry was monopolistic and required unique regulation. As a result, under rate of return regulation, the PRC sought to set rates that were neither unreasonably high so as to unjustly burden ratepayers nor unreasonably low so as to prevent a carrier from earning a reasonable rate of return on its investment. *PNM Gas Servs. v. Pub. Util. Comm’n*, 2000-NMSC-012, ¶ 8, 129 N.M. 1, 1 P.3d 383. The PRC also held hearings whenever a carrier sought to increase its rates, with the burden on the carrier to show the new rate was just and reasonable. Section 63-9A-8.1 (1998).

2The AFOR plan commenced July 1, 2001, and terminated on March 8, 2006. The terms were measured in twelve-month periods commencing on July 1, except for year five which ended on March 8, 2006.

3On June 30, 2000, Qwest merged with U.S. WEST, Inc. Some of these pending cases involved U.S. WEST.

4The AFOR plan initially set Qwest’s prices to $10.66 for residence basic exchange service, and $34.37 for business basic exchange service, or 1FB.
90 percent of the investment target required after year three. In other words, Qwest was only $45 million short. Qwest also averred that the $788 million investment was (1) no longer necessary because it had succeeded in meeting and exceeding the AFOR plan service quality benchmarks, and (2) unfeasible because of the economic downturn in the telecommunications sector. Qwest submitted a status report which stated that significant, negative, and unanticipated changes in the telecommunications sector had occurred since the AFOR plan was entered into which “argues against expenditure of $788 million...as...originally projected.” Nita Taylor, then Qwest’s Director of Regulatory Affairs, reaffirmed the PRC’s authority to revise the AFOR and reconsider the amount of the infrastructure investment or extend the period for Qwest to be compliant.

(12) The PRC concluded that the AFOR plan and order did not consider any “substantial compliance” standard for the investment commitment. Additionally, the PRC observed that if Qwest’s investment continued at the pace of the first two quarters of year four, Qwest’s total investment shortfall would be in the range of $220 million. The PRC also explained that there was no support for Qwest’s position that the AFOR plan investment commitment was tied only to the service standards. Finally, the PRC asserted that while Qwest argued that the telecommunications economic downturn should relieve it of the investment commitment, at no time did Qwest represent that it could not fulfill the commitment. Due to Qwest’s acknowledgment that it would fall short of the investment commitment, the PRC determined that it must address the prospect of a shortfall and put a remedial process in place.

(13) The parties made suggestions regarding the appropriate remedial process. While the PRC acknowledged that it would be premature to impose any penalties for violations until after the AFOR plan five-year term was completed, it determined that an incentive would be appropriate to ensure that Qwest would fulfill the $788 million infrastructure investment. The PRC ultimately decided on an incentive in the form of consumer credits or refunds in an amount equal to any eventual shortfall in the investment commitment. Acknowledging that the parties had not devoted any time to the details of a credit or refund procedure, the PRC opened Case No. 05-00094-UT to determine (1) Qwest’s ultimate compliance with the $788 million investment commitment at the end of the AFOR plan five-year term, and (2) the refund or credit procedure’s implementation and enforcement. The PRC issued a final order, including its findings and conclusions, on April 14, 2005.

(14) Qwest timely appealed the PRC’s final order to this Court. The Supreme Court has jurisdiction under Sections 63-7-1.1(E) and 63-9A-14, and Rule 12-102(A)(2) NMRA. We allowed the General Services Department of the State of New Mexico (GSD) to intervene and file a brief in opposition to Qwest’s appeal, under Section 63-9A-14, as a party “whose rights may be directly affected by the appeal.”

II. STANDARD OF REVIEW

(15) Section 63-9A-16 of the New Mexico Telecommunications Act states the applicable standard of review of an appeal of the PRC’s orders. “The supreme court shall affirm the [PRC’s] order unless it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law.” Section 63-9A-16(B); see also El Vadito de los Cerrillos Water Ass’n v. Pub. Serv. Comm’n, 115 N.M. 784, 787, 858 P.2d 1263, 1266 (1993) (stating the applicable standard of review).

III. DISCUSSION

A. Overview

(16) The core issue in this appeal involves Qwest’s AFOR plan commitment to invest a total of $788 million in its New Mexico network infrastructure. Qwest argues that the PRC’s incentive, the consumer credit or refund in an amount equal to the investment shortfall, is not in accordance with law because (1) the PRC lacks statutory authority to order Qwest to issue customer credits or refunds, (2) this order violates the rule against retroactive remedies, (3) the order was motivated by an impermissible objective of economic development and job growth, and (4) the order is premature and speculative because the AFOR plan term was not yet completed. The PRC argues that its order is authorized by law under its plenary power to regulate telecommunications and to interpret and enforce the AFOR plan; it is merely enforcing the AFOR plan that Qwest had agreed to and not appealed; and the AFOR plan expressly gives it the power to provide additional incentives to ensure Qwest’s compliance. The PRC generally denies that its order is in the form of retroactive remedy or that it was substantially based on any impermissible objective and asserts that the order is not premature or speculative because Qwest has been found non-compliant.

(17) We affirm the PRC. We agree that the PRC has broad authority to regulate telecommunications in New Mexico and find that the New Mexico Telecommunications Act explicitly authorized the PRC to enter into the AFOR plan and add the consumer credit or refund order incentive. The PRC’s consumer credit or refund order was based primarily on the AFOR plan terms and is not a prohibited form of retroactive remedy. The incentive order is neither premature nor speculative because Qwest admitted it would not meet the $788 million investment commitment and that it should not be forced to comply.

(18) Qwest argues that the credit or refund order should still be set aside even if authorized. It is Qwest’s position that the PRC could have found Qwest to be in compliance with the investment commitment after year three because Qwest was substantially compliant, or alternatively, because the PRC had found a different telecommunications company, having completed 94 percent of its investment commitment and regulated under a different AFOR plan, to be compliant. According to Qwest, the PRC order is defective because the order failed to include software expenses toward the infrastructure investment, and relied on unsworn statements that were not subjected to cross-examination and the undisclosed advice of an expert. We affirm the PRC on all these issues because the PRC’s order was not arbitrary, capricious, or an abuse of discretion; because it was supported by substantial evidence in the record; and because it is in accordance with the law.

B. The Consumer Credit or Refund Incentive Order

1. The Consumer Credit or Refund Incentive is Implicitly Authorized by the Legislature

(19) Qwest argues that no statute authorizes the PRC’s order that Qwest issue consumer credits or refunds in the amount of an investment shortfall. The PRC argues that its plenary authority to regulate telecommunications services within New Mexico, as provided by the Legislature and the New Mexico Constitution, authorizes the incentive.

(20) Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes. PNM Elec. Servs. v. Pub. Util. Comm’n, 1998-NMSC-017, ¶ 10, 125 N.M. 302, 961 P.2d 147. Statutory interpretation is a question of law which we review de novo. Pub. Serv. Co. v. Pub. Util. Comm’n,
and operations and lower prices for such services. Section 63-9A-2. The Legislature also declared that telecommunications providers are subject to the Act, and “the regulation thereof . . . provided.” Section 63-9A-5. Section 63-9A-8.2(C) ordered the PRC to eliminate rate of return regulation and implement AFORS for large telecommunications carriers like Qwest. Reading the New Mexico Constitution, the Public Regulation Act, and the New Mexico Telecommunications Act together, we find the Legislature sought creation of a new form of regulation for telecommunications providers and left regulatory authority to the PRC. Pursuant to Section 63-9A-8.2(C), the PRC eliminated rate of return regulation for Qwest and implemented an AFOR plan. Section 63-9A-11 expressly grants the PRC the authority to hear complaints alleging violations of any order or rule pursuant to the Act, and to issue a decision.

{21} The New Mexico Constitution, article XI, section 2, gives the PRC the “responsibility for regulating . . . transmission and pipeline companies, including telephone, telegraph and information transmission companies . . . in such manner as the legislature shall provide.” The Public Regulation Commission Act, Section 8-8-4, sets out the general powers and duties of the PRC. The PRC “shall administer and enforce the laws with which it is charged and has every power conferred by law.” Section 8-8-4(A). The PRC is also given discretion to “take administrative action by issuing orders not inconsistent with law . . . and to enforce those orders by appropriate administrative action and court proceedings.” Section 8-8-4(B)(5). Specifically regarding telecommunications companies, the Legislature has given the PRC authority to “fix, determine, supervise, regulate and control all charges and rates of . . . telegraph, telephone . . . and transmission companies,” Section 63-7-1.1(A)(1), “change, amend and rescind rates,” Section 63-7-1.1(A)(5), and “determine and decide any question and to issue orders relating to its powers and duties,” Section 63-7-1.1(D). Similarly, this Court has recognized the PRC’s broad authority to regulate telecommunications, and to take appropriate measures to protect consumers. Att’y Gen. v. Pub. Reg. Comm’n (In re Proposed Merger of Qwest), 2002-NMSC-006, ¶ 6, 131 N.M. 770, 42 P.3d 1219.

{22} In the 2000 amendments to the New Mexico Telecommunications Act, the Legislature stated its intent to permit a regulatory framework that will allow an orderly transition from a regulated telecommunications industry to a competitive market environment. It is further the intent of the legislature that the encouragement of competition in the provision of public telecommunications services will result in greater investment in the telecommunications infrastructure in the state, improved service quality and operations and lower prices for such services.

Qwest also compares this case to ENMR Telephone Cooperative v. State Corporation Commission, 118 N.M. 654, 884 P.2d 810 (1994), in which we found that the State Corporation Commission had no express statutory authority to order a telephone cooperative to pay the cost of a regulatory audit. In that case, the Court recognized “the Commission[’s] broad authority to act in the public interest in matters of ratemaking and in matters of public convenience and necessity.” Id. at 655, 884 P.2d at 811. However, we denied the Commission’s argument that the New Mexico Constitution, article XI, section 7 (repealed 1999), provided broad enough authority that the Commission could act outside of statute. Id. at 656, 884 P.2d at 812. Since we find the PRC credit or refund incentive implicitly authorized by statute in this case, Qwest’s argument is unpersuasive.

{24} Qwest does not argue that the AFOR plan and order were themselves improper exercises of the PRC’s authority. Testimony from Qwest executives shows that Qwest was well aware of the nature of the investment commitment and the risk involved with making that commitment five years in advance. Qwest also does not claim that the benefits received from the AFOR plan, the settlement of the eight pending utility cases and the two residence basic exchange service price cap increases, were beyond the PRC’s authority. Finally, Qwest did not appeal the original AFOR plan or order.

{25} Qwest’s argument rests on the fact that no statute expressly gives the PRC the authority to order Qwest to issue a credit or refund. Qwest relies in part on In re Proposed Merger of Qwest, 2002-NMSC-006, ¶ 4, where this Court upheld a PRC determination that it had no statutory authority to approve or disapprove telecommunications mergers. In that case, however, we explicitly upheld the PRC’s broad authority to regulate telecommunications rates and services. Id. ¶ 6. Here, the AFOR plan and order are within the PRC’s express authority to regulate Qwest. While the Legislature did not expressly give the PRC the authority to issue consumer credits or refunds, the New Mexico Telecommunications Act and PRC’s broad regulatory authority demonstrate the Legislature’s intent to authorize the PRC to approve the terms of individual AFOR plans. The authority to choose a proper incentive to ensure compliance with those terms, expressly found in the AFOR plan, is implicit in the Legislature’s grant of authority.

{26} Qwest does not argue that the AFOR plan and order were themselves improper exercises of the PRC’s authority. Testimony from Qwest executives shows that Qwest was well aware of the nature of the investment commitment and the risk involved with making that commitment five years in advance. Qwest also does not claim that the benefits received from the AFOR plan, the settlement of the eight pending utility cases and the two residence basic exchange service price cap increases, were beyond the PRC’s authority. Finally, Qwest did not appeal the original AFOR plan or order.

{27} Qwest argues that there are statutory limits to the PRC’s enforcement authority. The PRC “may apply to the district court for injunctions to prevent violations of any provision of the New Mexico Telecommunications Act . . . or of any rule or order of the [PRC] issued pursuant to that act,” Section 63-9A-20, and “impose an administrative fine on a telecommunications provider for any act or omission that the provider knew or should have known was a violation of any applicable law or rule or order of the [PRC],” NMSA 1978, § 63-7-23(B) (2000). Qwest argues that the PRC is limited to these two mechanisms to enforce Qwest’s compliance. We refuse to so limit the PRC’s regulatory authority. The Legislature has given the PRC the discretion “to enforce
[its] orders by appropriate administrative action and court proceedings.” Section 8-8-4(B)(5) (emphasis added). Since the Legislature has implicitly authorized that the PRC create and enforce this incentive on Qwest, the incentive is an appropriate administrative action. We find that these statutes provide the PRC additional avenues to prevent violations of the New Mexico Telecommunications Act.

2. The Consumer Credit or Refund Does Not Violate the Rule Against Retroactive Remedies

{28} Qwest next avers that the consumer credit or refund order violates the rule against retroactive remedies because the order is a remedial measure, and the AFOR plan is legislative in nature. The PRC generally denies that the credit or refund is a retroactive remedy because it is a proper use of its authority to change, amend and rescind rates, and affirms its duty to protect New Mexico consumers.

{29} Qwest cites to Mountain States Telephone & Telegraph Co. v. State Corporation Commission, 90 N.M. 325, 341, 563 P.2d 588, 604 (1977), for the general rule that, “[r]etroactive remedies, which are in the nature of reparations rather than rate-making, are peculiarly judicial in character, and as such are beyond the authority of the Commission to grant.” Our statement in Mountain States alone does not preclude the PRC from implementing a retroactive procedure. In Hobbs Gas Co. v. Public Service Commission, 115 N.M. 678, 684, 858 P.2d 54, 60 (1993), the State Corporation Commission unreasonably and unlawfully ordered the gas company to issue refunds when the commission abruptly changed methodologies without giving the company notice. The Court used a retroactive lawmaking analysis to determine the propriety of applying new regulatory interpretations and adopted a five-factor balancing test to determine if an administrative agency’s adjudicatory rulemaking should be applied only prospectively:

1. whether the particular case is one of first impression,
2. whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law,
3. the extent to which the party against whom the new rule is applied relied on the former rule,
4. the degree of the burden which a retroactive order imposes on a party, and
5. the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. at 682, 858 P.2d at 58 (quoted authority omitted). The holding in Hobbs Gas that a refund was unauthorized was based on fairness to the company, which had reasonably relied on the commission’s previous practice. Id. at 684, 858 P.2d at 60. Applying the factors to this case, we find that Qwest had proper notice of its $788 million infrastructure investment commitment, and therefore, the credit or refund incentive is not an impermissible retroactive remedy.

{30} Under factor one, whether the case is one of first impression, AFOR plans are new forms of regulation that the PRC has not previously enforced. This is the first time that the PRC has dealt with Qwest’s non-compliance with AFOR plan terms. Factor two, whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, also favors the PRC because it is not departing from established rules, but simply following AFOR plan terms. The AFOR plan explicitly empowers the PRC to add incentives should they be necessary to ensure that Qwest fulfills its obligations. Under the AFOR plan terms, the PRC determined that a credit or refund option would best ensure Qwest’s compliance with the infrastructure investment commitment. Factor three, the extent to which the party against whom the new rule is applied relied on the former rule, is not an issue because there was no former rule that Qwest relied upon. As to factor four, the burden the retroactive order imposes on a party, Qwest argues that it is a great burden to pay upward of $200 million over the AFOR plan’s two remaining years. While spending any amount of money may be burdensome for a corporate entity, Qwest was aware in 2001 that it was obligated to invest $788 million in its New Mexico infrastructure. Qwest also argues that changed circumstances, such as a telecommunications economic downturn, increased competition, and losses in traditional revenue, make the infrastructure investment unnecessary and increase its burden. We find such claims are insufficient to demonstrate a burden on Qwest because comments by Qwest executives during AFOR plan hearings demonstrated the company was aware that it would be held to its commitment in spite of external forces. Factor five, the statutory interest in applying a new rule despite the reliance of a party on the old standard, does not apply because, as stated under factor three, Qwest had no former rule on which to rely.

{31} Qwest also cites a number of cases in which an administrative commission’s order of a consumer refund or credit was found to be outside the commission’s authority. See id. at 684, 858 P.2d at 60; Gen. Tel. Co. of the Sw. v. Corp. Comm’n, 98 N.M. 749, 756-58, 652 P.2d 1200, 1207-09 (1982) (finding the commission without authority to decrease telephone company’s rates, thereby retroactively reducing what the commission had previously determined to be fair, just, and reasonable rate of return for the company); S.C. Elec. & Gas Co. v. Pub. Serv. Comm’n, 272 S.E.2d 793, 795 (S.C. 1980) (finding a commission order for a refund was unauthorized retroactive rate-making when the commission had previously approved the company’s rate). These cases provide no guidance because, as Qwest readily admits in its briefs, the cases cited were all under the previous rate of return scheme. The PRC’s consumer credit or refund incentive was made under an alternative form of regulation. Unlike the different administrative commissions listed above, we have already found that the PRC had the implied statutory authority to order the credit or refund incentive in this case. Consequently, we find Qwest’s retroactive remedy argument without merit.

3. The PRC’s Credit or Refund Order Did Not Impermissibly Rely on Economic Objectives

{32} Qwest claims that the PRC’s order was motivated by an impermissible objective of increasing economic development and job growth in New Mexico. The PRC avers that its order does not primarily rely on this objective. Qwest asks us to find that the PRC deviated from its statutory duty to regulate utilities according to the law based on one paragraph in the PRC’s final order which states, “[i]nvestment in telecommunications infrastructure is an especially important, if not crucial, factor in stimulating business activity, economic development and job creation throughout all sectors of New Mexico’s economy.” (Footnote omitted.) One statement in a sixty-five page order does not demonstrate the PRC relied primarily on this factor. The statement was made in the context of describing the AFOR plan hearings in which Qwest executives discussed the benefits to New Mexico and Qwest. To put the statement in context, the statement preceded a description of the infrastructure improvements Qwest could make to its network in response to Qwest’s claim that its completion of service standards was all
4. The Consumer Credit or Refund Order Is Not Premature or Speculative

{34} Qwest urges this Court to set aside the consumer credit or refund order because the five-year term of the plan is not over and Qwest could be compliant with the $788 million investment commitment before the end of the plan. Qwest has invested $427.8 million, about 90 percent of its investment obligation through year three.

{35} The PRC order was made pursuant to an investigation of whether Qwest would likely remain compliant with the investment commitment, and if not, what incentives should be developed to ensure compliance. Qwest never contested the PRC staff’s contention that Qwest would fall short of the total investment commitment. In fact, Qwest’s position was that the entire $788 million investment commitment was no longer necessary and that any investment should be viewed in the context of the AFOR plan service standards. In Qwest’s view, the service standards were its only binding obligation. Qwest urged the PRC to use its authority to reopen the AFOR plan in order to decrease the investment commitment. When the PRC requested that Qwest determine potential infrastructure projects Qwest could use to meet the investment commitment, Qwest announced, “the entire balance does not need to be spent and should not be spent. Expecting Qwest to devise a plan it could not endorse is thus no more reasonable or satisfactory.” Qwest would negotiate only when other parties were willing “to set aside their preoccupation with $788 million or any other specific number.” We find the consumer credit or refund incentive order was not based on speculation but on this substantial evidence. Consequently, we deny Qwest’s request to set aside the order on these grounds.

{36} The PRC opened Case No. 05-000094-UT to determine Qwest’s ultimate compliance with its AFOR plan. If Qwest completes its investment commitment and the service standards, Qwest will not be subject to any consumer refund or credit. If an error were to arise under this new case, Qwest would have the opportunity to appeal to this Court.

C. The PRC’s Finding That the AFOR Plan Does Not Recognize “Substantial Compliance” Does Not Make the Consumer Refund or Credit Order Defective

{37} According to Qwest, the PRC’s refund or credit order should be set aside since the PRC could have found Qwest to be substantially compliant with the AFOR plan because (1) Qwest had fulfilled most of its AFOR plan commitments, or (2) the PRC had found a different communications company, VALOR Telecommunications of New Mexico, to be in substantial compliance with its respective investment commitment. The PRC argues that the AFOR plan does not include the concept of “substantial compliance,” that Qwest admitted it would be non-compliant with the investment commitment, and that VALOR’s AFOR compliance provides no guidance on determining Qwest’s AFOR non-compliance. We agree with the PRC.

{38} The PRC order should be set aside only if it is arbitrary, capricious or an abuse of discretion; not supported by substantial evidence in the record; or otherwise not in accordance with law. Section 63-9A-16(B)

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Att’y Gen. v. Pub. Util. Comm’n, 2000-NMSC-008, ¶ 6, 128 N.M. 747, 998 P.2d 1198. The Supreme Court analyzes the entire record when determining whether substantial evidence supports the PRC’s order. Id. ¶ 4. The PRC’s order is rejected “only if conflicting evidence renders incredible the evidence in support of the decision.” Id. ¶ 6.

{39} First, we turn to the existence of a substantial compliance standard in Qwest’s AFOR plan. During the investigation hearings, Qwest for the first time argued that the PRC could find that Qwest was substantially compliant with the AFOR plan as a whole. Qwest conceded that the AFOR plan contained no substantial compliance definition, but argued that a definition was unnecessary because Qwest was meeting a number of its commitments, such as 90 percent of the investment obligation and all the service quality standards, over the first three years. As Qwest admitted, however, there is no substantial compliance standard applicable the overall completion of its two commitments. With regard to the investment commitment, the AFOR plan states unequivocally that “Qwest commits to invest a total of $788 million in its New Mexico network infrastructure over the five-year term of the Plan.” The number was not randomly arrived at by the parties, but was part of the settlement of Qwest’s pending cases and a commitment by Qwest to invest 25 percent more than it had over the last five-year period. Throughout the plan, the two commitments were treated as separate and independent of one another. In particular, the reopener provision, Section X.B.5.e, gives the PRC the authority to “modify the [AFOR plan] to ensure future compliance with service standards or investment commitments.” (Emphasis added.) Section VIII dealt with the $788 million infrastructure commitment, while Section IX described the quality service commitment. The wording of the AFOR plan clearly states the investment commitment was not based on service standards.

{40} Qwest urges this Court to read a substantial compliance standard as permissible and applicable under statute. Section 63-9A-12 states, “[a] substantial compliance by the [PRC] with the requirements of the New Mexico Telecommunications Act [63-9A-1 NMSA 1978] shall be sufficient to give effect to all rules, orders, acts and regulations of the [PRC] . . . .” While the statute does include the terms “substantial compliance,” there is no support for Qwest’s contention that this should apply to its compliance with the AFOR plan. The statute clearly considers substantial compliance only by the PRC with the New Mexico Telecommunications Act. Cf. Ferguson-Steele Motor Co. v. State Corp.

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8This opinion does not prevent the PRC, Qwest, and other parties from broadening the scope of Case No. 05-000094-UT to consider other mechanisms to enforce the investment commitment. See § 63-7-1.1(D) (giving the PRC the power to issue orders relating to its powers and duties); NMAC 17.1.2.25 (2001) (“The Commission may at any time investigate any matter within its jurisdiction.”); NMAC 17.1.2.34(H) (permitting the consolidation of two or more proceedings involving a similar question of fact).
principle of substantial compliance with investment commitments, factual differences between VALOR and Qwest’s compliance lead to different results in each case. Unlike Qwest, VALOR never challenged the validity of its AFOR plan investment commitment, never argued the commitment was no longer necessary for compliance, nor that it would not comply with the total investment commitment. Also, the substantial investment reduction resulted in an investigation of whether Qwest would be compliant with its investment obligation. Because VALOR’s investment has remained steady, PRC staff have not recommended an investigation nor found that VALOR has been anything but compliant with its commitments. For this reason, we find that the PRC did not act arbitrarily, capriciously, or abuse its discretion in not applying a substantial compliance standard to Qwest.

It is also questionable whether Qwest can be found substantially compliant with the AFOR plan even if such a standard existed. When confronted with concerns that it could fall short over $200 million of the infrastructure investment commitment, Qwest did not claim it would meet the target at the end of five years, but only that the target should no longer apply. According to Qwest, PRC staff and the other interveners were focusing too narrowly on the $788 million investment commitment without acknowledging the benefits that had been realized by New Mexico consumers in other areas. The PRC found in its order, however, that in each of Qwest’s first two quarterly reports for year four Qwest averaged $19.5 million of investment. Based on the quarterly reports, the PRC projected a total investment of $78 million at the end of year four. This would place Qwest at only 80 percent, or $505.8 million of the required $630.4 million investment, through year four. This rate of investment would place Qwest’s compliance level even lower at the end of the AFOR plan five-year term. Qwest has never argued that its investment would increase to meet compliance levels. Based on this uncontested evidence, the PRC found Qwest would not be compliant, substantially or otherwise, with the investment commitment at the end of the AFOR plan five-year period. Therefore, we find that the PRC did not err in determining that the AFOR plan did not consider substantial compliance.

D. The PRC Did Not Abuse Its Discretion in Excluding Qwest’s $46 Million in Software Expenses From the Investment Commitment

At the compliance investigation hearings, Qwest argued that $46 million in software expenses should count toward the $788 million investment commitment. The American Institute of Certified Public Accountants Statement of Position (SOP) 98-1 requires capitalization of software costs, and this position has been adopted by the Federal Communications Commission (FCC). Qwest already counts its interstate capitalized software costs as investment in its annual reports and seeks to add its intrastate costs. In the credit or refund order, the PRC agreed with Qwest’s interpretation of SOP 98-1, but refused to credit the entire $46 million toward Qwest’s investment commitment. The PRC ordered that only software expenses that were incrementally higher than pre-AFOR levels would count toward the investment commitment because this would be consistent with the AFOR plan objective of increased investment. Because no evidence was presented as to what Qwest’s software expenses were before the AFOR plan term, the PRC deferred the determination of what software expenses would be counted toward the investment commitment for investigation under Case No. 05-000094-UT. Qwest avers the PRC cannot modify SOP 98-1 by counting only software costs above the pre-AFOR baseline period. Because no party contested Qwest’s reading of SOP 98-1, Qwest charges the PRC’s modification of SOP 98-1 was arbitrary and capricious. Qwest also observes that if it could add these software expenses to the investment already made, it would be compliant over the AFOR plan’s first three years.

The original AFOR plan and order clarify the PRC’s position on the issue. Contrary to its position on appeal, Qwest admits it opposed the capitalization of software expenses in AFOR plan negotiations while other parties supported the SOP 98-1 position. Qwest opposed the capitalization of these expenses because it would have caused significant fluctuations in revenue requirements during the AFOR plan. Qwest witnesses testified that including software expenses at the AFOR plan’s onset would embed a highly negative revenue requirement into Qwest’s expense structure, weighing against the benefits that Qwest would ultimately receive from the AFOR plan. PRC staff and GSD allege that Qwest’s position allowed it to benefit under rate of return regulation. The AFOR plan was ultimately silent on whether these costs should be capitalized or expensed, but Qwest determined that it would continue to expense the costs for intrastate ratemaking purposes. Qwest also requested that the AFOR plan investment commitment be measured according to its Jurisdictional Report 21 (JR 21) because JR 21 was a standard accounting document that it already generated for reporting capital expenditures in the state. JR 21 did not include intrastate software costs, but Qwest asked that JR 21 be the measure of its investment commitment.

Qwest revealed its desire to change its position on SOP 98-1 in rebuttal testimony during the PRC’s investigation into Qwest’s compliance with the investment commit-
Qwest claimed that it changed its position after an internal study to determine if it could eliminate any state-specific accounting practices, including those that reflected differences between FCC regulations and state commission regulations. Recognizing that New Mexico regulations are silent on this state’s adoption of FCC accounting principles, including SOP 98-1, Qwest determined that it should have originally advocated for the inclusion of SOP 98-1 for New Mexico accounting purposes.

[47] PRC staff and others took issue with the timing of Qwest’s change of position on SOP 98-1 because if Qwest were allowed to include the $46 million in software expenses it would be compliant with the infrastructure investment for year three. GSD asserts that Qwest did not want to include these software expenses when negotiating the AFOR plan in order to set a higher intrastate rate. The AFOR plan standards, commitments, and benefits were determined based on Qwest’s original position, and now Qwest’s change in position would allow it to receive another benefit. PRC staff also argued that Qwest should not be permitted to add these software expenses because Qwest alerted the PRC of its change of position on SOP 98-1 only during rebuttal testimony, and, therefore, did not allow any other party to offer testimony on this point.

[48] In 1999, the FCC allowed carriers to use SOP 98-1 and ordered all telecommunication carriers to “account for computer software costs in accordance with” generally accepted accounting principles. In re 1998 Biennial Regulatory Review, 14 F.C.C.R. 11396, 11418-19 (1999). However, the FCC did not amend all its rules, remarking that “[t]he changes in accounting standards which this Commission approves will not necessarily be binding on the ratemaking practices of the various state commissions.” 47 C.F.R. § 32.16(b) (2002). Therefore, the FCC’s adoption of SOP 98-1 is not necessarily binding on the PRC. Under these facts, we find the PRC worked within its authority to fashion a compromise by permitting Qwest to include only intrastate software investment above pre-AFOR levels to count toward the investment commitment. The PRC made a determination within its authority that was not arbitrary or capricious, and it was supported by substantial evidence. See Section 63-9A-16(B); El Vado delos Cerrillos Water Ass’n, 115 N.M. at 787, 858 P.2d at 1266.

E. The PRC’s Credit or Refund Order Did Not Improperly Rely on Unsworn Statements or Statements Not Subject to Cross-Examination

[49] Qwest contends that the PRC’s credit or refund order is defective because it relied on two improper forms of evidence. The PRC order cited a statement from the Santa Fe mayor, a non-party, and a post-hearing statement by the Department of Defense and all other Federal Executive Agencies (DOD/FEA). According to Qwest, these statements were not properly admitted into evidence nor subjected to cross-examination. The PRC responds that it based its order on evidence in the record, and that the information to which Qwest objects was redundant and not necessary for the PRC’s decision.

[50] Section 8-8-4(B)(10) allows the PRC to adopt “reasonable administrative, regulatory and procedural rules” to carry out its duties. Pursuant to this legislative directive, the PRC has passed rules to conduct hearings. A non-party is afforded the opportunity to comment on the record, “but such statement shall not be considered by the [PRC] as evidence.” NMAC 17.1.2.26(F) (2001). Regulations also allow a non-original party to intervene in a proceeding, NMAC 17.1.2.26(A), and if the intervention motion is granted, the entity has the same rights as original parties, NMAC 17.1.2.26(D)(7). Such rights include submitting proposed findings and conclusions, orders, and briefs. NMAC 17.1.2.38.

[51] The mayor wrote a statement that was read during Qwest’s compliance hearings. Qwest does not argue that reading the statement was improper, only that the PRC improperly relied on it as evidence in its consumer credit or refund order. The order cites the mayor’s testimony regarding service deficiencies in the Santa Fe area, including aged infrastructure, DSL unavailability, new service installation delays, and service quality problems, to show that Qwest has investment opportunities to improve its infrastructure.

[52] Qwest also complains of the order’s citation to the Reply Statement of the DOD/FEA, which was submitted in lieu of a response brief on February 18, 2005, pursuant to NMAC 17.1.2.38.A. The PRC order referred to the DOD/FEA’s Reply Statement to buttress the argument that infrastructure inadequacies existed at Los Alamos National Laboratory and White Sands Missile Range. Qwest argues that the PRC improperly relied on the DOD/FEA statement because it was submitted after hearings and not subject to cross-examination.

[53] The PRC and GSD aver that any error in including this material is harmless because these statements were redundant of existing evidence before the PRC. A GSD witness testified to the planned installation of diversity routed fiber rings in the Santa Fe area which had not been completed, and a Qwest witness was cross-examined on this infrastructure concern, DSL deficiencies across the state, and Qwest’s aging telecommunications lines. The DOD/FEA concerns regarding Los Alamos and White Sands were addressed in cross-examination of Qwest witnesses by DOD/FEA counsel, as well as in DOD/FEA’s Position Statement of February 3, 2005.

[54] The mayor and DOD/FEA’s statements are cited in just two paragraphs of the PRC’s 65-page final order. The statements were cited to demonstrate existing infrastructure improvement needs and to contest Qwest’s claim that its fulfillment of service standards should relieve it from fulfilling the investment commitment. These two specific citations were followed by evidence properly before the PRC, which addressed service deficiencies that Qwest could correct and count toward the AFOR plan investment commitment. We find the DOD/FEA statement was proper evidence included in the credit or refund order because DOD/FEA was a party, and Qwest had notice of the statement’s contents. Because there was substantial evidence properly before the PRC, inclusion of the mayor’s statement is not reversible error, and we affirm. However, we caution the PRC to take care in citing to proper evidence in its orders. If this were a case in which the mayor’s statements were the only source of Qwest’s infrastructure deficiencies, we could have been forced to overrule the PRC’s determination of the existence of

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infrastructure deficiencies.

F. The PRC’s Refusal to Disclose Non-party Expert Advice Was Not Error

{55} Qwest complains that the PRC improperly relied on the advice of a non-party expert, Dr. David Gabel, in its order. The record is silent on the exact nature of Dr. Gabel’s advice to the PRC, but the PRC’s consumer credit or refund order generally presumes that a party or its representative, outside the presence of the PRC, cannot communicate with a party or its representative, outside the presence of the PRC. Gabel’s advice to the PRC, but the PRC’s consumer credit or refund order generally presumes that a party or its representative, outside the presence of the PRC, cannot communicate with a party or its representative, outside the presence of Gabel’s advice.

{56} Ex parte communication is “a direct or indirect communication with a party or his representative, outside the presence of the other parties, concerning . . . a pending adjudication, that deals with substantive matters or issues on the merits of the proceeding.” NMAC 1.2.3.7(B) (2004); see also NMAC 1.2.3.9(D) (2004) (prohibiting communications with a party outside the presence of the other parties concerning a pending adjudication). Ex parte communication is generally prohibited by statute, Section 8-8-17, and the PRC’s own administrative rules, see NMAC 1.2.3. There are exceptions, however. The Legislature has permitted PRC commissioners to have ex parte communications with non-party experts whose advice need be shared with the parties, and with advisory staff whose advice need not be shared.

{57} The non-party expert identified in Section 8-8-17(C)(4) and the advisory staff identified in Section 8-8-17(C)(2) are differentiated by the terms of these statutes. Ex parte communication with a non-party expert on an adjudicatory issue is allowed “if the commissioner or hearing examiner gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.” Section 8-8-17(C)(4); see also NMAC 1.2.3.9(D). By the terms of Section 8-8-17, non-party experts are those contacted directly by a commissioner and who provide advice on an issue raised in the rulemaking or adjudication. Non-party experts can be contacted by individual commissioners as long as the advice is provided to the parties. The administrative code expressly regulates communications between commissioners and parties, and Dr. Gabel is not a party.

{58} The Public Regulation Commission Act allows the PRC chief of staff to hire advisory staff with expertise in “regulatory law, engineering, economics and other professional or technical disciplines” to assist the PRC. NMAC 1978, § 8-8-13(A) (1998). Section 8-8-17(C)(2) permits ex parte communications between a commissioner and advisory staff and this need not be shared with the parties. Advisory staff are charged with analyzing case records and recommended decisions; advising the PRC on policy issues; assisting the PRC in the development of rules and in writing final orders; and performing other duties as assigned by the chief of staff, Section 8-8-13(B). Advisory staff have temporary, term or contract employment relationships with the PRC. Section 8-8-13(A). In the order, Dr. Gabel was identified as a contract consultant who assisted the PRC in areas of his expertise, reviewed the record, and furnished advice on the record in closed sessions.

{59} Statutory construction is an issue which we review de novo. Pub. Serv. Co. v. Pub. Util. Comm’n, 1999-NMSC-040, ¶ 14. “In construing a particular statute, a reviewing court’s central concern is to determine and give effect to the intent of the legislature.” Id. ¶ 18 (quoted authority omitted). A statute’s plain language is the primary indicator of legislative intent. Id. Additionally, when different statutes cover the same subject matter, they should be harmonized and construed together in a way that facilitates their operation when possible. Id. ¶ 23. We decline to find that the PRC’s previous determination about the nature of Dr. Gabel’s advice is dispositive of the issue before us because statutory interpretation is the proper function of the Court, and we give little deference to the PRC’s own interpretation. Id. ¶ 14.

{60} Qwest’s concern is that the PRC could circumvent the prohibition against ex parte communication and render Section 8-8-17(C)(4) moot by contracting with a non-party expert and classifying the expert as advisory staff and refusing to disclose any aspect of the expert’s advice. Because Dr. Gabel’s relationship with the PRC and his advice fall within the definition of advisory staff, see Section 8-8-13(A), we conclude that the PRC need not provide Qwest and other parties with the substance of Dr. Gabel’s advice. Even though we hold in the present case that Dr. Gabel is advisory staff, under another set of facts he could fall under the category of a non-party expert. Because we find no error on this issue, we affirm the PRC’s final order.

IV. CONCLUSION

{61} The PRC had statutory authority to enter into an AFOR plan with Qwest. Qwest advocated for and committed to a $788 million infrastructure investment. The AFOR plan terms explicitly allowed the PRC to reopen the AFOR plan and provide an incentive for Qwest to comply with its investment commitment. The New Mexico Telecommunications Act implicitly authorizes the PRC to order a consumer credit or refund incentive. The PRC’s incentive order is not an impermissible retroactive remedy, not motivated by an impermissible objective, nor was it premature or speculative.

{62} The PRC had substantial evidence that Qwest believed it should not be held to the infrastructure commitment and would not complete the investment. The PRC acted within its discretion when refusing to find the existence of a substantial compliance standard and refusing to count Qwest’s entire intrastate software expenses toward the investment commitment. The PRC generally relied on proper evidence, and any reliance on improper evidence was harmless. Dr. Gabel is advisory staff and, therefore, the PRC did not err when it refused to disclose the substance of his advice to Qwest. As a result, we affirm.

{63} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
PAMELA A. MINZNER, Justice
(minority opinion)
MINZNER, Justice (concurring in part and dissenting in part).

Bar Bulletin - October 30, 2006 - Volume 45, No. 44
I am not persuaded that the New Mexico Telecommunications Act (the Act), NMSA 1978, §§ 63-9A-1 to -20 (1985, as amended through 2004), expanded the PRC’s enforcement powers, and I would conclude that the challenged credit or refund “incentive” was not within the scope of the PRC’s statutory authority.

We have previously recognized that enforcement powers are distinct from regulatory powers. See U.S. West Commc’ns, Inc. v. State Corp. Comm’n, 2006-NMSC-010, ¶ 55, 127 N.M. 254, 980 P.2d 37 (“[T]he power to change rates is not necessarily the same as the power to enforce a rate change. . . .” [The latter power is reserved for this Court when the company does not comply with the Commission’s order . . . ”]). We have been particularly hesitant to find remedial powers implied in statutory language. Callahan v. N.M. Fed’n of Teachers-TV, 2006-NMSC-010, ¶ 25, 139 N.M. 201, 131 P.3d 51 (observing that the Labor Relations Board’s power to enforce provisions of statute through “appropriate administrative remedies” did not empower the board to award compensatory damages); Mountain States Tel. & Tel. v. State Corp. Comm’n, 90 N.M. 325, 341, 563 P.2d 588, 604 (1977) (“Retroactive remedies, which are in the nature of reparations rather than rate-making, are peculiarly judicial in character, and as such are beyond the authority of the Commission to grant.”).

I believe the credit or refund order is essentially remedial. The credit or refund will be imposed as a penalty in the event that Qwest fails to meet the investment requirements of its plan. Because the amount of the credit or refund is tied directly to the shortfall in Qwest’s investment, it appears to have been designed to compensate Qwest’s customers and the state. In my view, this is “in the nature of reparations” and is not within the statutory authority of the PRC. See Mountain States, 90 N.M. at 341, 563 P.2d at 604.

The majority interprets the Act’s open-ended “alternative form of regulation” as allowing the PRC a significant amount of flexibility not only in the requirements imposed on telecommunication utilities, but also in how those requirements are enforced. I am not persuaded that the PRC’s authorization is quite so broad. The statute did not explicitly alter the enforcement powers of the PRC. NMSA 1978, Section 63-7-23 (2000), states the maximum fines for several different types of violations by telecommunications companies while Section 63-9A-20 permits the PRC to seek an injunction from the district court to prevent violations of PRC orders. There is no indication that the PRC has any special power to enforce an alternative form of regulation beyond its statutory power to enforce any other form of regulation.

Both the wording and the placement of the “alternative form of regulation” language suggest that the Legislature intended to create an alternative only to rate-of-return regulation, not to the entire structure governing the scope and limits of the PRC’s authority. Section 63-9A-8.2(C) explicitly instructs the PRC to eliminate rate-of-return regulation for certain large carriers, and to implement an “alternative form of regulation.” No changes were made to the more general sections setting out the PRC’s enforcement powers and no additional language clarifies the scope of these powers in relation to alternative forms of regulation.

While it could be argued that an “alternative form of regulation” includes an alternative form of enforcement, this is not the only possible reading of Section 63-9A-8.2(C). The PRC’s powers, to set rates and direct the development of telecommunications service in New Mexico, were enforced through the statutory mechanisms identified above prior to the adoption of the alternative form of regulation. The PRC had the power to issue fines, alter the rate structure, issue new orders, and seek injunctions from the district courts. Any alternative regulation could be enforced by the same means. I am not persuaded that NMSA 1978, Section 8-8-4(B)(5) (1998), permitting the PRC to “enforce those orders by appropriate administrative action and court proceedings” expands the authority granted more explicitly in Chapter 63. See Callahan, 2006-NMSC-010, ¶ 25. The amendments to the Act appear to replace only a portion of the earlier statutory regime, and the Legislature left intact the enforcement sections. This can be viewed as some evidence that the Legislature intended the new “alternative form of regulation” to be enforced in the same manner as earlier rate setting regulations.

If the Legislature had intended to significantly expand the PRC’s enforcement powers, it seems reasonable to expect that some language in Chapter 63, Article 9A or elsewhere would make that explicit. Furthermore, the PRC cannot grant itself powers beyond those authorized by statute. The provisions of Section 63-9A-8.2(C) can and should be read consistently with the PRC’s statutory powers, not as an expansion of those powers. Qwest’s plan reserves for the PRC the right to modify its regulations in response to new developments, but the modifications or incentives are also limited by statute. Thus, the PRC’s incentives must fall within the scope of the agency’s authority to be proper.

I am concerned that the majority opinion and Section 63-9A-8.2(C) provide no guidance to the PRC regarding the scope of its powers. The statute provides very few parameters for the alternative form of regulation. Compare § 63-9A-8.2(C), with 220 Ill. Comp. Stat. 5/13-506.1 (2004). It appears that any measure—punitive, positive, or frivolous—that could increase the likelihood of Qwest’s compliance with its plan is permitted. I would not conclude that the Legislature granted the PRC such broad authority by implication. Because the majority opinion concludes that the PRC correctly determined that Qwest was unlikely to comply with the investment requirement of its plan, and I agree, I would hold only that the incentive adopted was not within the scope of the PRC’s authority, and remand to allow the PRC to select a proper incentive, or to seek enforcement of Qwest’s plan in a manner authorized by statute.

PAMELA B. MINZNER, Justice
From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-043

Topic Index:
Custodial Interference
Plea and Plea Bargaining
Child Custody; Child Custody Jurisdiction Act; and UCCJA (Uniform Child Custody Jurisdiction Act)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
versus
DAVID HUNTER,
Defendant-Respondent.
No. 29,258 (filed: July 26, 2006)

ORIGINAL PROCEEDING ON CERTIORARI
FRANK K. WILSON, District Judge

PATRICIA A. MADRID
Attorney General
ANN M. HARVEY
Assistant Attorney General
Santa Fe, New Mexico
for Petitioner

JOHN BIGELOW
Chief Public Defender
SUE A. HERRMANN
Appellate Defender
CATHERINE AVA BEGAYE
Appellate Defender
Santa Fe, New Mexico
for Respondent

OPINION

PAMELA B. MINZNER, JUSTICE

1 Defendant, David Hunter, entered a plea of no contest to three counts of custodial interference in violation of NMSA 1978, Section 30-4-4 (1989). Defendant initially moved to dismiss the charges, then entered his plea of no contest. His subsequent motion to withdraw his plea and renew the motion to dismiss were denied and Defendant appealed. The Court of Appeals concluded that there may have been a “fair and just” basis for permitting Defendant to withdraw his plea and remanded to the district court for reconsideration of its denial. The State petitioned this Court for certiorari.

2 We conclude that Defendant has provided sufficient evidence that his plea was not voluntary and knowing due to the inadequate assistance of his defense counsel and that the district court abused its discretion by denying Defendant’s motion to withdraw his plea. We remand to the district court for proceedings consistent with this opinion.

I. BACKGROUND

3 The charges of custodial interference arise from a Missouri custody order, and we therefore begin our recitation of the facts with the Missouri custody proceedings. In April of 1992, Defendant was granted a default divorce in Butler County, Missouri. The Missouri court granted physical custody of the couple’s three minor children to Defendant. His wife, Ms. Smith, was granted supervised visitation which was to take place in Defendant’s presence. Ms. Smith was apparently living in Texas and did not appear at these proceedings. Defendant testified that he moved to New Mexico with the children in 1994.1 The record does not indicate that Defendant made any attempt to register the Missouri custody award in New Mexico.

4 In 1997, Ms. Smith, who was still residing in Texas, motioned the Missouri court for a change in custody based on changed circumstances. Defendant, who remained in New Mexico with the three children, was served a summons from the Missouri court. He consulted a civil attorney who advised him that the Missouri court did not have jurisdiction to enter the modification order because he, Ms. Smith, and the children had all been living outside of Missouri during the previous year. Defendant responded to the Missouri court with a letter contesting the court’s jurisdiction. The Missouri court modified the custody order, finding that Defendant had defaulted by failing to appear, and granting primary custody of the children to Ms. Smith. It is not clear that the Missouri court ruled on its own jurisdiction in that proceeding.

5 Ms. Smith brought the modified Missouri custody order to New Mexico and attempted to take custody of the children. She did not seek to enforce the judgment through the civil courts or have the order registered in New Mexico, but requested the assistance of the Alamogordo police in taking physical custody of the children. The Alamogordo police refused to enforce the order at that time because the Missouri order had not been perfected in a civil action in New Mexico. Ms. Smith returned to Texas and took no further action to register the Missouri modification in New Mexico. In 2001, Ms. Smith again contacted the Alamogordo police department and requested their assistance to enforce the still unregistered custody order modification. After an investigation, Defendant was charged with one count of custodial interference contrary to Section 30-4-4. He was indicted on three counts of custodial interference, one for each of the three children.

6 Defendant moved to dismiss the charges as a matter of law on November 14, 2001. This motion was made at Defendant’s insistence; his defense counsel testified that she did not believe that there was any merit to this motion. On December 18, 2001, Defendant entered a no contest plea to three counts of custodial interference prior to any hearing on his motion to dismiss. Defendant then moved to withdraw his plea on March 26, 2002. He testified that he requested that his attorney withdraw his plea three weeks after it was entered, but this motion was not made immediately because Defendant’s counsel moved to withdraw from representation. In his motion to withdraw his plea, Defendant argued

1The State contests this, arguing that a 1995 custody stipulation between Defendant and Ms. Smith, which was never filed with the Missouri court, shows that the children were still in Missouri in 1995.
that his plea was not voluntary because it was entered shortly after Defendant learned that his daughter had been raped and that Defendant was too distressed at that time to have made a considered decision. He stated that his defense counsel had advised him to take the no contest plea and that he would be sentenced to probation, allowing him to get out of prison and help his daughter. He also argued that his plea was not voluntary because his counsel refused to discuss his defenses with him, and even advised him that she would withdraw his motion to dismiss if he did not plead no contest. Finally, he claimed that accepting the plea would result in manifest injustice, because the Missouri order that formed the basis of the charge was not registered in New Mexico.

{7} The district court held an evidentiary hearing and received testimony of Defendant and his defense counsel at the time of his plea. Defense counsel testified that she “did not feel . . . that [Defendant] had a viable defense” and that she advised Defendant to that effect. She also testified that she did not discuss a conditional plea with Defendant, and conceded that such a plea was a possibility in the case. The district court denied Defendant’s motion to withdraw his plea. Defendant appealed.

{8} The Court of Appeals remanded, State v. Hunter, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, holding that the district court may grant a motion to withdraw a plea for “any fair and just reason” if the state is not substantially prejudiced by reliance on that plea. Id. ¶ 28. The remand permitted the district court to reconsider its denial and determine whether there was a “fair and just” reason to permit Defendant to withdraw his plea. In addition, the Court of Appeals held that Defendant’s three convictions for custodial interference violated double jeopardy. Id. ¶¶ 37-38. The State appealed to this Court and we granted certiorari.

{9} Following oral argument, this Court quashed our writ of certiorari with respect to the Court of Appeals double jeopardy holding and remanded to the district court for the limited purpose of correcting its judgment and sentence. With regard to the district court’s denial of Defendant’s motion to withdraw his plea, we now conclude that the Defendant has shown that his plea was not voluntary and knowing due to the inadequate assistance of his defense counsel. We therefore conclude that the district court abused its discretion in denying Defendant’s motion to withdraw his plea, and we remand for proceedings consistent with this opinion.

II. DISCUSSION

{10} We first consider the standard articulated by the Court of Appeals for review of Defendant’s pre-sentence motion to withdraw. The State argues that the Court of Appeals erred in holding that the district court should have applied a “fair and just” standard and that the district court properly applied the knowing and voluntary standard adopted by our earlier cases. The proper standard applied to a defendant’s motion to withdraw a plea of guilty or no contest is a question of law which we review de novo. Rutherford v. Chaves County, 2003-NMSC-010, ¶ 8, 133 N.M. 756, 69 P.3d 1199 (“The standard of review . . . is a question of law which we review de novo.”).

{11} This Court has stated the standard applied on appeal to motions to withdraw a guilty plea.

A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court, and we review the trial court’s denial of such a motion only for abuse of discretion. A court abuses its discretion when it is shown to have acted unfairly, arbitrarily, or committed manifest error. A denial of a motion to withdraw a guilty plea constitutes manifest error when the undisputed facts establish that the plea was not knowingly and voluntarily given.

State v. Garcia, 1996-NMSC-013, 121 N.M. 544, 546, 915 P.2d 300, 302 (citations and internal quotation omitted). This standard has been applied on appeal to all motions to withdraw a plea, whether prior to or following sentencing. See id. (stating that the defendant made his initial oral motion to withdraw his plea prior to sentencing, and applying the “knowing and voluntary” standard); State v. Guerrero, 1999-NMSC-026, ¶ 6, 126 N.M. 699, 974 P.2d 669 (applying a knowing and voluntary standard to a written motion to withdraw guilty plea submitted prior to sentencing). We therefore apply this standard when reviewing the district court’s denial of Defendant’s motion to withdraw his plea.

{12} A trial court abuses its discretion when it denies a motion to withdraw a plea that was not knowing or voluntary. Garcia, 121 N.M. at 546, 915 P.2d at 302. The voluntariness of a plea entered on the advice of counsel “depends on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases.’” Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). “The two-part standard delineated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), applies to ineffective-assistance claims arising out of a plea agreement.” State v. Paredez, 2004-NMSC-036, ¶ 13, 136 N.M. 533, 101 P.3d 799. “To establish ineffective assistance of counsel, a defendant must show: (1) ‘counsel’s performance was deficient,’ and (2) ‘the deficient performance prejudiced the defense.’” Id. (quoting Strickland, 466 U.S. at 687).

A. Deficient Performance

{13} Counsel’s performance is deficient if it “fell below an objective standard of reasonableness.” Strickland, 466 U.S. at 688. We “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)); Paredez, 2004-NMSC-036, ¶ 14. Although sound trial strategy encompasses many of the decisions defense counsel might make, omissions relating to client’s basic duty to communicate with a client are often recognized as ineffective assistance. New Mexico courts have found that counsel’s performance was deficient where counsel failed to investigate a significant issue raised by the client, State v. Barnett, 1998-NMCA-105, ¶ 30, 125 N.M. 739, 965 P.2d 323 (defense counsel made no effort to discover the scope of a prosecutor’s prior representation of his client and failed to advise the client of his ability to disqualify prosecutor), where counsel did not discuss any possible defenses prior to the plea, State v. Kincheloe, 87 N.M. 34, 35-36, 528 P.2d 893, 894-95 (Ct. App. 1974), where counsel affirmatively misrepresented the immigration consequences of a plea, and even where counsel failed to advise a defendant of the severe immigration consequences of his guilty plea. Paredez, 2004-NMSC-036, ¶¶ 15-16 (“We go one step further, though, and hold that an attorney’s non-advice to an alien defendant on the immigration consequences of a guilty plea would also be deficient performance.”).

{15} Defendant argues that his counsel’s advice fell below any objective standard of reasonableness in five respects. First, counsel incorrectly determined that Defendant’s motion to dismiss was without
merit, and the Missouri court had proper jurisdiction to issue the 1997 modification to the custody order. Second, counsel failed to challenge the enforcement of the modification order, which had never been registered in New Mexico. Third, counsel failed to inform Defendant of his defenses based on a lack of intent to deprive Ms. Smith of her rights. Fourth, counsel failed to recognize that Defendant’s three convictions for custodial interference could be challenged as violating double jeopardy. Finally, counsel failed to advise Defendant that he might have the option of entering a conditional plea, preserving his right to a ruling on the motion to dismiss and the validity of the underlying Missouri custody modification. To determine whether Defendant’s counsel was constitutionally ineffective, we must examine the merits of each of these contentions. Defendant must establish that the facts support the motion or challenge, and that a reasonably competent attorney could not have decided the motion was unwarranted. Patterson v. LeMaster, 2001-NMSC-013, ¶ 19, 130 N.M. 179, 21 P.3d 1032.

{16} Defendant first argues that counsel erred in determining that his motion to dismiss was without merit. We first consider whether there is a factual basis for this claim, and then consider whether a reasonably competent attorney could have reached a similar conclusion.

{17} While Defendant maintains that he was living in New Mexico with the children in 1997, and had been here since 1994, the State disputes this fact, arguing that a 1995 custody stipulation between the parents suggests that the children were still in Missouri at that time. The State suggests that Defendant cannot establish facts necessary to support his motion to dismiss. In addition, the State argues that the district court in its discretion could choose to disregard Defendant’s testimony on this point and instead conclude that the children were present in Missouri at the time of the 1995 stipulation.

{18} While Defendant has the burden of showing that facts support his motion to dismiss, we are not persuaded that the 1995 custody stipulation undercuts this showing. The stipulation may provide some evidence about the residence of the children, but we note that this document, even if accurate, does little to establish the residence of the children between December of 1996 and June of 1997, the six months prior to the entry of the custody modification. This is the relevant time period for jurisdictional purposes. Defendant adequately established a factual basis for his motion to dismiss. His testimony is supported by evidence that the children were with Defendant after the order was entered, and that Defendant’s summons from the Missouri court was delivered in April to an address in Alamogordo, New Mexico. Finally, it does not appear that either defense counsel or the district court based their decisions on a potential difficulty in establishing the children’s residence. We conclude that Defendant’s consistent testimony regarding the children’s residence was not in dispute, and when taken together with the additional supporting evidence in the record, is sufficient to establish a factual basis for his motion to dismiss.

{19} The Uniform Child Custody Jurisdiction Act (UCCJA) was adopted by Missouri in 1978, and in effect in 1997. Mo. Rev. Stat. § 452.450 (1994). The statute governs when a Missouri court has the jurisdiction to make a custody determination or modify a custody order.

1. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This state:
(a) Is the home state of the child at the time of commence ment of the proceeding; or
(b) Had been the child’s home state within six months before commencement of the proceeding and the child is absent from this state for any reason, and a parent or person acting as parent continues to live in this state; or

(2) It is in the best interest of the child that a court of this state assume jurisdiction because:
(a) The child and his parents, or the child and at least one litigant, have a significant connection with this state; and
(b) There is available in this state substantial evidence concerning the child’s present or future care, protection, training, and personal relationships;

(3) The child is physically present in this state and:
(a) The child has been abandoned; or
(b) It is necessary in an emergency to protect the child because he has

been subjected to or threatened with mistreatment or abuse, or is otherwise being neglected; or

(4) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

2. Except as provided in subdivisions (3) and (4) of subsection 1 of this section, physical presence of the child, or of the child and one of the litigants, in this state is not sufficient alone to confer jurisdiction on a court of this state to make a child custody determination.

3. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.


{20} If the children were residing in New Mexico with Defendant in the six months prior to the modification order, Missouri was not their home state. There is no suggestion that the children were present in Missouri in 1997, and it appears that New Mexico did not decline jurisdiction at any time. Therefore, jurisdiction in Missouri was only proper if it was in the best interest of the children that a Missouri court assume jurisdiction. The statute clarifies that this is the case only if “the child and his parents, or the child and at least one litigant, have a significant connection with this state; and there is available in this state substantial evidence concerning the child’s present or future care, protection, training, and personal relationships.” Mo. Rev. Stat. § 452.450. Defendant and the children were living in New Mexico in 1997, and Ms. Smith was a resident of Texas. Evidence about the children’s current and future care was in Texas and New Mexico, not in Missouri. Given these facts, it appears that Missouri did not have jurisdiction to issue the 1997 order. See Haydon v. Darrough, 961 S.W.2d 940, 941-42 (Mo. Ct. App. 1998) (holding that a Missouri court did not have jurisdiction to modify a custody order under the UCCJA because mother and child had relocated to Virginia almost a year before the hearings, and the father
lived in Indiana); cf. Newton v. Newton, 811 S.W.2d 868, 869 (Mo. Ct. App. 1991) (“[W]here a custody decree is entered in Missouri, and the child and the parent move to another state, Missouri continues to have jurisdiction to hear subsequent custody and visitation matters, so long as one parent continues to reside in Missouri.”) (emphasis added).

21) Thus, there was a sound factual basis for Defendant’s motion, and defense counsel’s advice that the motion to dismiss was without merit and unlikely to succeed was erroneous. Counsel’s conclusion that the court retained continuing jurisdiction to modify its original order is simply inconsistent with the UCCJA, the statute governing jurisdiction over child custody matters in 1997. The Missouri order provided the basis for the charge against Defendant, and counsel was specifically instructed by Defendant to review this issue. There does not appear to be any objectively reasonable rationale for failing to correctly advise Defendant that this was a sound basis for seeking dismissal of the charges against him. Cf. United States v. Hansel, 70 F.3d 6, 7-8 (2d Cir. 1995) (holding counsel ineffective where defendant pled guilty to crimes that were barred by the statute of limitations because the charges would have been dismissed if counsel had acted competently). Moreover, we can perceive no reasonable strategic justification for failing to pursue this issue or accurately advise Defendant. The criminal custodial interference statute applies only to custody orders issued by a court of competent jurisdiction. Section 30-4-4(A)(2). We can identify no strategic concern that would justify failing to advise a client correctly regarding such a complete defense. A reasonably competent attorney would not have concluded that Defendant’s motion to dismiss was without merit and would not have so advised her client.

22) Defendant also argues that counsel’s performance was deficient because she did not challenge the district court’s authority to enforce the Missouri order, which had not been registered in New Mexico. The transcript of proceedings before the district court does not address this issue with any specificity and it is not clear whether this issue was specifically discussed or researched by defense counsel. In the hearing on the motion to withdraw his plea, Defendant did not develop this issue by asking his prior counsel any specific questions about her research, conclusions or advice regarding this defense.

23) The criminal custodial interference statute contemplates the immediate involvement of a court exercising civil jurisdiction and appears to assume that a civil action has been instituted before any criminal enforcement was attempted. “Upon recovery of a child a hearing by the civil court currently having jurisdiction or the court to which the custody proceeding is assigned, shall be expeditiously held to determine continued custody.” Section 30-4-4(F) (emphasis added). Section 30-4-4(A)(2), however, defines custody determination as “a judgment or order of a court of competent jurisdiction providing for the custody of a child, including visitation rights” and does not directly refer to state registration of the judgment. We are not asked to decide at this time whether such registration is in fact required, and do not so do. We instead conclude that this issue was sufficiently ambiguous that a competent attorney may have reasonably concluded that New Mexico registration of the Missouri order was not required by the statute. Defendant therefore has not met his burden to show either a sound factual basis for this claim or that counsel’s failure to pursue it fell below the standard expected of a reasonably competent attorney.

24) We find an even weaker record with regard to Defendant’s potential lack of intent defense. Defense counsel’s testimony certainly suggests that an intent defense was not the focus of her discussions with Defendant, and that she did not view such a defense as viable. She was not questioned, however, about her basis for rejecting this defense. Given the evidence that Defendant was aware of the Missouri modification order in 1997, it may have been reasonable for counsel to conclude that Defendant did not have a viable defense based on knowledge or intent. We conclude that Defendant has not met his burden to show a factual basis for this claim or that a reasonably competent attorney would have pursued it.

25) Defendant’s final claim of inadequate assistance is based on counsel’s failure to advise Defendant that he might have the option of entering a conditional plea, preserving his right to a ruling on the motion to dismiss and the validity of the underlying Missouri custody modification. Defense counsel specifically testified that she did not discuss a conditional plea with Defendant, and she conceded that such a plea was a possibility in the case. This concession establishes some factual basis for Defendant’s claim. Moreover, we cannot discern a strategic reason for not investigating this option, given Defendant’s express interest in maintaining his motion to dismiss. A conditional plea would have accomplished Defendant’s clear goal of speeding the resolution of the case while preserving his challenge to the underlying Missouri order. Failure to discuss this option, taken together with the incorrect assessment of the merits of Defendant’s motion to dismiss, falls below the threshold for objectively reasonable representation. We therefore consider whether Defendant met his burden to show that, but for counsel’s deficient performance, he would not have pled no contest.

B. Prejudice

26) In order to show prejudice under Strickland’s second prong, a defendant must show that “counsel’s constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59. “In other words . . . the defendant must show that there is a reasonable probability that, but for counsel’s errors, he [or she] would not have pleaded guilty and would have insisted on going to trial.” Id. When a claim of ineffective assistance of counsel is raised in the context of a motion to withdraw a plea, a defendant need not show that his pending motion would have been successful in order to establish his prejudice. See United States v. Streater, 70 F.3d 1314 (D.C. Cir. 1995) (holding that counsel’s erroneous advice that certain defenses had been waived as a result of defendant’s pretrial motions induced defendant to plead guilty and remanding without inquiry into the likely success at trial of defendant’s

\[\text{2}\text{The State has suggested to this Court that defense counsel had additional reasons for her conclusion, which are not reflected in the record, and which the State does not identify. We note that counsel testified in an evidentiary hearing on Defendant’s motion to withdraw his plea. Both parties had the opportunity to question her at that time about her representation of Defendant. A central issue in that hearing was her conclusion that Defendant’s jurisdictional challenge to the 1997 modification order was unlikely to succeed. The State had the opportunity at that time to fully develop the basis for this conclusion on the record. Where the district court has held a full hearing on the precise issue raised before us, we need not consider the possibility of additional evidence that is not of record.}\]
planned lack-of-knowledge defense). In this case, Defendant must show he would not have entered into the plea agreement if he had been given constitutionally adequate advice about the merits of his challenge to the Missouri custody modification. Paredez, 2004-NMSC-036, ¶ 20; Patterson, 2001-NMSC-013, ¶ 28. “Because courts are reluctant to rely solely on the self-serving statements of defendants, which are often made after they have been convicted and sentenced, a defendant is generally required to adduce additional evidence to prove that there is a reasonable probability that he or she would have gone to trial.” Patterson, 2001-NMSC-013, ¶ 29. We have previously recognized that “a defendant’s pre-conviction statements or actions may indicate whether he or she was disposed to plead or go to trial.” Id. ¶ 30. We have also considered the strength of the State’s evidence, reasoning that a defendant may be more likely to plead guilty if the evidence against him is strong. Id. ¶ 31 (emphasizing that this inquiry is not to predict the outcome of a trial, but to determine whether defendant would have chosen to go to trial in light of the evidence).

{27} After reviewing the record, we are persuaded that Defendant would not have pleaded guilty had it not been for counsel’s advice that his defense was meritless. Defendant clearly wanted to pursue a challenge to the Missouri custody modification order based on the Missouri court’s lack of jurisdiction. This challenge, if successful would have provided a complete defense against the charges of custodial interference. Defendant raised this issue consistently from his encounter with the Alamogordo Police in 2001 until his plea and insisted, in the face of resistance from his defense counsel, that the issue be raised in a motion to dismiss the charges against him. Defendant’s testimony in his withdrawal of plea hearing reflects his certainty that he had a valid defense to any charges stemming from the custody modification. Defendant also attempted to renew the motion to dismiss after obtaining new counsel. Cf. Paredez, 2004-NMSC-036, ¶ 21 (noting that defendant’s prompt motion to withdraw his guilty plea suggested that he would not have pleaded guilty had he been properly advised of collateral immigration consequences).

{28} We are persuaded by this record that Defendant would not have agreed to enter a no contest plea and waive this defense had he not been erroneously advised that it was without merit. There is evidence in the record that Defendant had additional reasons for seeking a swift resolution to his case. Counsel failed, however, to discuss any conditional plea option with Defendant. We have little doubt, based on this record, that Defendant would have pursued this option had it been discussed. Thus, we are persuaded that Defendant entered his plea because of his counsel’s erroneous and inadequate advice, and that he would not have done so without this advice. We therefore conclude that Defendant’s plea was not knowing, voluntary and intelligent, and the district court abused its discretion by refusing to allow Defendant to withdraw this plea.

{29} The State suggests that any prejudice to Defendant was effectively cured through the district court’s colloquy at the time the plea was entered. Defendant indicated both that he was satisfied with the advice provided by his attorney and understood that he was waiving his defenses. We recognize that the district court properly conducted the plea hearing, adhering to our rules governing the entry of pleas. Rule 5-303(F) NMRA 2006. This, however, cannot cure a defect caused by ineffective advice of counsel. A defendant cannot be held to have knowingly waived a defense if he has been incorrectly advised that it is without merit. Cf. Kincheloe, 87 N.M. at 35-36, 528 P.2d at 894-95 (defendant’s plea was not freely or intelligently given where counsel failed to discuss relevant defenses); Hill, 474 U.S. at 56-57 (recognizing that a defendant may challenge his guilty plea by showing that the advice he received from counsel was inadequate).

C. Remedy

{30} This Court and the Court of Appeals frequently remand direct appeals alleging ineffective assistance of counsel for further evidentiary hearings. We conclude that this is the rare appeal that does not require such a remand. We have previously observed that habeas corpus proceedings are “the preferred avenue for adjudicating ineffective assistance of counsel claims,” because “the record before the trial court may not adequately document the sort of evidence essential to a determination of trial counsel’s effectiveness . . . .” Duncan v. Kerby; 115 N.M. 344, 346, 851 P.2d 466, 468 (1993). In most cases, “an evidentiary hearing on the issue of trial counsel’s effectiveness may be necessary.” Id. at 347, 851 P.2d at 469. The Courts of Appeals have been reluctant to rule on the effectiveness of counsel without a fully developed record and has recognized that a remand might usurp this Court’s role in habeas proceedings under Rule 5-802 NMRA. See, e.g., State v. Swavola, 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct. App. 1992).

{31} In this case, however, the issue of counsel’s effectiveness was presented to the district court through Defendant’s withdrawal of plea motion, and the district court held an evidentiary hearing on counsel’s effectiveness. Both Defendant and counsel testified at this hearing. In addition, the district court was required to make a decision regarding counsel’s effectiveness in order to rule on the motion to withdraw. Where the trial court has held an evidentiary hearing regarding counsel’s effectiveness, both sides have had the opportunity to develop their positions, and the essential facts regarding counsel’s representation are not in dispute, we believe it is inconsistent with judicial economy to require additional proceedings on this issue. Cf. Varela v. State, 115 N.M. 586, 588, 855 P.2d 1050, 1052 (1993) (holding that claim of ineffective assistance of counsel affecting right to appeal could be heard directly and did not have to be brought in a collateral proceeding).

III. CONCLUSION

{32} Child custody proceedings are often highly emotional and require the district court to consider both complex procedural issues and complex factual matters in order to determine the best interests of the child. The present case illustrates the dangers inherent in attempting to prematurely resolve a custody dispute through criminal proceedings. We note that the charges in this case stem not from inherent parental rights, but from a modification to a prior custody order. At no point in this custody litigation, which has been pursued sporadically over fourteen years in two states, have both parents appeared in a single proceeding.

{33} Our criminal custodial interference statute suggests that a civil action should have been pursued on these facts before any criminal enforcement was attempted. Had a civil action been pursued, the outcome may have been similar but could have been reached with far more certainty. The best interests of the children, normally the central focus of any civil custody proceeding, were not, and could not have been, considered in this criminal case, and may have been very poorly served by this prosecution. Defendant, the custodial parent of three daughters for nearly a decade, was arrested, convicted and sentenced to six years of State supervision for violation of an unregistered, out-of-state custody order,
issued by a state which had not been the residence of either parent or children in the preceding year, after proceedings in which he did not appear. Prosecuting this case independently of a civil custody proceeding appears inconsistent with the interests the Legislature was seeking to protect in enacting Section 30-4-4.

{34} Applying the proper “knowing and voluntary” standard to Defendant’s motion to withdraw his plea, we conclude that his plea was not knowingly and voluntarily made because he received ineffective advice from counsel. We therefore remand to the district court with instructions to allow Defendant to withdraw his plea.

{35} IT IS SO ORDERED.

PAMELA B. MINZNER,

From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-044

Topic Index:
Criminal Procedure: Enhancement of Sentence; Guilty Plea; and Sentencing
Evidence: Prior Convictions or Judgments
Statutes: Conflicting Statutes; and Interpretation

STATE OF NEW MEXICO,
Plaintiff-Respondent,
versus
CHRIS ALLEN SIMMONS,
Defendant-Petitioner.
No. 29,563 (filed: August 29, 2006)

ORIGINAL PROCEEDING ON CERTIORARI
STEPHEN BRIDGFORTH, District Judge

OPINION

EDWARD L. CHÁVEZ, JUSTICE

{1} Chris Allen Simmons (“Defendant”) entered guilty pleas to pending charges on November 26, 2003. He appeals his sentencing under NMSA 1978, Section 31-18-17(D) (2003) (“habitual offender statute”), claiming that a 1990 felony conviction should not have been used to enhance his sentence when he completed his sentence for the 1990 conviction more than ten years before his plea of guilty to the present charges. The State relied on a plea agreement wherein Defendant admitted the validity of two prior felonies including the 1990 felony. However, during the sentencing hearing Defendant himself raised an issue as to whether the 1990 felony conviction was too old to be considered under the habitual offender statute. Despite Defendant having raised the issue the district court proceeded to sentence Defendant as an habitual offender using both prior felony convictions to enhance Defendant’s basic sentence by 20 years.

{2} The Court of Appeals affirmed and we granted certiorari to address the requirements of Section 31-18-17(D) as amended by the New Mexico Legislature in 2002 and 2003. In relevant part these amendments preclude the use of a prior felony conviction if the Defendant completed serving his or her sentence, probation or parole for the prior conviction more than ten years before the present conviction. We agree with Defendant that his plea agreement did not address the timeliness of the 1990 conviction under the habitual offender statute, and therefore, because Defendant raised the issue at the time of sentencing, the State continued to have the burden to prove the timeliness of the 1990 conviction. Accordingly we reverse the Court of Appeals and remand to the district court to determine whether the 1990 felony conviction met the time requirement of Section 31-18-17(D).

I. FACTS AND PROCEDURAL BACKGROUND

{3} Defendant was indicted on March 13, 2003 for possession of a controlled substance and possession of drug paraphernalia. He was later indicted April 17, 2003 on unrelated charges for residential burglary, conspiracy to commit residential burglary, theft of a credit card, fraudulent use of a credit card and conspiracy to commit fraudulent use of a credit card. On November 26, 2003, after consulting with his lawyer, Defendant signed Repeat Offender Plea and Disposition Agreements in which he agreed to plead guilty to all counts and to admit that he was the person convicted of two previous felonies as described in the State’s supplemental criminal information. The two separate cases were consolidated for sentencing. During the sentencing hearing, Defendant himself raised an issue as to whether the 1990 felony conviction could be used to increase his sentence as an habitual offender. The State did not respond to Defendant’s statement and the court went on to sentence Defendant.

{4} The district judge sentenced Defendant to eighteen months incarceration, with a four year habitual offender enhancement for the felony possession charge, and three hundred sixty-four days incarceration for the misdemeanor paraphernalia charge on the first indictment. Defendant was sentenced to three years incarceration for the residential burglary charge, and eighteen months incarceration for each of the other four felonies in the second indictment for a total basic sentence of nine years. Each of the five sentences under the second indictment was enhanced by four years based

{34} The only agreement regarding sentencing appeared to be that the sentences under both indictments would run concurrently.
on the two prior felony convictions. The sentence on the second indictment totaled twenty-nine years. As agreed to by the parties the sentences under both indictments were run concurrently, resulting in a total sentence of incarceration of twenty-nine years plus two years of parole.

{5} Defendant challenged his sentence in the Court of Appeals on the basis that the State failed to prove that his 1990 conviction could be used as a “prior felony conviction” within the meaning of Section 31-18-17(D) as amended by the Legislature in 2002. The Court of Appeals, in a memorandum opinion, affirmed Defendant’s sentence, holding that Defendant was precluded from contesting the date of the prior convictions since he admitted the validity of the prior convictions in his signed plea agreement. The Court of Appeals concluded that because Defendant admitted the validity of the prior convictions, the State had met its burden of proof that both prior felonies should be used to increase defendant’s basic sentence. This Court granted certiorari to address the requirements of Section 31-18-17(D) as amended by the New Mexico Legislature in 2002 and 2003. For the reasons detailed below we reverse the Court of Appeals and remand to the district court for re-sentencing.

II. DISCUSSION

A. The Habitual Offender Statute

{6} We interpret statutes de novo. See Romero Excavation & Trucking, Inc. v. Bradley Constr., Inc., 1996-NMSC-010, ¶ 6, 121 N.M. 471, 913 P.2d 659. Our principal objective in interpreting a statute is to determine the intent of the legislature. Regents of the Univ. of N.M. v. N.M. Fed’n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236. The habitual offender statute requires trial courts to alter the basic sentence for persons convicted of noncapital felonies who are “habitual offenders” because of prior felony convictions. See § 31-18-17. Prior to a July 1, 2002 amendment of Section 31-18-17, the habitual offender statute imposed a mandatory enhancement of the basic sentence in all cases where the defendant had a prior felony conviction, regardless of the date of the prior conviction. State v. Shay, 2004-NMCA-077, ¶ 2, 136 N.M. 8, 94 P.3d 8; see NMSA 1978, § 31-18-17 (1993). However, as of July 1, 2002, not all prior felony convictions can be used to enhance a basic sentence. In 2002, the Legislature amended Section 31-18-17 to authorize some discretion by trial courts when a defendant had only one prior felony conviction. Shay, 2004-NMCA-077, ¶ 2. The Legislature also changed the definition of “prior felony conviction” to include only those convictions “when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later . . . .” NMSA 1978, § 31-18-17(D)(2) (2002). In 2003, the Legislature amended the habitual offender statute again to exclude DWI convictions from the definition of prior felony conviction, while leaving the ten year limit intact. NMSA 1978, § 31-18-17(D)(1)(2) (2003).

{7} Before the 2002 amendments to the habitual offender statute, the State had to prove that a defendant had been convicted of a prior felony. State v. Garcia, 95 N.M. 246, 250, 620 P.2d 1271, 1273 (1980) (“The State makes a prima facie case upon proof that defendant has been convicted of a crime.”). Under the pre-2002 habitual offender statute, a prima facie case consisted of proof of the two elements of the statute: defendant must be the same person (identity) convicted of the prior felony (validity of conviction). See State v. Smith, 2000-NMSC-005, ¶ 2, 128 N.M. 588, 995 P.2d 1030 (identity not at issue but defendant contested validity of prior conviction); State v. Sanchez, 2001-NMCA-060, ¶ 20, 130 N.M. 602, 28 P.3d 1143 (the defendant admitted he was the same person convicted of the prior felonies); State v. Elliott, 2001-NMCA-108, ¶ 38, 131 N.M. 390, 37 P.3d 107 (the State made its prima facie case by showing the defendant was the person convicted of an offense that would be a felony in New Mexico). To meet its burden the State often entered into a written plea agreement with the defendant wherein the defendant admitted both his identity as the prior felon and the validity of the prior felony conviction. See Smith, 2000-NMSC-005, ¶ 4 (describing the defendant’s plea agreement affirming his prior convictions).

{8} After the 2002 amendments, three elements, rather than only two, must be proved: (1) defendant must be the same person, (2) convicted of the prior felony, and (3) less than ten years have passed since the defendant completed serving his or her sentence, probation or parole for the conviction. Clearly, in addition to identity and validity of conviction, Section 31-18-17 (2003) also has a time requirement before a prior felony conviction can be used to enhance a defendant’s sentence. Shay, 2004-NMCA-077, ¶ 22. In Shay, the Court of Appeals noted that the record there did not establish when the defendant had completed serving his sentence on a prior felony conviction, and therefore directed that “[o]n remand, the district court will need to make these determinations.” Id. {9} We are aware that a companion habitual offender statute explains the proceedings for prosecution of habitual offenders as requiring the trial court to make only two findings: “the defendant is the same person and that he was in fact convicted of the previous crime or crimes as charged.” NMSA 1978, § 31-18-20(C) (1983). This statute was last amended in 1983 and does not reflect the amendment to Section 31-18-17 in 2002. If there is a conflict between Sections 31-18-17 and 31-18-20, the recently amended, more specific statute controls. See NMSA 1978, § 12-2A-10(A) (1997) (explaining that if conflict in statutes “is irreconcilable, the later-enacted statute governs”); and see State v. Santillanes, 2001-NMSC-018, ¶ 11, 130 N.M. 464, 27 P.3d 456 (explaining that the goal of the general/specific rule when two statutes conflict is to determine legislative intent). Thus, the proceedings for prosecution of habitual offenders must include proof of all three of the elements required by Section 31-18-17: identity, conviction, and timing. See Shay, 2004-NMCA-077, ¶ 7 (“By deliberately changing the statute . . . and in narrowing the definition of a prior felony conviction, the legislature indicated its dissatisfaction with the old scheme and an intent to depart from that scheme.”)

B. Proof of Timeliness of Prior Felony Conviction

{10} Since the State has the burden of proof under habitual offender proceedings, Elliott, 2001-NMCA-108, ¶ 35, we examine the State’s case for the timeliness of the prior felony conviction at issue against Defendant. The standard of proof for the State’s evidence is a preponderance of the evidence. Smith, 2000-NMSC-005, ¶ 9. The sufficiency of the evidence is reviewed with a substantial evidence standard. State v. Treadway, 2006-NMSC-008, ¶ 7, 139 N.M. 167, 130 P.3d 746. When we review for substantial evidence we give deference to the findings of the district court. State v. Sandoval, 2004-NMCA-046, ¶ 8, 135 N.M. 420, 89 P.3d 92.

{11} In order to make a prima facie case under Section 31-18-17 (2003), the State must offer proof of all three elements: identity, conviction, and timing. In its memorandum opinion, the Court of Appeals held that the State met its prima facie burden of
proof, apparently through Defendant’s plea agreement, and therefore it was up to the trial court’s discretion to decide whether to believe Defendant’s assertion that the prior felony was outdated.

{12} We address the plea agreement as a unique form of contract, binding upon both parties, relying on the rules of contract construction. State v. Montano, 2004-NMCA-094, ¶ 7, 136 N.M. 144, 95 P.3d 1059. “‘Under these circumstances, contract interpretation is a legal issue that this Court reviews de novo.’” Id. (quoting State v. Fairbanks, 2004-NMCA-005, ¶ 15, 134 N.M. 783, 82 P.3d 954). Defendant signed two plea documents called “Repeat Offender Plea and Disposition Agreement” (Agreement), relating to the two separate cases that were later consolidated for sentencing. Each Agreement contains “Admission of Identity” and “Supplemental Criminal Information” sections through which Defendant agreed that he was the person convicted of enumerated crimes, and thus admitted to the first two elements of the definition of prior felony conviction contained in the habitual offender statute. The “Admission of Identity” section required Defendant to agree “that the conviction for these crimes is valid as defined below in the section labeled ‘Habitual Offender Proceedings.’” The Habitual Offender Proceedings section outlines various future possibilities for additional habitual offender proceedings against the defendant, and includes the following two sections pertinent to this case:

2. Proof. The State will use the defendant’s admission of identity on the prior felony convictions in any additional habitual offender proceedings. The defendant understands and agrees that the admissions alone will be sufficient to prove the existence of the convictions and the defendant’s identity.

3. Validity of Conviction. The defendant also agrees that the convictions listed in the section labeled “Admission of Identity,” as well as those to which the defendant is pleading guilty in this agreement, are valid. Valid means the defendant is the person who was convicted of the crimes, that the crimes were felonies and that the defendant’s constitutional rights, including the right to counsel, were explained to the defendant at the time the conviction was obtained. The defendant waives any collateral attack on the validity and effectiveness of the above convictions, including those to which the defendant is . . . pleading guilty under this agreement. The defendant agrees not to contest the validity of the convictions as defined above if additional habitual offender proceedings are brought under the terms of this agreement. If the defendant contests the validity of the convictions as defined above, the State may, at its option, reinstate any charges dismissed or not filed as a result of this agreement.

The State argues that Defendant admitted not only his identity and the fact of the 1990 prior felony conviction, but by signing the plea agreement also admitted that the conviction was “properly usable as a ‘prior felony conviction’ for sentencing enhancement.” The plain language of the agreement indicates otherwise. The only indication in the Agreement that Defendant admits the prior felony is “valid” plainly refers only to identity, conviction, and validity in terms of Defendant’s constitutional rights at the time of the prior convictions. There is no mention whatsoever of the third element for a prior felony conviction, that less than ten years have passed since the defendant completed serving his sentence, probation or parole for the conviction. Contrary to the State’s assertions that the issue of the timing of the conviction is a collateral attack on the validity or effectiveness of the prior felony conviction, the third element is not collateral, but is expressly required by the statute.

{13} The State has argued in this appeal that “it was not the State’s burden to present evidence on the issue of whether Petitioner’s 1990 prior felony conviction was less than ten years old and thus effective for sentencing enhancement purposes.” Through Section 31-18-17, as amended in 2002, the legislature made this issue the State’s burden. The State argues, however, that since Defendant has not produced evidence to support his claim of the invalidity of his prior conviction for sentencing purposes, this “simply is not a matter to be decided,” quoting State v. O’Neil, 91 N.M. 727, 730, 580 P.2d 495, 498 (Ct. App. 1978). The State has misinterpreted O’Neil, which describes the shifting burden of proof required for determining the validity of a prior conviction for sentencing purposes. In O’Neil, the State made a prima facie showing of the required elements for proving the prior convictions: the identity of the defendant and the existence of the prior convictions. Id. at 728, 580 P.2d at 496. The defendant then challenged the validity of the convictions, and thus had the burden of presenting evidence in support of the asserted invalidity. Id. at 729, 580 P.2d at 497. O’Neil demonstrates that the State must make its prima facie showing, including all of the required elements for a prior felony conviction as defined by the habitual offender statute, and then the burden of proof shifts to the defendant. In this case, the State has not made a prima facie showing of all three required elements, and therefore the burden of proof has not yet shifted to the defendant. Once the State presents a prima facie case showing identity, prior conviction, and timing, the burden to present proof of invalidity will shift to the defendant, and he will be required to produce evidence in support of his defense. Id. As O’Neil demonstrates, once such evidence is offered, “the State must then persuade the fact finder that the guilty pleas are valid . . . It is the State that is relying on the prior convictions in order to enhance defendant’s sentence for his last felony conviction.” Id.

{14} The burden of making a prima facie case is not onerous on the State. The “Supplemental Criminal Information” filed by the State to support the habitual offender enhancement in this case already contained the dates of the previous conviction, the exact charge, and the jurisdiction of the conviction. In addition, NMSA 1978, Section 31-13-1(C) (2005) requires that “[a] person who has served the entirety of a sentence imposed for a felony conviction, including a term of probation or parole shall be issued a certificate of completion by the corrections department.” We also note that even when the prior felony conviction occurred in another state, as in this case, information should be available to assist the State in proving all three elements of a prior felony conviction. For example, the felony conviction at issue here occurred in Nevada. Nevada statutory law requires the Director of the Corrections Department to submit to the county clerk every month a list of “offenders released from prison or discharged from parole.” Nev. Rev. Stat. § 209.134 (2005). This list includes the name of each offender “released from prison by expiration of his term of imprisonment during the previous month or who was discharged from parole during the previous month,” as well as “the case number of each offense for which the offender was released or discharged.” Id. Thus, with modern technology and the public records
of state corrections departments, it should not be difficult for the State to prove all three required elements of a prior felony conviction under the habitual offender statute. The Legislature has made it clear that as of July 1, 2002 only certain prior felony convictions may be used to enhance a defendant’s basic sentence.

15 The State must prove that any and all prior felony convictions it relies on to enhance a sentence meet this definition. Although the State may make its prima facie showing by having defendant admit all of the necessary requirements of the definition in a written plea agreement, the agreement in this case did not satisfy the recent requirements of the Legislature, and the trial court should have determined that the State had not met its burden. See NMRA 5-607(E) (“the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made”). If Defendant’s 1990 conviction meets the definition of prior felony conviction, the district court must increase his sentence under the habitual offender statute. § 31-18-17(B). Therefore, we remand to the district court for re-sentencing of Defendant consistent with this opinion.

III. CONCLUSION

16 The record does not support a finding that less than ten years have passed since Defendant’s instant felony conviction and the time Defendant completed serving his sentence, probation or parole for the 1990 felony conviction. See State v. Fairbanks, 134 N.M. 783, 787, 82 P.3d 954 (Ct. App. 2003) (“New Mexico courts hold that a guilty plea typically constitutes ‘conviction’ once the court accepts and records it”); NMSA 1978 § 30-1-11 (1963) (“no person shall be convicted of a crime unless found guilty . . . upon defendant’s confession of guilt . . . accepted and recorded in open court”). Because Defendant raised the issue at the time of sentencing and the plea agreement did not satisfy the elements for a prior felony conviction, the State should have made its prima facie showing that the 1990 conviction met the definition of “prior felony conviction” under Section 31-18-17. Therefore, Defendant’s sentence is vacated and this case is remanded for re-sentencing pursuant to Section 31-18-17 consistent with this opinion.

17 IT IS SO ORDERED.

EDWARD L. CHÁVEZ,

Justice

WE CONCUR:

RICHARD C. BOSSON, Chief Justice
PAMELIA B. MINZNER, Justice
PATRICIO M. SERRA, Justice
PETRA JIMENEZ MAES, Justice

From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-045

Topic Index:

Appeal And Error: Substantial or Sufficient Evidence
Criminal Law: Child Abuse or Neglect

STATE OF NEW MEXICO,
Plaintiff-Petitioner,

versus

KEVIN JENSEN,
Defendant-Respondent.

No. 29,528 (filed: August 29, 2006)

ORIGINAL PROCEEDING ON CERTIORARI

KEVIN R. SWEAZEA, District Judge

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OPINION

EDWARD L. CHÁVEZ, JUSTICE

1 Everyday for at least two weeks at the home of Defendant Kevin Jensen, fifteen-year-old Robbie Stroup got drunk on liquor supplied by Defendant while viewing pornographic websites on Defendant’s computer. Defendant’s home was filthy and filled with animal feces, rodent droppings, and rotten food in the refrigerator. Defendant was tried on two counts of contributing to the delinquency of a minor, contrary to NMSA 1978, § 30-6-3 (1990), and one count of child abuse by endangerment, contrary to NMSA 1978, § 30-6-1(D)(1) (2001, prior to 2004 amendment). A jury convicted him on all counts. Defendant appealed to the Court of Appeals, challenging only his child abuse conviction and arguing that no rational jury could have found his conduct created a reasonable probability or possibility that Robbie’s health would be endangered.

2 The Court of Appeals wrote a comprehensive opinion summarizing New Mexico law on child endangerment. The Court of Appeals interpreted this Court’s recent opinion in State v. Graham, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285, as injecting an inquiry into the “child’s susceptibility to harm.” State v. Jensen, 2005-NMCA-140, ¶ 16, 138 N.M. 647, 124 P.3d 1186. The Court of Appeals reversed Defendant’s conviction, concluding that the evidence “does not portray a defenseless child too young to protect himself.” Jensen, 2005-NMCA-140, ¶ 22. Because the Court of Appeals believed the fifteen-year-old could protect himself from the filthy and unsanitary conditions of Defendant’s home by simply choosing not to go there, the Court of Appeals concluded the child was not endangered. Id. ¶ 22-24.

3 We granted the State’s petition for writ of certiorari and reverse the Court of Appeals. Although a child’s susceptibility to harm is a factor a jury might consider when determining whether a defendant has committed child abuse, this factor alone is insufficient for a reviewing court to rule as a matter of law that Defendant did not cause the child to be in a situation that might endanger his health. We hold, viewing the evidence in the light most favorable to the prosecution, that a rational trier of fact could have found that the circumstances as
a whole satisfied the essential elements of the crime of child abuse beyond a reasonable doubt.

I. BACKGROUND

[4] Robbie Stroup, a fifteen-year-old boy from Moriarty, was reported missing on October 28, 2002. As part of her investigation, Chief Deputy Susan Encinias interviewed Robbie’s mother at her home while Defendant was present. Chief Deputy Encinias learned that Robbie had been at Defendant’s home the day before he was reported missing. Following the interview of Mrs. Stroup, Chief Deputy Encinias went with Defendant to his house located about five houses from the Stroup’s residence for the purpose of interviewing Defendant. Before entering Defendant’s home, several dogs had to be removed from inside. Chief Deputy Encinias testified as to the “totally horrible,” “filthy,” “nasty,” and “terrible” conditions inside Defendant’s home, which included dog feces and rodent droppings throughout the house. She also explained that an emu rushed at her upon opening a bedroom door in the house.

[5] On October 29, 2002, with Defendant’s consent, Deputy Sheriff Milton Torrez searched Defendant’s house. Deputy Sheriff Torrez testified that he had not seen a house “half as bad.” In the living room area, there were dog feces, dog vomit on the floor, and rat and bird droppings in a cage. The entire kitchen area, including the stove, dishwasher, sink, and counter top, was dirty and littered with rodent droppings. The stove top burners, where Defendant cooked for Robbie, were also littered with rat droppings. The computer table that Robbie frequently used to surf the Internet was covered with trash and had rat or mouse droppings. Black rotten food was in the refrigerator next to some good hamburger meat. There was no place to sit at the dining room table without coming into contact with the extremely dirty conditions. The baseboards looked as though dogs had urinated on them, and the dirty bathroom had empty coke bottles and a filthy looking plastic soda pop jug with a yellowish orange liquid in it. The entire house was littered with dust, papers, bottles, and animal waste that created a constant stench. In fact, an animal control officer who came to take Defendant’s emu had to go outside to avoid vomiting from the smell.

[6] Robbie first met Defendant through his eighteen-year-old high school friend, Ben Wetherill. Robbie visited Defendant often. While at Defendant’s house, Robbie would drink alcohol supplied by Defendant, smoke cigarettes, and look at adult pornographic sites on Defendant’s computer. Ben testified that he and Robbie got drunk at Defendant’s house every night for more than two weeks straight in October, 2002. Along with beer, Ben and Robbie drank Bacardi 101 and Wild Turkey. On one occasion, Ben became sick from drinking too much and vomited on one of the dogs in the house.

[7] Defendant was charged with two counts of contributing to the delinquency of a minor and one count of child abuse for events which took place between August 1, 2002, and October 28, 2002. A jury convicted Defendant of one count of contributing to the delinquency of a minor, based on providing alcoholic beverages to Robbie; one count of contributing to the delinquency of a minor, based on providing Robbie with access to pornographic websites; and one count of child abuse by endangerment, based on placing Robbie in a situation that might have been dangerous to Robbie’s health or life.

II. DISCUSSION

[8] Defendant contends the evidence was insufficient to convict him of child abuse. “In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.” State v. Cunningham, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id. ¶ 26 (quoting State v. Garcia, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992)). We must not re-weigh the evidence or substitute our judgment for the judgment of the jury. State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988).

[9] In this case Defendant was charged with “knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be . . . placed in a situation that may endanger the child’s life or health.” § 30-6-1(D)(1). The jury was instructed, in relevant part, that the State had to prove the following beyond a reasonable doubt:

1. Kevin Jensen caused Robbie Stroup to be placed in a situation which endangered the life or health of Robbie Stroup;
2. The defendant acted with reckless disregard. To find that Kevin Jensen acted with reckless disregard, you must find that Kevin Jensen knew or should have known the defendant’s conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of Robbie Stroup.

3. Robbie Stroup was under the age of 18.

[10] Proof of child endangerment is sufficient for a conviction if a defendant places a child within the zone of danger and physically close to an inherently dangerous situation. See State v. McGruder, 1997-NMSC-023, ¶¶ 37-38, 123 N.M. 302, 940 P.2d 150 (child abuse conviction upheld where the defendant aimed a gun at and threatened to shoot a child’s mother when the child was behind the mother, putting the child in a direct line of physical danger). Child abuse can also be found when the conduct creates indirect danger to a child. See State v. Castaneda, 2001-NMCA-052, ¶ 22, 130 N.M. 679, 30 P.3d 368 (child abuse conviction upheld where intoxicated mother drove recklessly on wrong side of highway while her children were riding unrestrained in the car, thus exposing the children to the possibility of danger). Although it is not necessary that the child actually suffer physical harm, “[t]here must be a reasonable probability or possibility that the child will be endangered.” Graham, 2005-NMSC-004, ¶ 9 (quoting McGruder, 1997-NMSC-023, ¶ 37) (internal quotation marks omitted).

[11] In reversing Defendant’s conviction, the Court of Appeals interpreted this Court’s holding in Graham as injecting another element into the endangerment inquiry, “namely, the child’s susceptibility to harm.” Jensen, 2005-NMCA-140, ¶ 16. Because in Graham we described the children as “very young children” and quoted various precedents as referring to the Legislature’s intent to protect “defenseless” children, the Court of Appeals interpreted our holding in Graham to require an inquiry into the child’s “susceptibility to Defendant’s offerings, his ability to protect himself, and his exposure to harm.” Id. If the child has the capacity to protect himself from harm, the Court of Appeals concludes, the adult defendant in this case is not guilty of child endangerment. We disagree.

[12] In Graham, we upheld a conviction for child abuse when a father left marijuana in the immediate vicinity of his children and
there was a reasonable probability or possibility that the children would come into contact with the controlled substance that could have endangered their health. 2005-NMSC-004, ¶ 14. We noted in that opinion that “[i]t is also common knowledge that the same amount of an intoxicant can have a more profound impact on infants and toddlers than on adults or even older children.” Id. ¶ 12. As such, “[g]iven the illegality of the substance and the Legislature’s determination that the substance is particularly dangerous to minors, we believe[d] it was within the jurors’ experience to decide whether the amount of accessible marijuana endangered the health of a three-year-old child and a one-year-old child.” Id. While age within the context of child endangerment inevitably will be considered by juries, age alone cannot provide the basis for a reviewing court to set aside a verdict of the jury. The Legislature has made it clear that child abuse applies to any child under the age of eighteen. See Section 30-6-1(A)(1) (defining “child” as a person less than eighteen years of age). The focus of a reviewing court must continue to be on whether a defendant caused or permitted a child to be placed in a situation with a reasonable probability or possibility that the child’s health or life may be endangered. ¶ 13. Defendant focuses on the filthy conditions of the house and argues that the prosecution was only able to prove a speculative or mere possibility of endangerment to the child. The State points to cases in other jurisdictions where child abuse convictions were upheld based solely on exposing a child to filthy and unhealthy living conditions. See State v. Piep, 84 P.3d 850 (Utah Ct. App. 2004); State v. Deskins, 731 P.2d 104 (Ariz. Ct. App. 1986); State v. Smith, 634 P.2d 1 (Ariz. Ct. App. 1981). In Piep, for example, the Court of Appeals in Utah found that child abuse occurred when defendants placed children among living conditions that included: foul odors, rotten food, food on the floor, scattered clothing, evidence of human feces, and a substance seeping from the refrigerator. The conviction was upheld because such conditions endangered the health and welfare of the children. Piep, 84 P.3d at 853.

¶ 14 In this case, regarding the filthy conditions, the State argues that the presence of rodent droppings throughout the home, including on the stove where Defendant cooked for the child, could have exposed the child to contracting hantavirus. We are not persuaded by this specific argument since the State did not put on evidence at trial to assist the jury with understanding whether the risk of contracting hantavirus was a reasonable probability or possibility. When filthy living conditions provide the exclusive basis for charging a defendant with child endangerment, the State must assist the trier of fact with evidence that supports a finding that there is a reasonable probability or possibility that such filthy conditions endangered the child.

¶ 15 However, this case is not exclusively about filthy living conditions. The State argues that it was the combination of activities—providing the child with access to pornography and supplying alcohol to the child on a daily basis so the child could drink in excess while in a filthy environment—which prove child endangerment. As pointed out by the State, the child was in fact harmed when he became so intoxicated that he vomited. Yet Defendant continued to supply alcohol to the fifteen-year-old, assuring the child’s daily intoxication. This was not a situation where an adult occasionally supplied alcohol to a child. The evidence was that for at least two weeks Defendant supplied the child with alcohol, knowing the child was drinking in excess. While the Court of Appeals may be correct that the fifteen-year-old could have simply avoided the Defendant altogether, the child’s failure to avoid Defendant does not exonerate Defendant as a matter of law. Conduct that includes supplying alcohol to this fifteen-year-old on a daily basis, cooking hamburger meat that was stored next to black rotten food in the refrigerator for the child, and cooking on a stove top littered with rodent droppings distinguishes this case from those cases where only filthy conditions are at issue.

¶ 16 Finally, we believe a rational juror could find that Defendant knew or should have known that Robbie was in danger of becoming sick from daily intoxication with alcohol supplied by Defendant, consumption of food cooked on a stove littered with rodent droppings and eaten in an environment with animal feces scattered throughout, or a combination of these risks. “[W]here a jury verdict in a criminal case is supported by substantial evidence, the verdict will not be disturbed on appeal.” State v. Anaya, 98 N.M. 211, 212, 647 P.2d 413, 414 (1982).

III. CONCLUSION

¶ 17 We conclude that the jury had sufficient evidence to convict Defendant of child abuse. We reverse the Court of Appeals and affirm the conviction.

¶ 18 IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

RICHARD C. BOSSON, Chief Justice

PAMELA B. MINZNER, Justice

PATRICIO M. SERRA, Justice

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

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Request for Applications
City of Albuquerque
Legal Secretary Position
LEGAL SECRETARY: Legal secretary position available in the Real Estate Land Use Division requiring considerable knowledge of legal terminology, litigation procedures, pleadings and other legal documents. Associate’s degree in Business Administration or related field, plus three (3) years of secretarial experience, two (2) of those years must be as a Legal Secretary. Related education and experience may be interchangeable on a year for year basis. (Exception: The Legal Secretary experience is not interchangeable). Please apply online at www.cabq.gov. Application deadline is November 10, 2006

Associate Attorney
Busy insurance defense firm is interested in hiring an attorney to assist with all aspects of the insurance defense practice. Salary commensurate with experience and qualifications. Excellent benefits, collegial environment. Please send fax or email resume to 6000 Indian School NE, Suite 200, Albuquerque, NM 87110. Fax: 883-3232. Email: archibeque@obrienlawoffice.com.

Trust Assistant
Small but rapidly growing trust operation is seeking talented and ambitious Trust Assistant to work in all phases of client administration, operations, and new business development. Ideal candidate will also be comfortable dealing with clients, prospects, and referral sources coming from a wide and varied cross section of the State. Also prefer candidates having experience reading and interpreting trusts, wills, and related documents. Relevant experience might include work in a trust department, investment advisory firm, insurance agency, or law office. Opportunity to advance as operation continues to grow. Send resume with salary requirements to: Trust, P.O. Box 1048, Albuquerque, NM 87103.

Legal Assistant
Northern New Mexico Hospitality/Tourism Company, Taos area: full-time senior-level position, reporting to the General Counsel. 8-10 years experience required with proficiency in Word, Excel, Outlook, and legal document preparation. Join our Winning Team. Competitive pay and comprehensive benefits including amenities. Send cover letter and resume in confidence to cooljobsnm@zianet.com. EOE

Public Defenders
The Public Defender Department is seeking entry and mid-level attorneys for the Appellate Division in Santa Fe. Competitive salaries; excellent benefits. Please contact John Stapleton at (505) 827-3900, x102, or e-mail at john.stapleton@state.nm.us. The State of New Mexico is an equal opportunity employer.

Wanted-Legal Research & Writing
Part time lawyer or paralegal. Send writing samples, salary requirements. Kerry Morris, 901 Lomas, NW, Albuquerque, NM 87102.

Director
The Utton Transboundary Resources Center at the University of New Mexico School of Law invites applications for the position of Director. This non-tenure track position will begin May 2007. The mission of the Utton Center is to promote equitable and sustainable management and utilization of transboundary resources through impartial expertise, multi-disciplinary scholarship, and preventive diplomacy. The Director provides administrative leadership, fiscal and personnel management for the Center, and is responsible for management and development of programs, resources and services. Candidates must possess J.D. or other terminal degree, have excellent verbal and written communication skills, five years of related professional or academic experience, and experience in water, environmental or natural resources law and/or policy. Additional information is available at: http://www.unm.edu/~oecounm/facpost.html. To apply submit signed letter of interest by 3pm Mountain Time on December 18, 2006, describing interest in and qualifications for the position, curriculum vita, and names and contact information of five professional references to: Carol Parker, UNM Legal Assistant Position, 901 Lomas, NW, Albuquerque, NM 87131.

Request for Applications
City of Albuquerque
Legal Secretary Position
LEGAL SECRETARY: Legal secretary position available in the Municipal Affairs Division requiring considerable knowledge of legal terminology, litigation procedures, pleadings and other legal documents. Associate’s degree in Business Administration or related field, plus three (3) years of secretarial experience, two (2) of those years must be as a Legal Secretary. Related education and experience may be interchangeable on a year for year basis. (Exception: The Legal Secretary experience is not interchangeable). Please apply online at www.cabq.gov. Application deadline is November 10, 2006

Assistant Trial Attorney - Cibola County
The Thirteenth Judicial District Attorney’s Office is accepting applications for an experienced attorney to fill the position of Assistant Trial Attorney in the Cibola County Office, Grants, NM. This position requires a felony caseload and at times some misdemeanor prosecutions. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Filemon Gonzalez, District Office Manager, 333 Rio Rancho Blvd. Suite 303, Rio Rancho, New Mexico 87124. Deadline for submission of resumes: Immediate opening until filled.

Attorney
Attorney needed for reputable law firm to handle litigation cases in full range of creditor’s rights and thrive in a fast paced practice. Excellent work environment in new offices at the Journal Center. Submit in confidence cover letter, resume, references, and salary requirements to: sjrlawoffice@littledranttel.com.

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.

Associate Attorney, Immigration Law
Small Immigration Law Firm has immediate opening for associate attorney with 0-4 yrs. experience, to represent immigrants in administrative cases filed with the Immigration Service. Must be self-starter, able to manage caseload, with strong computer skills, and excellent written and verbal communication skills. Spanish proficiency a plus. Must be admitted to NM or other state bar, or willing to sit for next bar exam. Please forward letter of interest, resume, and salary reqs. to sjrlawoffice@zianet.com or to Sarah Reinhardt, 110 Quincy NE Albuquerque NM 87109. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Filemon Gonzalez, District Office Manager, 333 Rio Rancho Blvd. Suite 303, Rio Rancho, New Mexico 87124. Deadline for submission of resumes: Immediate opening until filled.

Legal Assistant
Legal Assistant w/exp needed for law firm representing numerous, nationwide banking/servicer clients in full range of creditor’s rights. Must thrive in a fast paced environment. Great ben include hol, vac, sick leave, health, dental, retire plan & more. Submit in confidence cover letter, resume, sal his & req to: 7430 Washington Street, NE Albuq, NM 87109, fax 833-3040, or email admin@littledranttel.com.
**Assistant Trial Attorney - Valencia County**
The Thirteenth Judicial District Attorney’s Office is accepting applications for an experienced attorney to fill the position of Assistant Trial Attorney in the Valencia County Office, Los Lunas, NM. This position requires a felony caseload and at times some misdemeanor prosecutions. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Filemon Gonzalez, District Office Manager, 333 Rio Rancho Blvd. Suite 303, Rio Rancho, New Mexico 87124. Deadline for submission of resumes: Immediate opening until filled.

**Legal Support**
High Desert Legal Staffing seeks legal secretaries and paralegals with strong computer skills for both temporary and permanent positions with leading firms in Albuquerque and Santa Fe. E-mail: LBrown@highdesertstaffing.com; fax (505) 881-9089; or call (505) 881-3449 for immediate interview.

**OFFICE SPACE**
**San Felipe Plaza in Old Town**
Two office suite within established law office in newly renovated office park adjacent to Albuquerque Museum, Hotel Albuquerque, and Seasons Grill. Conference rooms and some services available. Prefer attorneys with compatible business practices. $800-$1200/mo office ($1600-$2400/mo. total). Please contact Murray Thayer or Jason Kent @ 345-8400 for more information.

**Downtown Albuquerque**
620 Roma Avenue, NW $550 per month. Includes office, all utilities (except phones), cleaning, conference rooms, access to full library, receptionist to greet clients and take calls. A must see. Call 243-3751.

**Prestige Offices near Albuquerque Courts**

**Refurbished Double Adobe Office Building**
On Paseo de Peralta in rail yard neighborhood. Six rooms for two or three offices and reception, finished basement, fire place, hardwood floors, air, hot water baseboard heat, paved parking. Approx. 1900 sq. ft. $2,200 per month plus deposit and utilities. C-1 zoning. Phone 983-7252 or 690-3357.

**3009 Louisiana**
Very desirable Uptown location. Executive suite and staff station, Shared conference room, reception area, copier/kitchen. 889-3899.

**Nob Hill Executive Center**
Designed for attorneys and all mediators who want a presence in Albq. The office is equipped with state of the art technologies, concierge svs, reception and package handling. Office space & Virtual space available, Rates are daily/weekly. Contact Adrienne 505-314-1300.

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

**Share Beautiful Offices**
Share beautiful offices in Bank of America Building with two established family law practitioners. $667 per month, January ’07 - April ’08 remaining on lease. Secretarial space, conference room included. Call 242-9982.

**Office Sharing**
GREAT LOCATION. Share offices in beautiful building at 1201 Lomas NW. Ample parking, walk to courthouses. Large office, paralegal office, shared conference room and library (furnished or unfurnished), kitchen/ file/workroom, storage, copier, fax, DSL internet access, phone equipment, security system, other amenities. Non-smoking. Rent negotiable depending on needs. Call Robert Gorman 243-5442.

**Albuquerque Offices**
Albuquerque offices for rent, 820 2nd NW, one block from courthouses, copier, fax, high speed internet, off street parking, library, statutes up to date, telephone system, conference room, receptionist, rates depending on space rented $500 to $1000 monthly. Call Ramona @243-7170 for appointment.

**Office Space Available**
**400 Gold SW**
Executive suite includes reception, conference rooms, breakroom, copy/fax services, & phone system. Offices starting at $475/month. Suites also available 950SF to 5000 SF, negotiable lease terms and improvements. Covered on-site parking available. Call Daniel 241-3803, daniel@armstrongproperties.net.

**Attractive Shared Office Space**
Attorneys-Uptown location, 2539 Wyoming, NE, Large furnished private office. Shared reception area, secretary, conference room, DSL, copy machine, fax $990 plus shared costs. Contact Crystal Pritchard or Burt Broxterman, 296-4821.

**Downtown**
Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $165 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

**Uptown Square Office Building**
Prestigious Uptown location, high visibility, convenient access to I-40, Bank of America, companion restaurants, shopping, two-story atrium, extensive landscaping, ample parking, full-service lease. Two different suite sizes, 850SF & 1000SF available now and 2806SF available February 1, 2007. Buildouts for larger suite include separate kitchen area, storage and 5 windowed offices. Competitive Rates. Tenant Improvements negotiable. Call Ron Nelson or John Whisenant 883-9662.

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## Santa Clara Pueblo v. Martinez:
### Past and Present Day Consequences

State Bar Center, Albuquerque  
Thursday, November 9, 2006  
2.7 General CLE Credits  
Co-Sponsor: Indian Law Section

In 1978 the U.S. Supreme Court decided *Santa Clara Pueblo v. Martinez* and affirmed the power of self governance for all federally recognized Pueblos and Tribes. While the case arose from a dispute about membership qualifications that differentially treated male and female members, this CLE is not restricted to this topic. This CLE will address the impact of the important *Santa Clara* principles: tribal sovereignty, tribal sovereign immunity, and when federal law and federal court review are appropriate for internal law.

<table>
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<tr>
<th>Time</th>
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<td>8:20 a.m.</td>
<td>Registration</td>
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| 9:00 a.m. | *Santa Clara Pueblo v. Martinez: The Tribal Sovereignty and Enrollment Dispute, Then and Now*  
Professor Gloria Valencia-Weber, UNM School of Law  
Tim Vollmann, Esq., Sole Practitioner, Albuquerque  
Rina Swentzell, M.A., Ph.D., Santa Clara Pueblo Member |
| 10:15 a.m. | Break                                                                    |
| 10:30 a.m. | *Santa Clara Principles in Contemporary Indian Law Tribal, State and Federal Jurisdictional Conflicts*  
Steffani Cochran, General Counsel, Pueblo of Pojoaque Legal Department  
A review of recent decisions such as *N.M. v. Romero* (2006) resulting from jurisdictional conflicts and the current day exercise of tribal sovereignty as defined in *Santa Clara.* |
| 12:00 p.m. | Lunch – Native American Cuisine (provided at the State Bar Center)     |
| 1:00 p.m.  | Indian Law Section Annual Meeting and Awarding of ILS Bar Scholarships  |

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