Alliance Program:

Guide to Member Benefits

For more information visit www.nmbar.org; or contact State Bar of New Mexico Membership Services, 5121 Masthead NE, Albuquerque, NM 87109
Phone: (505) 797-6033 • E-mail: membership@nmbar.org

Through the stated or implied endorsement of Alliance Program Participants, the State Bar of New Mexico assumes no liability for claims, losses, costs, damages, judgments or settlements including costs, expenses and attorneys fees arising from or in any manner relating to (1) any inaccurate representations made by the participant, (2) any breach of any warranty or any default in the performance of any of the covenants made by the participant, and (3) any negligent acts or omissions, whether inadvertent or intentional, and any willful misconduct by participant.
State Bar of New Mexico

Bill Kitts Mentor Program

Mentor: a trusted counselor or guide

The program “not only dramatically increased my learning curve but also allowed me to avoid many of the common mistakes that often befall newer attorneys.”

Micah Rose - Staff Attorney, Senior Citizens’ Law Office

Visit www.nmbar.org and select Attorney Services/Practice Resources
SEMINAR REGISTRATION FORM
CLE PROGRAMS - State Bar Center

NOVEMBER 21 - VIDEO REPLAYS

Immigration Fundamentals: Keeping Families Together
State Bar Center • Tuesday, November 21, 2006
3.0 General CLE Credits
9:00 a.m. – Noon • $109

Genetic Testing and Employment Discrimination
3.2 General CLE Credits
1:00 – 4:15 p.m. • $129

How To Do Your First Personal Injury Case
State Bar Center • Tuesday, November 21, 2006
5.0 General & 1.0 Ethics CLE Credits
8:30 a.m. - 3:00 p.m. • $189

HIPAA Security: Double Secret Probation
State Bar Center • Tuesday, November 21, 2006
3.0 General CLE Credits
9:30 – 12:30 p.m. • $109

Pro Se Can You See
State Bar Center • Tuesday, November 21, 2006
1.0 Ethics & 1.0 Professionalism CLE Credits
1:00 – 3:00 p.m. • $79

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 ___________________________
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Professionalism Tip

With respect to parties, lawyers, jurors and witnesses:
I will give all cases deliberate, impartial and studied analysis and consideration.

Meetings

November

13
Taxation Section Board of Directors, noon, via teleconference

15
Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 10th floor conference room

15
Law Office Management Committee, noon, State Bar Center

16
Natural Resources, Energy, and Environmental Law Section Board of Directors, noon, State Bar Center

16
Real Property, Probate and Trust Section Board of Directors, 4 p.m., Rodey Law Firm

State Bar Workshops

November

13
Living Wills and Advanced Health Directives, 6 p.m., CNM Paralegal Law Center, South Valley Campus, 5816 Isleta SW, Albuquerque

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 serv-
cices 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.

Board of Legal Specialization
Comments Solicited
The following attorney is applying for
certification as a specialist in the area of law
identified. Application is made under the
New Mexico Board of Legal Specialization,
Rules 19-101 through 19-312 NMRA. The
Rules of the New Mexico Board of Legal
Specialization provide that the names of
those seeking to qualify shall be released for
publication. Further, any person may com-
ment upon any of the applicant’s qualifica-
tions within 30 days after the independent
inquiry and review process carried on by the
board and appropriate specialty committee.
The board and specialty committee encour-
age attorneys and others to comment upon
any applicant. Address comments to New
Mexico Board of Legal Specialization, PO
Box 93070, Albuquerque, NM 87199.
Daniel Ulibarri
Trial Specialist - Civil

Legal Specialists Announced
The New Mexico Supreme Court Board of
Legal Specialization is pleased to an-
ounce the following attorneys as board
certified specialists:
Employment & Labor
Robert Tinnin
Environmental Law
Jerry D. Worsham II
Federal Indian Law
Daniel Rey-Bear
Family Law
Sandra Morgan Little
Jan Tepper-Gilman
Local Government Law
Harry Connelly

Natural Resources – Water Law
Susan C. Kery
Real Estate Law
Edward J. Roibal

To receive information on any of the
certified specialty areas, call the Legal
Specialization Administrative Office, (505)
821-1890.

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.

Law Library
Open Monday–Friday, 8 a.m.–6 p.m.
Closed Saturdays and Sundays
Holiday Closings:
Nov. 23 and 24
Dec. 22 at 1 p.m.
Dec. 25
Dec. 29 at 1 p.m.
Jan. 1, 2007
Phone: (505) 827-4850; fax: (505) 827-
4852; e-mail: libref@nmcourts.com; Web

First Judicial District
Court
Criminal Bench and Bar
Brown-Bag Meeting
The 1st Judicial District Court Criminal
Bench and Bar will have a brown-bag meet-
ing at noon, Nov. 21, in the courtroom of
Judge Michael E. Vigil. Issues and topics
for discussion may be submitted to Sally or
Kim, (505) 827-5047.

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,
incompetency/mental health, adoption
and probate cases for years 1974 to 1989,
inclusive but not limited to cases that have
been consolidated. Cases on appeal are
excluded. Counsel for parties are advised
that exhibits can be retrieved through Nov.
24. 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 re-
leased 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
domestic cases for the years 1981 to 1989,
civil cases for the years 1982 to 1992, LR
(Metro Court cases) for the years 1988 to
1995 and criminal cases from 1986, includ-
ed 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. 12 to Dec.
21. Attorneys who have cases with exhibits
should verify exhibit information with the
Archives and Special Services Division, at
841-7596/5452, from 8 a.m. to noon and
from 1 to 5 p.m., Monday through Friday.
Plaintiff exhibits will be released to counsel
counsel of record for the defendant(s) by
Order of the Court. All exhibits will be re-
leased in their entirety. Exhibits not claimed
by the allotted time will be considered
abandoned and will be destroyed by Order
of the 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 year 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
New Mexico

The duties of Judge 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 appointment will be made at the Dec. 15 Board of Bar Commissioners meeting. Members wishing to serve on the reappointment commission should send a letter of interest and brief resume by Dec. 1 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

**Fifth Judicial District Announcement of Vacancy**

A vacancy on the 5th Judicial District Court will exist in Carlsbad as of Dec. 31 upon the retirement of the Honorable Jay Forbes. The chair of the 5th Judicial District Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/application.php, or e-mailed/faxed/mailed by calling Sandra Bauman, (505) 277-4700. The deadline for applications has been set for 5 p.m., Dec. 11. Applications received after that date are not considered.

The Judicial Nominating Commission will meet at 9 a.m., Jan. 8, 2007, at the Eddy County Courthouse, 102 N. Canal, Carlsbad, to evaluate the applicants for this position.

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

**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 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. Kelcher, 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., Dec. 4, 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 Appointment**

The Board of Bar Commissioners will make one appointment to the New Mexico Commission on Access to Justice for a three-year term. The appointment will be made at the Dec. 15 Board of Bar Commissioners meeting. Members wishing to serve on the commission should send a letter of interest and brief resume by Dec. 1 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

**Legal Aid (NMLA) Board Appointments**

The Board of Bar Commissioners will make two appointments to the New Mexico Legal Aid (NMLA) Board at its next meeting on Dec. 15. Both of the appointments are for one-year terms to end December 2007, with one of the positions being recommended by the Indian Law Section. Members wishing to serve on the NMLA Board should send a letter of interest and brief resume by Dec. 1 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

**Board of Editors Vacancies**

Four attorney positions on the State Bar Board of Editors will expire at the end of 2006. The editorial board reviews and approves articles submitted for publication in the Bar Bulletin. All vacancies are two-year terms, beginning Jan. 1, 2007 and ending Dec. 31, 2008. Interested attorneys should have previous publishing/editing experience, be available to review articles regularly, and attend quarterly board meetings in person or by teleconference. Send resumes by Nov. 30 to Dorma Seago, dseago@nmbar.org, or by mail to PO Box 92860, Albuquerque, NM 87199.

**Casemaker Online Legal Research**

**Training in Silver City**

Casemaker, the State Bar’s newest membership service, is free online legal research that includes New Mexico and federal materials, as well as access to 25 other state libraries. Trainings on how to use Casemaker will be held from 5:30-6:30 p.m. on Jan. 17 and from 9 to 10 a.m. on Jan. 18 in Silver City. The training will be conducted in the Grant County Administration Building, Commissioner’s Meeting Room, 1400 Highway 180 East, Silver City. Seating is limited. To reserve a space, call (505) 797-6000. The training is approved for 1.0 CLE general credit.

**Committee for Delivery of Legal Services to People with Disabilities Pro Bono Interpreter Program**

The State Bar and the Committee for Delivery of Legal Services to People with Disabilities jointly sponsor the New Mexico Pro Bono Web site at www.nmbar.org. The site is designed to help visitors find lawyers and non-lawyers who are willing to provide legal services to those in need. The site also provides information about community outreach programs, offers resources for non-lawyers, and has an online legal referral form. The site is available in both English and Spanish and is a valuable tool for connecting people in need of legal services with those who can assist them. Additionally, the site includes a directory of pro bono programs and volunteer opportunities throughout the state. This initiative is supported by the State Bar of New Mexico, the American Bar Association, and other philanthropic organizations. It is a testament to the dedication of the legal community in ensuring that all residents have access to the legal resources they need.
Disabilities are pleased to announce the establishment of the Pro Bono Interpreter Program. This program is available to attorneys providing pro bono representation to clients who are deaf or hard of hearing. Attorneys can apply for reimbursement of the costs of an interpreter up to $250 per case. Interpreter services must be provided by the Community Outreach Program for the Deaf (COPD). The funds for this program are limited to $500 and will be disbursed on a first-come/first-serve basis. Attorneys interested in applying for interpreter reimbursement can do so by completing the application available on the State Bar Web site, www.nmbar.org. Direct questions to Richard Spinello, rspinello@nmbar.org.

International and Immigration Law Section

Pro Bono Opportunity

Immigration Detention Facilities

In response to the American Bar Association’s (ABA) request for volunteers, the International and Immigration Law Section is providing the following notice. The ABA’s Commission on Immigration is recruiting attorneys interested in participating in the commission’s Detention Standards Implementation Initiative. The commission has previously worked with the Department of Justice and the former Immigration and Naturalization Service to draft detainee standards for individuals held in federal immigration custody. The commission is now recruiting and coordinating delegations of volunteer attorneys to tour detention facilities and interview detainees. Delegations will receive training and support from the commission and will file reports regarding the implementation of standards. This is an excellent opportunity to see immigration detention facilities, contribute to the implementation of humane confinement standards and make a difference facilitating immigrant and refugee legal access. It is estimated that each volunteer will donate approximately 15 pro bono hours. Interested attorneys should contact Christine Morganti at the State Bar office, (505) 797-6028.

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; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Senior Lawyers Division

Nominating Committee Report

The report of the Senior Lawyers Division nominating committee follows. Additional nominations may be made in the form of a petition signed by at least 10 members of the division. All members of the State Bar of New Mexico in good standing who are 55 years of age or older and who have practiced law for 25 years or more are members of the division and are eligible for office.

A nomination petition form is included on page 10 of this issue. The petition must identify the position sought and state that the member has agreed to the nomination. The deadline for submission of petitions to the State Bar is Nov. 30.

If no additional nominations are received, the nominees listed below are deemed elected by acclamation. If additional nominations are received via nominating petition, ballots will be mailed to all members of the division by Dec. 15.

Position #1, Term: 2007-2009
Nominee: Sarah M. Bradley
Sarah M. Bradley graduated from the UNM School of Law in 1972. She practiced with the law firm of Bradley & McCulloch from 1980 through 2000, when the firm closed. Bradley works occasionally as a mediator and arbitrator.

Position #2, Term: 2007-2009
Nominee: Thomas G. Fitch
Biography unavailable.

Position #3, Term: 2007-2009
Nominee: Richard F. Rowley, II
Biography unavailable.

OTHER BARS

American Bar Association 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.
Grammy Foundation and the ABA Forum on the Entertainment and Sports Industries Legal Writing Contest 2007

The Grammy Foundation announces the ninth annual Entertainment Law Initiative (ELI). The program is designed to promote discussion and debate on the most compelling legal issues facing the music industry today. It also fosters future careers in entertainment law by seeking out the nation’s top law students and giving them invaluable networking and educational opportunities.

ELI includes a national writing contest, a legal seminar series and a high-profile scholarship luncheon. The writing contest involves a 3,000 word essay on a compelling legal issue facing the music industry. The contest is open to law students. The paper submission deadline is Jan. 5, 2007. For complete contest rules, e-mail eli@grammyfoundation.com. For more information, contact Marisela Huerta at (310) 392-3777.

The first place winner receives $5,000. Four second place winners receive $1,500. All winners receive one Grammy Awards show ticket, a round-trip ticket to the Grammy Awards, hotel accommodations and a ticket to the MusiCares Person of the Year dinner.

UNM School of Law Library Fall Hours

Monday – Thursday  8 a.m. to 11 p.m.
Friday  8 a.m. to 6 p.m.
Saturday  9 a.m. to 6 p.m.
Sunday  12 noon to 11 p.m.
Thanksgiving Break
   Nov. 22  9 a.m. to 6 p.m.
   Nov. 23 and 24  Closed
Phone: (505) 277-6236

OWLS Association Panel Discussion

The UNM School of Law OWLS (Older and/or Wiser Law Students) Association and the State Bar of New Mexico are co-sponsoring a panel discussion of second career lawyers with a reception immediately following at the State Bar Center, 5121 Masthead Road NE in Albuquerque, on Nov. 13, from 5-7:30 p.m. (panel discussion 5-6 p.m.; reception 6-7:30 p.m.). All members and law students are invited to attend.

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. 14 and 21; Dec. 5, 12 and 19.
New Employer Workshops: Nov. 28; and Dec. 26.

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

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. Regionals are Feb. 16–17, state finals are March 16–17, and nationals are May 10–13. Contact Michelle Giger, (505) 764-9417, ext. 11.

Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by 5 p.m., Monday the week prior to publication.
NOMINATION PETITION for SENIOR LAWYERS DIVISION
STATE BAR OF NEW MEXICO - 2006 ELECTION

We, the undersigned members of the Senior Lawyers Division in good standing, nominate ___________________________ of ___________________________, New Mexico, for Position # ______, Senior Lawyers Division Board of Directors.

Date Submitted: ___________________________________________ (Note: Ten (10) signatures are required)

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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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# 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 November 13, 2006**

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Submission = date of oral argument or briefs-only submission
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# Published Opinions

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<td>24991</td>
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# Unpublished Opinions

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IN THE MATTER OF THE AMENDMENT OF RULES 1-005 AND 1-123 NMRA OF THE RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Civil Procedure for the District Courts Committee to adopt amendments to Rules 1-005 and 1-123 NMRA, and the Court having considered said request and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 1-005 and 1-123 NMRA of the Rules of Civil Procedure for District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 1-005 and 1-123 NMRA of the Rules of Civil Procedure for District Courts shall be effective for cases filed on or after December 18, 2006;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of Rules 1-005 and 1-123 NMRA by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 24th day of October, 2006.

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Edward L. Chávez

1-005. Service and filing of pleadings and other papers.

A. Service; when required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party, unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of settlement, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 1-004 NMRA.

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, or by mailing a copy to the attorney or party at the attorney’s or party’s last known address, or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.

C. Definitions. As used in this rule:

(1) “delivery of a copy” means:
   (a) handing it to the attorney or to the party;
   (b) sending a copy by facsimile or electronic transmission when permitted by Rule 1-005.1 NMRA or Rule 1-005.2 NMRA;
   (c) leaving it at the attorney’s or party’s office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place thereof; or
   (d) if the attorney’s or party’s office is closed or the person to be served has no office, leaving it at the person’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; and

(2) “mailing a copy” means sending a copy by first class mail with proper postage.

D. Service; numerous defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

E. Filing; certificate of service. All papers after the complaint required to be served upon a party, together with a certificate of service indicating the date and method of service, shall be filed with the court within a reasonable time after service, except that the following papers shall not be filed unless on order of the court or for use in the proceeding:

(1) summonses without completed returns;
(2) subpoenas;
(3) returns of subpoenas;
(4) interrogatories;
(5) answers or objections to interrogatories;
(6) requests for production of documents;
(7) responses to requests for production of documents;
(8) requests for admissions;
(9) responses to requests for admissions;
(10) depositions;
(11) briefs or memoranda of authorities on unopposed motions;
(12) offers of settlement when made; and
(13) mandatory and supplemental disclosures served pursuant to Rule 1-123 NMRA.

Except for the papers described in Subparagraphs (1), (10) and (11) of this paragraph, counsel shall file a certificate of service with the court within a reasonable time after service, indicating the date and method of service of any paper not filed with the court.

F. Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. “Filing” shall include filing a facsimile copy or filing an electronic copy as may be permitted.
pursuant to Rule 1-005.1 NMRA or Rule 1-005.2 NMRA. A paper filed by electronic means in compliance with Rule 1-005.1 NMRA constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

1-123. Mandatory disclosure in domestic relations and paternity actions; preliminary disclosure requirements.

A. Duty to disclose. Parties to domestic relations actions shall disclose to other parties relevant information concerning characterization, valuation, division or distribution of assets or liabilities, whether separate or community property, in any proceeding involving the distribution of property or the establishment or modification of child or spousal support as provided in this rule.

B. Preliminary disclosure. Unless otherwise stipulated by the parties and ordered by the court or otherwise ordered by the court:

1. in every domestic relations action involving property and debt division or characterization, within forty-five (45) days after service of the petition, the parties shall serve a disclosure as provided in Domestic Relations Form 4A-122 NMRA. The disclosure shall contain:
   a) an interim monthly income and expense statement;
   b) a community property and liabilities schedule; and
   c) a separate property and liabilities schedule.
   The statements and schedules shall substantially comply with Domestic Relations Forms 4A-122, 4A-131 and 4A-132 NMRA approved by the Supreme Court. The schedules shall be accompanied by a list of the documents utilized to complete the schedules.

   2. in actions concerning spousal support or child support, within forty-five (45) days of service of process on the opposing party, the petitioner or movant shall serve upon the opposing party, and the opposing party shall serve upon the petitioner or movant, an affidavit of disclosure containing the following information:
   a) federal and state tax returns, including all schedules, for the year preceding the request;
   b) W-2 statements for the year preceding the request;
   c) Internal Revenue Service Form 1099s for the year preceding the request;
   d) work-related daycare statements for the year preceding the request, if applicable;
   e) dependent medical insurance premiums for the year preceding the request, if applicable;
   f) wage and payroll statements for four months preceding the request; and
   g) in actions concerning modification of spousal support, a statement of income and expenses pursuant to Domestic Relations Form 4A-122 NMRA.

C. Supplemental disclosure. Sworn disclosure schedules shall be served in accordance with Rule 1-026 NMRA upon all parties, with copies to the trial court, at least five (5) days before trial.

D. Child support worksheets. In actions involving child support, the parties shall each complete a child support worksheet as provided by Section 40-4-11.1 NMSA 1978. The worksheets shall be served upon all parties, with copies to the trial judge, at least five (5) days before trial.

E. Duty of the State as a party. Under this rule, the State of New Mexico is required to produce only documents intended to be introduced at an evidentiary hearing, at least five (5) days prior to the hearing, unless otherwise prohibited by law.

F. Failure to comply. Failure to comply with this rule may result in the assessment of costs and attorney fees against the delinquent party or such other sanctions as the court deems appropriate.

Committee Commentary

In domestic relations actions, the parties are subject to the mandatory disclosure requirements set forth in this rule. The purpose of mandatory disclosure is to decrease acrimony and mistrust between the parties, lessen legal fees and costs, emphasize fiduciary duties, assist parties to make honest, full and complete disclosure of the existence and value of assets, debts and income, and encourage the parties to restructure their relationships inexpensively, efficiently and respectfully. The parties should be mindful of these objectives in making their disclosures under these rules.

Although these disclosures are mandatory, this rule in no way limits permissible discovery pursuant to Rules 1-026 to 1-037 NMRA. The parties are free to avail themselves of all applicable discovery procedures unless the court orders otherwise.

As is typical with other discovery requests and responses, disclosures under this rule are not to be filed with the court. Rather, they are to be served upon the parties and the trial court as set forth in the rule. Certificates of service of the disclosure should be filed with the clerk pursuant to Rule 1-005 NMRA.

NO. 06-8300-23

IN THE MATTER OF THE AMENDMENT OF RULE 5-104 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Criminal Procedure for the District Courts Committee to amend Rule 5-104, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 5-104 NMRA of the Rules of Criminal Procedure for the District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rule 5-104 NMRA of the Rules of Criminal Procedure for District Courts shall be effective on and after December 18, 2006; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced rule by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 24th day of October, 2006.

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Edward L. Chávez
5-104. Time.
A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, “legal holiday” includes New Year’s day, Martin Luther King, Jr.’s birthday, Presidents day, Memorial day, Independence day, Labor day, Columbus day, Veterans’ day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.
B. Enlargement. When by these rules or by a notice given thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or
(2) upon motion made after the expiration of the specified period permit the act to be done.
The court may not extend the time for filing a motion for new trial, for filing a notice of appeal, for filing a motion for acquittal or for filing a motion for an extension of time for commencement of trial.
C. For motions. A written motion, other than one which may be heard ex parte, and notice of the hearing thereon shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not later than one (1) day before the hearing, unless the court permits them to be served at some other time.
D. Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

7-105. Assignment and designation of judges.
A. Assignment. The metropolitan court is divided into two divisions: a criminal division and a civil division.
Criminal cases filed in the metropolitan court shall be assigned among the criminal division judges of the metropolitan court as equitably as possible on a random basis. Once a judge is assigned to hear a case that judge shall have sole responsibility for the case and no other judge may take any action on the case except:
(1) at arraignment or first appearance;
(2) in cases where the judge has been recused, is excused or the chief judge has assigned another judge; or
(3) with the approval of the assigned judge, the agreed upon judge and all of the parties.
B. Reassignment.
(1) Recusal. Upon recusal, the chief judge of the metropolitan court shall assign another judge pursuant to these rules to preside over the case;
(2) Excusal. Upon the filing of a notice of excusal, the judge or clerk of the court shall give written notice to the parties to the action. Upon the filing of a notice of excusal, the parties or their counsel may agree to another judge of the metropolitan court to preside over the case and this agreement shall be contained in the notice of excusal. If the parties do not file a notice of agreement naming a new judge at the time the excusal is filed, or if the agreed upon judge does not agree to accept the case, the chief judge of the metropolitan court shall randomly assign another metropolitan court judge to preside over the case.
(3) Certification to district court. If all metropolitan court judges in the district have been excused or have recused themselves, no later than ten (10) days after filing of the last notice of excusal or recusal the chief judge of the metropolitan court shall either appoint a pro tem judge in accordance with the provisions of Section 34-8A-4.2 NMSA 1978 or certify by letter to the district court of the county in which the action is pending the fact of such excusal or recusal and the district court shall designate another
judge to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel and to the metropolitan court. The chief judge of the metropolitan court also may appoint a pro tem judge or send certification to the district court if the chief judge determines, after consultation with the metropolitan court judges, that such action is appropriate.

C. Subsequent proceedings. All proceedings shall be conducted in the metropolitan court or at another location designated by the chief judge of the metropolitan court. The clerk of the metropolitan court shall continue to be responsible for the court file and shall perform such further duties as may be required.

D. Unavailability of judge. At any time during the pendency of the proceedings if the assigned judge is unavailable, the chief judge may designate another judge to hear any matter. Upon appearance of the designated judge, the parties may move to continue the case until the original judge is available to hear the matter by stipulating to an extension of the time limitations set forth in Rule 7-506 NMRA, or the parties may exercise their rights to excuse the designated judge pursuant to these rules. If any designated judge is excused, the chief judge may designate another judge to preside over the matter.

7-106. Excusal; recusal; disability.

A. Definition of parties. “Party” as used in this rule shall be the defendant, the state, a municipality, a county or person filing the complaint or citation.

B. Excusal. Whenever a party to any criminal action or proceeding of any kind files a notice of excusal, the judge’s jurisdiction over the cause terminates immediately.

C. Limitation on excusals. No party shall excuse more than one judge. A party may not excuse a judge after the party has requested that judge to perform any discretionary act other than conducting an arraignment or first appearance, setting initial conditions of release or a determination of indigency. No judge may be excused from conducting an arraignment or first appearance or setting initial conditions of release.

D. Procedure for excusing a judge. A party may exercise the statutory right to excuse the judge before whom the case is pending by filing with the clerk of the court a notice of excusal. When a judge is designated to hear any matter because of the unavailability of the assigned judge, subject to the limitations in Paragraph C of this rule, the parties shall exercise their right to the excusal either in writing or orally when the designated judge first calls the case. In all other instances, the notice of excusal must be signed by a party and filed within ten (10) days after the later of:

1. arraignment or the filing of a waiver of arraignment; or

2. service on the parties by the court of notice of assignment or reassignment of the case to a judge.

E. Notice of reassignment; service of excusal. If the case is reassigned to a different judge, the court shall give notice of the reassignment to all parties. Any party electing to excuse a judge shall serve notice of such election on all parties.

F. Recusal. No judge shall sit in any action in which the judge’s impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a certificate of recusal in any such action. Upon receipt of notification of recusal from a judge, the clerk of the metropolitan court shall give written notice to each party. Upon recusal, another judge shall be assigned or designated to conduct any further proceedings in the action in the manner provided by Rule 7-105 NMRA.

G. Failure to recuse. If a party believes that the judge’s impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, the party may file a notice of facts requiring recusal. The notice shall specifically set forth the constitutional grounds alleged. Upon receipt of the notice, the judge may file a certificate of recusal in the action or enter an order finding that there are not reasonable grounds for recusal. If within ten (10) days after the filing of notice of facts requiring recusal, the judge fails to file a certificate of recusal in the action, either prohibiting the metropolitan court judge from proceeding further or finding that there are insufficient grounds to reasonably question the metropolitan court judge’s impartiality under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct.

H. Stay. If a letter is filed with the district court and metropolitan court certifying the issue of recusal to the district court pursuant to Paragraph G of this rule, the metropolitan court judge may enter a stay of the proceedings pending action by the district court. If the metropolitan court judge fails to stay the proceedings, the party filing the letter in the district court may petition the district court for a stay of metropolitan court proceedings.

The district court may grant a stay of the proceedings for not more than fifteen (15) days after the filing of a letter certifying a recusal issue to the district court. Unless a stay is granted, the metropolitan court judge shall proceed with the adjudication of the merits of the proceedings.

I. Inability of a judge to proceed. If a trial or hearing has been commenced and the judge is unable to proceed, any other judge of the court may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. The successor judge may recall any witness. If no other judge is available, either party may certify that fact by letter to the district court of the county in which the action is pending. The district court may make such investigation as the court deems warranted. If the court finds that the metropolitan court judge is in fact disabled or unavailable, the court shall designate another judge to preside over the case.

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Rules of Appellate Procedure Committee to adopt amendments to Rules 12-208, 12-209, 12-306, 12-307, 12-307.1 NMRA and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 12-208, 12-209, 12-306, 12-307, 12-307.1 NMRA of the Rules of Appellate Procedure hereby is APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 12-208, 12-209, 12-306, 12-307, 12-307.1 NMRA of the Rules of Appellate Procedure shall be effective for cases filed on or after December 18, 2006;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the above-referenced amendments by publishing the same in the Bar Bulletin and the NMRA.

DONE at Santa Fe, New Mexico, this 24th day of October, 2006.

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Edward L. Chávez

12-208. Docketing the appeal.

A. Attorney responsible. Unless otherwise ordered by the Court, trial counsel shall be responsible for preparing and filing a docketing statement in the Court of Appeals or a statement of the issues in the Supreme Court.

B. When filed. Within thirty (30) days after filing the notice of appeal in all appeals except those under Rules 12-203, 12-204, 12-603 and 12-604 NMRA, the appellant shall file a docketing statement, if the appeal has been docketed in the Court of Appeals, or a statement of the issues, if the appeal has been docketed in the Supreme Court.

C. Service. The appellant shall serve a copy of the docketing statement or statement of the issues on the district court clerk and on those persons who are required to be served with a notice of appeal pursuant to Rule 12-202 NMRA.

D. Docketing statement; contents.

A docketing statement shall contain:

1. a statement of the nature of the proceeding;
2. the date of the judgment or order sought to be reviewed, and a statement showing that the appeal was timely filed;
3. a concise, accurate statement of the case summarizing all facts material to a consideration of the issues presented;
4. a statement of the issues presented by the appeal, including a statement of how the issue arose and how they were preserved in the trial court, but without unnecessary detail. The statement of the issues should be short and concise and should not be repetitious. General conclusory statements such as “the judgment of the trial court is not supported by the law or the facts” will not be accepted;
5. for each issue, a list of authorities believed to support the contentions of the appellant and any contrary authorities known by the appellant and, where known, the applicable standard of review. Argument on the law shall not be included, but a short, simple statement of the proposition for which the case or text is cited shall accompany the citation;
6. a statement specifying whether the entire proceedings were tape recorded, and if not, identifying the portion of the proceedings, other than the record proper, not tape recorded;
7. a reference to all related or prior appeals. If the reference is to a prior appeal, the appropriate citation should be given; and
8. where applicable, a copy of the order appointing appellate counsel.

E. Statement of the issues; contents. A statement of the issues shall contain each issue to be presented by the appeal, including a statement of how the issue arose, how each issue was preserved in the trial court and a statement of the court’s jurisdiction, but without unnecessary detail. The statement of the issues should be short and concise and should not be repetitious. General conclusory statements such as “the judgment of the trial court is not supported by the law or the facts” will not be accepted.

F. Amendment. The Court of Appeals may, upon good cause shown, allow the amendment of the docketing statement. The Supreme Court may, upon good cause shown, allow the amendment of a statement of the issues.

G. Cross-appeals. A party who files a cross-appeal in accordance with Paragraph B of Rule 12-201 NMRA shall file a docketing statement in the Court of Appeals or a statement of the issues in the Supreme Court in accordance with this rule within thirty (30) days after the notice of appeal is filed by the cross-appellant and shall pay a docket fee as provided in Paragraph H of this rule.

H. Docket fee. Except where free process has been granted on appeal, the docket fee shall accompany the filing of a docketing statement in the Court of Appeals and a statement of the issues in the Supreme Court unless the party filing the docketing statement or statement of the issues has already paid a docket fee.

I. Response not permitted. No response to a docketing statement or statement of the issues is allowed.

J. Failure to serve docketing statement or statement of the issues. On a monthly basis, the district court clerk shall forward to the appellate court a list of all criminal cases in which a notice of appeal has been on file for at least sixty (60) days but in which the district court has not been served with a copy of a docketing statement or a statement of the issues.

12-209. The record proper (the court file).

A. Composition. The papers and pleadings filed in the district court (the court file), or a copy thereof shall constitute the record proper. Depositions shall not be copied. The original, if contained in the court file, shall be filed with the appellate court and shall not be sealed except upon the order of the district court or appellate court. The record proper shall be prepared in the manner provided by Rule 22-301 NMRA of the Rules Governing the Recording of Judicial Proceedings.

B. Transmission. Upon receipt of a copy of the docketing
“Filing” shall include filing a facsimile copy or filing an electronic copy as may be permitted pursuant to Rule 12-307.1 NMRA or Rule 12-307.2 NMRA. A filing made by facsimile or electronic means in compliance with Rule 12-307.1 NMRA or Rule 12-307.2 NMRA constitutes a written paper for the purpose of applying these rules. Filing by mail is not complete until actual receipt. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

B. Service of all papers required. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall be served by such party or person acting for the party on all other parties to the proceeding. Service shall be made at or before the time of filing the paper with the court.

C. Service: how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, or by mailing a copy to the attorney or party at the attorney’s or party’s last known address, or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.

D. Definitions. As used in this rule:

(1) “delivery of a copy” means:
   (a) handing it to the attorney or to the party;
   (b) sending a copy by facsimile or electronic transmission when permitted by Rule 12-307.1 NMRA or Rule 12-307.2 NMRA;
   (c) leaving it at the attorney’s or party’s office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or
   (d) if the attorney’s or party’s office is closed or the person to be served has no office, leaving it at the person’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; and

(2) “mailing a copy” means sending a copy by first-class mail with proper postage.

E. Proof of service. Except as provided in Rules 12-307.1 and 12-307.2 NMRA, proof of service shall be in the form of written acknowledgment of service by the person served, certificate of the clerk of the court or of the attorney making service, or affidavit of any other person. It shall state the manner and date of service, the names of the persons served and the addresses used for service. Such proof of service shall be filed with the papers or immediately after service is effected.

12-307.1. Filing and service by facsimile.

A. Facsimile copies permitted to be filed. Subject to the provisions of this rule, a party may file a facsimile copy of any paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a paper has the same effect as any other filing for all procedural and statutory purposes. The filing of papers with the court by facsimile copy shall be made by faxing them to the clerk of the court at a number designated by the clerk. Each appellate court shall designate one or more telephone numbers to receive fax filings.

B. Facsimile service by court of notices, orders or writs. Facsimile service may be used by the court for issuance of any notice, order or writ. The clerk shall note the date and time of
successful transmission on the file copy of the notice, order or writ.

C. Paper size and quality. No facsimile copy shall be filed with the court unless it is on plain paper and substantially satisfies all of the requirements of Rule 12-305 of these rules.

D. Filing by facsimile. A paper may be filed with the court by facsimile transmission if:
   (1) a fee is not required to file the paper;
   (2) only one copy of the paper is required to be filed; and
   (3) the paper to be filed is preceded by a cover sheet with the names of the sender and the intended recipient, any applicable instructions, the voice and facsimile telephone numbers of the sender, an identification of the case, the docket number and the number of pages transmitted.

E. Facsimile copy filed by an intermediary agent. Facsimile copies of papers filed in person by an intermediary agent are not subject to the restrictions of Paragraph D of this rule.

F. Time of filing. If facsimile transmission of a paper faxed is begun before the close of the business day of the court in which it is being filed, it will be considered filed on that date. If facsimile transmission is begun after the close of business, the paper will be considered filed on the next court business day. For any questions of timeliness, the time and date affixed on the cover page by the court’s facsimile machine will be determinative.

G. Service by facsimile. Any document required to be served by Paragraph B of Rule 12-307 NMRA may be served on a party or attorney by facsimile transmission if the party or attorney has:
   (1) listed a facsimile telephone number on a paper filed with the court in the action; or
   (2) agreed to be served with a copy of the paper by facsimile transmission.

Service of a paper by facsimile is accomplished when the transmission is successfully completed.

H. Proof of service by facsimile. Proof of service by facsimile shall be in the form of written acknowledgment of service by the person served, certificate of the clerk of the court or of the attorney making service or affidavit of any other person. It shall state:
   (1) that the paper was served by facsimile transmission; and
   (2) the date of service and telephone numbers of the sending and receiving facsimile machines.

I. Demand for original. A party shall have the right to inspect and copy any paper that has been filed or served by facsimile transmission if the paper has a statement signed under oath or affirmation or penalty of perjury.

J. Conformed copies. Upon request of a party, the clerk shall stamp additional copies provided by the party of any paper filed by facsimile transmission.

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NO. 06-8300-22

IN THE MATTER OF THE AMENDMENT OF RULE 24-102 NMRA OF THE RULES GOVERNING THE NEW MEXICO BAR

ORDER

WHEREAS, this matter came on for consideration by the Court upon the Court’s own recommendation to amend Rule 24-102 of the Rules Governing the New Mexico Bar, and the Court being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 24-102 of the Rules Governing the New Mexico Bar hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments to Rule 24-102 of the Rules Governing the New Mexico Bar shall be effective immediately;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced rule by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 24th day of October, 2006.

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Edward L. Chávez

24-102. Annual license fee.

Every member of the state bar shall, prior to the first day of January of each year, pay to the executive director of the state bar an annual license fee, which fee shall be determined and fixed by the Board of Bar Commissioners prior to January of each calendar year. Members whose dues are received after the first day of February will be assessed a late payment penalty of one hundred dollars ($100.00). Active members who fail to disclose professional liability insurance coverage information after the first day of March will be assessed a late disclosure penalty of one hundred dollars ($100.00). If a member’s dues and late penalty are not received before the last day of March, the Board of Bar Commissioners shall, through its executive director, certify to the Supreme Court the name of each member failing to pay their annual license fee and late penalties. New admittees shall pay the annual license fee fixed by the bar on or before the first day of the month following the date of their admission prorated for the number of full months remaining in the calendar year following the date of their admission to the bar. New admittees whose dues are received after the first day of the second month following their admission will be assessed a late payment penalty of one hundred dollars ($100.00). If a new admittee’s dues and late penalty are not received after the first day of the third month following the new admittee’s admission, the Board of Bar Commissioners shall, through its executive director, certify to the Supreme Court the name of each member failing to pay their annual license fee and late penalties.

Whenever the Board of Bar Commissioners of the State Bar shall cause to be certified to the Supreme Court that any member of the state bar has failed or refused to pay the license fee or late penalty fee immediately upon receipt of said certification from the executive director of the state bar, the clerk of the Supreme Court shall issue a citation requiring the delinquent member to show cause before the Court, within fifteen (15) days after service of such citation, why such member should not be suspended from the right to practice in the courts of this state. Service of such citation may be personal or by first class mail. The payment of such delinquent license fee on or before the return day of such
citation, and payment of accrued costs, shall be deemed sufficient showing of cause, and shall serve to dismiss the citation. Suspension orders shall be served by certified mail.

Any member suspended under the provisions of this rule shall be required to petition the Board of Bar Examiners for reinstatement, and as a condition precedent to any granting of reinstatement pursuant to Paragraph B of Rule 15-302 NMRA shall be required to pay a reinstatement fee of:

A. twice that member’s then license fee, plus
B. all fees in arrears, plus
C. all accrued late penalty payments.

Any attorney in good standing may file a petition with the Supreme Court for voluntary withdrawal as a member of the bar of this state. Upon the filing of such petition, the Court may enter an order terminating the petitioner’s membership in the bar of this state, and the petitioner shall not thereafter be entitled to practice law in the courts of this state. No order of suspension for failure thereafter to pay the annual bar license fee will be entered against such member, and the member’s withdrawal will not prejudice the member’s record or standing during the period of membership in the bar of this state.

The Board of Bar Commissioners may waive all or part of any license fee in cases of extreme individual hardship. In cases where a petition for waiver of all or part of any license fee has been rejected by the Board of Bar Commissioners, an attorney may petition the Supreme Court for modification or reversal of the action of the board.

All moneys collected by the executive director in accordance with the provisions of this rule shall be deposited to an account designated as State Bar of New Mexico general fund and shall be disbursed by order of the Board of Bar Commissioners in carrying out the functions, duties and powers vested in said board. The Board of Bar Commissioners shall on or before March 1 of each year submit to the Supreme Court of New Mexico an accounting and audit of all funds received and disbursed during the prior calendar year. Such audit shall be performed by an auditor to be selected by the board. No member of the Board of Bar Commissioners or any committee member appointed by the board shall receive any compensation, but shall receive mileage and per diem at the same rate as provided for public officers and employees of the state and may be reimbursed with the approval of the Board of Bar Commissioners for expenses incurred in conjunction with travel on Board of Bar Commission business.
The Rules of Appellate Procedure Committee is considering whether to recommend proposed amendments to the Rules of Appellate Procedure for the Supreme Court’s consideration. If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, please send your written comments to:
Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
Your comments must be received by the Clerk on or before Dec. 4, 2006, to be considered by the Court.

12-201. Appeal as of right; when taken.
A. Filing notice. A notice of appeal shall be filed:
   (1) if the appeal is filed from a decision or order suppressing or excluding evidence or requiring the return of seized property pursuant to Paragraph (2) of Subsection B of Section 39-3-3 NMSA 1978, within ten (10) days after the decision or order appealed from is filed in the district court clerk’s office; and
   (2) for all other appeals, within thirty (30) days after the judgment or order appealed from is filed in the district court clerk’s office.
   The three (3) day mailing period set forth in Paragraph B of Rule 12-308 NMRA does not apply to the time limits set forth in Subparagraphs (1) and (2) of this paragraph.
   A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the district court clerk’s office shall be treated as filed after such filing and on the day thereof. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period last expires.
B. Cross appeals. If more than one party files a notice of appeal, the party to file the first notice of appeal shall be deemed the appellant, and any opposing party filing a notice of appeal shall be a cross-appellant, unless the court orders otherwise.
C. Review without cross-appeal. An appellee may, without taking a cross-appeal or filing a docketing statement or statement of the issues, raise issues on appeal for the purpose of enabling the appellate court to affirm, or raise issues for determination only if the appellate court should reverse, in whole or in part, the judgment or order appealed from.
D. Post trial motions extending the time for appeal. If a party timely files a motion pursuant to Paragraph B of Rule 1-050 NMRA, Paragraph D of Rule 1-052 NMRA, or Rule 1-059 NMRA[- or a motion pursuant to Rule 5-614 NMRA based on grounds other than newly discovered evidence], the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from [either] the entry of an order expressly disposing of the motion or the date of any automatic denial of the motion under that statute or any of those rules, whichever occurs first. If a party timely files a motion pursuant to a rule or statute that provides that the motion is automatically denied if not granted within a specified period of time, the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from either the entry of an order expressly disposing of the motion or the date of any automatic denial of the motion, whichever occurs first. An order granting a motion for new trial in civil cases is not appealable and renders any prior judgment non-appealable. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set forth in this paragraph.
E. Other extensions of time for appeal.
(1) Before the time for filing a notice of appeal has expired, upon a showing of good cause, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this rule.
(2) After the time has expired for filing a notice of appeal, upon a showing of excusable neglect or circumstances beyond the control of the appellant, the district court may extend the time for filing a notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of time otherwise provided by this rule, but it shall be made upon motion and notice to all parties.
(3) The district court retains jurisdiction to rule on a motion for extension of time to file the notice of appeal regardless of whether the notice of appeal has been filed.
(4) No motion for extension of time to file the notice of appeal may be granted after sixty (60) days from the time the appealable order is entered. If the motion is not granted within the sixty (60) days, the motion is automatically denied. If a post-trial motion is timely filed pursuant to Section 39-1-1 NMSA 1978, Paragraph B of Rule 1-050 NMRA, Paragraph D of Rule 1-052 NMRA or Rule 1-059 NMRA or a motion pursuant to Rule 5-614 NMRA based on grounds other than newly discovered evidence, this sixty (60) day period begins to run from either the entry of an order expressly disposing of the motion or the date of any automatic denial of the motion under that statute or any of those rules, whichever occurs first.
(5) In computing time, pursuant to this paragraph, the three (3) day mailing period set forth in Rule 12-308 NMRA does not apply.
(6) Any party obtaining an order extending the time to file an appeal shall promptly serve notice of the order in accordance with Rule 12-307 NMRA.
2006 Grant Committee

Annual IOLTA grant awards are based on the recommendations of a seven-member committee composed of lawyers and nonlawyers who are appointed to serve three-year terms by the State Supreme Court, the Center for Civic Values and the State Bar of New Mexico. If you are interested in serving on the Committee, please contact one of theappointing entities.

Supreme Court Appointees
David M. Berlin, Esq.
The Hon. Petra Jimenez-Maes
The Hon. John Pope

CCV Appointees
John P. Hays, Esq.
Kathy Silva

State Bar Appointees
Kim A. Griffith, Esq.
Edward T. O’Leary

Grant Budget Up 40% Since 2005

It’s great news for New Mexico nonprofits seeking IOLTA grant funding. The 2007 budget will increase by more than 15%, bringing the two-year increase to more than 40%. Applications were due November 1, and CCV received 15 of them, seeking a total of nearly half a million dollars, and ranging in request size from a low of $6,750 to a high of $104,639. With $225,000 available, difficult decisions lie ahead for the Grant Committee.

IOLTA funds are generated from the pooled trust account interest of lawyers and law firms enrolled in New Mexico’s opt-out IOLTA program. More than $3.49 million has been distributed to nonprofits that provide a variety of services to about 400,000 people each year. Grants are awarded to New Mexico organizations that provide civil legal services for the poor, law-related education for the public or improvements in the administration of justice.

We’ve Moved

The Center for Civic Values has relocated to First Plaza Galeria. Our offices are in the North Tower at 200 Third Street NW, Suite 607, in Albuquerque. Our telephone numbers are the same: 505.764.9417 or 800.451.1941, outside Albuquerque. Thank you First Plaza for making us an offer we couldn’t refuse.

Trust Account Certification and IOLTA Participation

Shortly you will receive your 2007 New Mexico State Bar Dues Form. Section 8 of the Form is your Trust Account Certification and IOLTA Participation statement. ALL New Mexico attorneys are required to: (1) complete Section 8 in its entirety, providing all requested information; and, (2) return it with the Dues Form to the State Bar.

NOTE: To opt out of IOLTA, you must also submit a declination letter to the Clerk of the Supreme Court. If you fail to submit both Section 8 and the declination letter, you will be in non-compliance with Rule 17-204(b) of the Rules Governing Discipline, and you will be reported to both the Court and the Disciplinary Board.

Reminder!

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Grantee Focus-Senior Citizens’ Law Office Tackles System for Elderly
Notes from SCLO’s Health Care Rights Project . . .

- J.F. contacted our office upon receiving notices from Medicare that she was required to remit the balance of her Medicare Part B premium to Medicare. J.F. believed that an error must have occurred, because the amount she was billed for her Medicare premium in 2006 was nearly twice what she paid in 2005. Upon review of the matter, SCLO learned that 42 USC §1395r(f) of the Medicare Act imposes a beneficiary protection that Social Security had apparently failed to implement. Specifically, that provision requires that a recipient’s Medicare premium not be increased so much that the increase reduces the amount of Social Security benefits below the amount that was payable in the year before the Medicare premium was increased. In other words, the law limits a person’s Medicare Part B increase to their Social Security’s cost of living adjustment. Of interest — although legislation has been introduced — there is currently no such beneficiary protection to account for rises in Part D premiums. Upon presenting the law and this argument to Medicare and Social Security, our office was successful in obtaining for our client a refund of $740 in past Medicare premium increases.

- D.P. received a notice that her Disabled and Elderly Waiver Medicaid benefits were being terminated due to excess resources. D.P. is in assisted living and relies heavily on the services provided through the D and E Waiver program in order to live independently. Without the Waiver services, D.P. would be forced into a more restrictive living environment. Angelica Anaya Allen (SCLO’s new executive director) visited her at her apartment and determined that a fair hearing request should be filed immediately to preserve D.P.’s services, while investigating the propriety of the Human Services Department’s (HSD) action terminating benefits. The request has been filed and SCLO is in the process of investigating the claims, while counseling D.P. and her son about the eligibility criteria for the Medicaid Waiver, so future problems do not arise.

- A monolingual Spanish-speaking couple received a large bill from Lovelace Senior Plan. They had been unaware that they were eligible for QMB to pay their Medicare copayments, so SCLO referred them to the local ISD office to apply. For the Lovelace bill, SCLO is assisting them to work out a payment plan so they can make small, affordable remittances.

- On behalf of B.D., SCLO filed a request for a fair hearing before the HSD for denial of her application for alleged failure to provide verification of her income, resources and Medicare eligibility. B.D. is quite elderly and frail. Her physical condition and oxygen dependence (combined with her apartment complex’s broken elevator) had effectively rendered her homebound for several months. In an odd twist, HSD notified B.D. of the information it allegedly required to process her claim only after it had already denied her application. As grounds for appeal, SCLO argued: (1) B.D. was denied proper notice of HSD’s alleged requirement for verification; (2) the verification untimely requested was, in fact, not necessary to process B.D.’s application; and, (3) HSD’s insistence that B.D. supply the untimely requested information ignored her right to reasonable accommodation of her disability as a homebound, frail senior.

Congratulations to SCLO staff for their health care rights work on behalf of seniors!
Making a Difference

CCV extends a very special thank you to Mary Rosner of Rosner & Chavez in Las Cruces. According to the bank rep who called us, Ms. Rosner took our Honor Roll of Financial Institutions (see below) to the firm’s bank to ask why they didn’t appear on it. As a result of her inquiry, we are pleased to announce that Citizens Bank of Las Cruces has joined the Honor Roll.

One person CAN make a difference! If your financial institution doesn’t appear on the Honor Roll, won’t you please ask why?

Honor Roll of Financial Institutions

Sincere thanks to the financial institutions below. Because they waive minimum balance requirements, waive processing charges to CCV or offer competitive interest rates, several thousand additional dollars are available annually to help the nearly 1/2 million New Mexicans who benefit from services provided by IOLTA-funded organizations.

National News and Notes
Revenue Enhancement Rule Changes in Connecticut, Massachusetts and Mississippi

The past several months have seen the high courts in three states adopt amendments to IOLTA rules and guidelines with the goal of increasing IOLTA revenues. In June, the judges of Connecticut’s Superior Court endorsed a proposal for an amendment adding a comparability requirement to the state’s IOLTA rule. When it takes effect on September 1, the amended rule will require banks holding IOLTA deposits to pay no less on those deposits than the highest interest rate or dividend paid to a bank’s own non-IOLTA customers when the IOLTA account meets the same balance or other eligibility qualifications. The Connecticut Bar Foundation, which operates the state’s IOLTA program, expects that this change will double its IOLTA revenue.

On May 18, the Supreme Court of Mississippi amended the state’s IOLTA rule to convert the IOLTA program from opt-out to mandatory status. The new rule will require Mississippi attorneys who handle client funds to participate in IOLTA starting January 1, 2007. The move to mandatory is expected to boost IOLTA revenues. The new rule also contains comparability and other provisions that have the potential to further increase revenues as they are implemented. Mississippi will become the 32nd mandatory IOLTA program in the United States, and it is the fifth state to adopt mandatory IOLTA since 2004, following Oklahoma, South Carolina, Utah and Indiana.

In late July the Supreme Judicial Court of Massachusetts ordered the revision of guidelines for the Massachusetts IOLTA Committee. The revisions are intended to “assure fair and reasonable interest rates” on IOLTA accounts and utilize comparability provisions similar to those adopted in Connecticut, Mississippi and elsewhere. The IOLTA committee has been authorized by the court to begin implementing the new requirements on or before January 1, 2007.

From Dialogue-A Publication of the ABA’s Division for Legal Services

Thanks for Your Interest!
Thank you and congratulations to the following attorneys and firms for opening new/additional IOLTA accounts or converting existing trust accounts to IOLTA. You are making a difference in the lives of nearly half a million New Mexicans who receive services from IOLTA-funded programs. (Law firm names are listed according to the information provided by their financial institutions.)

Anne H. Assink Attorney at Law
Barbara Ann Michael
Beate Boudro Attorney at Law
Booth & Simpson
Butler & Hosch
Carlos A. Ibarra-Aguirre Atty at Law
Christopher L. Graeser, Attorney at Law
Comeau Maldegen Templeman & Indall LLP
Consultants United
Darrell M. Allen
Davis & Kelly LLC
Everett Law
Frederick H. Sherman Trustee
Fredlund & Bryan
Harry N. Relkin
Jacquelyn Robins Attorney at Law
Jarner Law Offices
Jay Goodman Attorney at Law PC
Joanna D. Aguilar
Joel A. Davis
Karlos Ulibarri Attorney at Law
Khalsa Law Office
Lance Himmelman Esq.
Law Office of Meshell A. Bell
Law Office of Rod D. Baker
Law Offices of Andrew P. Ortiz PC
Law Offices of Rebecca C. Branch
Lawrence P. Zamzok Atty at Law
Leslie Christine Petersen PC Trust
Littlejohn Law Office
Luebben Johnson & Barnhouse LLP
Marcus J. Cameron IOLTA
Martin M. Martinez Attorney at Law
Melissa Reeves
Michele Huff Client IOLTA account
Michelle Bowdon
Mickale C. Carter
Miller Stratvert PA
Pamela B. Dobbs
Patricia L. Simpson PC
Paul W. Grace, Esq.

Philip Saltz
Pickett & Murphy
Ramos Law Office
Randall S. Roberts PC
Richard C. Cauble Law Office
Robert L. McIntyre
Robert L. Scavron Attorney at Law
Robert M. Hall PC
Rothstein Donatelli Hughes Dahlstrom
Schoenbueg & Bienvenu LLP
Samantha Dunning Esq.
Sandra Engel, Attorney at Law
Santistevan & Associates
Scott C. Cameron
Sidney Childress Trust Account
Stevan J. Schoen, P.A.
Susan C. Little & Associates
Suzanna R. Valdez
Tova Indritz Attorney at Law
Yarbro & Associates PA
The undisputed facts of the case are as follows. Defendant, a police officer, was the stepfather of Rachel Rogers. At the age of sixteen, Rachel used her stepfather’s firearm to commit suicide. Defendant had taken off the holster belt containing his firearm and placed it on a table on the enclosed backyard save Defendant and a friend. During this time, Rachel briefly came outside and asked Defendant to go to the store for her. Defendant stated that during this contact she was calm, coherent, and exhibited no signs of agitation, depression, or distress. Upon noticing that his firearm was missing from its holster on the table about thirty to forty-five minutes later, Defendant went looking for it. He found Rachel dead in the shower from an apparent gunshot wound. Her diary later revealed that Rachel’s condition was caused by pills she had taken, trying to commit suicide.

{3} About a year and a half prior to her death, and prior to Defendant’s marrying her mother and taking up residence with the family, Rachel had taken some pills in a possible suicide attempt. She reported this immediately to her mother, who took her to the hospital for treatment. Rachel was released and her mother was assured that the behavior would not be repeated. Rachel received counseling after this incident and Rachel’s counselor never reported any additional suicidal tendencies.

{4} Defendant knew of the pill-taking incident prior to his marriage, but believed the problem had been resolved and that Rachel did not appear depressed or suicidal. Rachel had never expressed any suicidal thoughts to Defendant. Defendant asserted that Rachel’s behavior and interactions with Defendant gave him no basis to anticipate that she was considering suicide. He conceded that Rachel was facing juvenile court proceedings and had recently lost her job.

**DISCUSSION**

**Standard of Review**

{5} Summary judgment is properly granted where there is no genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). Upon a prima facie showing that summary judgment is proper, the burden shifts to the party opposing summary judgment to show specific evidentiary facts in the form of admissible evidence that require a trial on the merits. *Id.* at 334-35, 825 P.2d at 1244-45; *Ciup v. Chevron U.S.A., Inc.*, 1996-NMSC-062, ¶ 7, 122 N.M. 537, 928 P.2d 263. We accept Plaintiff’s facts as set forth in the complaint and the affidavit as true. See *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 4, 134 N.M. 43, 73 P.3d 181. However, [m]ere argument or contention of existence of material issue of fact . . . does not make it so. The party opposing a motion for summary judgment cannot defeat the motion . . . by the bare contention that an issue of fact exists, but must show that evidence is available which would justify a trial of the issue. *Spears v. Canon de Carme Land Grant*, 80
N.M. 766, 769, 461 P.2d 415, 418 (1969) (citation omitted). We review de novo the issue of whether the movant was entitled to judgment as a matter of law. *Akutagawa v. Lafin*, Pick & Heer, P.A., 2005-NMCA-132, ¶ 9, 138 N.M. 774, 126 P.3d 1138. ¶ 6 Plaintiff was required to establish that Defendant owed a duty to his stepdaughter to prevent her from accessing his firearm, and that his failure to do so was a proximate cause of her death. *Herrera*, 2003-NMSC-018, ¶ 6 (stating a “negligence claim requires the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff’s damages”). We address duty and proximate cause in turn. In the context of negligence, some issues are questions of fact while others remain questions of law. “Whether a duty exists is a question of law for the courts to decide.” *Solorzano* v. *Bristow*, 2004-NMCA-136, ¶ 21, 136 N.M. 658, 103 P.3d 582; *Herrera*, 2003-NMSC-018, ¶¶ 6, 10 (holding that foreseeability giving rise to duty is an issue that is determined as a matter of law). Proximate cause may also be an issue of law “if no facts are presented that could allow a reasonable jury to find proximate cause.” *Herrera*, 2003-NMSC-018, ¶ 35 (internal quotation marks and citation omitted).

**Defendant’s Duty**

¶ 7 Plaintiff argues that Defendant owed Rachel both common law and statutory duties to safely store his firearm. Conduct that falls below a standard of care does not alone support liability. To impose a duty, a relationship must exist that legally obligates Defendant to protect Plaintiff’s interest. See *Calkins v. Cox Estates*, 110 N.M. 59, 62, 792 P.2d 36, 39 (1990). Absent such a relationship, there exists no general duty to protect others from harm. *Grover v. Stechel*, 2002-NMCA-049, ¶ 11, 132 N.M. 140, 45 P.3d 80.

¶ 8 Whether one owes a duty to another also involves questions of foreseeability. Foreseeability is what one might objectively and reasonably expect, “not merely what might conceivably occur.” *Van de Valde v. Volvo of Am. Corp.*, 106 N.M. 457, 459, 744 P.2d 930, 932 (Ct. App. 1987) (internal quotation marks and citation omitted). “[N]o one is bound to guard against or take measures to avert that which he [or she] would not reasonably anticipate as likely to happen.” *Herrera*, 2003-NMSC-018, ¶ 20 (internal quotation marks and citation omitted). The risk must be actual and perceptible, not speculative. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) (“Proof of negligence in the air, so to speak, will not do.”) (internal quotation marks and citations omitted).

“If the harm was not willful, [the plaintiff] must show that the act as to [the plaintiff] had possibilities of danger so many and apparent as to entitle [the plaintiff] to be protected against the doing of it though the harm was unintended.” Id. at 101; *Herrera*, 2003-NMSC-018, ¶ 19.

¶ 9 Foreseeability of injury is not the sole consideration in establishing a duty, since a person’s duty to another is also tempered by policy considerations. In determining the existence of a duty, we look at the relationship of the parties, the nature of the plaintiff’s interest and the defendant’s conduct, and the public policy in imposing a duty on the defendant. *Calkins*, 110 N.M. at 63, 792 P.2d at 40. We look at both foreseeability and whether the obligation of the defendant is one to which the law will give recognition and effect. *Blake v. Pub. Serv. Co. of N.M.*, 2004-NMCA-002, ¶ 6, 134 N.M. 789, 82 P.3d 960; *Herrera*, 2003-NMSC-018, ¶ 9. The assessment of foreseeability takes into account “community moral norms and policy views, tempered and enriched by experience, and subject to the requirements of maintaining a reliable, predictable, and consistent body of law.” *Sanchez v. San Juan Concrete Co.*, 1997-NMCA-068, ¶ 12, 123 N.M. 537, 943 P.2d 571.

¶ 10 Foreseeability is also intertwined with issues of causation. *Herrera*, 2003-NMSC-018, ¶ 43 (Bosson, J., specially concurring) (commenting that the modern view sees foreseeability through the lens of proximate cause). “An independent intervening cause interrupts and turns aside a course of events and produces that which was not foreseeable as a result of an earlier act or omission.” UJI 13-306 NMRA. Courts generally decline to impute a duty to the defendant when he “neither caused the decedent’s uncontrollable suicidal impulse nor had custody of the decedent and knowledge of her suicidal ideation.” *Nelson v. Mass. Port Auth.*, 771 N.E.2d 209, 212 (Mass. App. Ct. 2002). Generally, suicide is an independent intervening cause of death that is not foreseeable and absolves a defendant of civil liability “unless, as a matter of law, there is no evidence upon which to submit the issue to the jury.” *City of Belen v. Harrell*, 93 N.M. 601, 604, 603 P.2d 711, 714 (1979).

¶ 11 There are two main exceptions to this general rule. The first exception allows liability where the actor’s tortious conduct induces a mental illness in the decedent from which the death results. See *Restatement* (Second) of Torts § 455 (1995). The second is a duty that results from a special relationship between the decedent and the defendant, that presumes or includes knowledge of the decedent’s risk of suicide. *English v. Griffith*, 99 P.3d 90, 94 (Colo. Ct. App. 2004) (“Special relationships typically involve circumstances in which the defendant either had a treating or supervisory relationship with the decedent or maintained custodial control over the decedent’s environment.”), see also *City of Belen*, 93 N.M. at 603, 603 P.2d at 713 (holding that where a party is in custodial care of jail and custodian has knowledge that charge may injure himself, law imposes a duty of reasonable care to protect prisoner); *Sindler v. Litman*, 887 A.2d 97, 109 (Md. Ct. Spec. App. 2005). Other special relationships are set forth in the *Restatement* (Second) of Torts §§ 314A, 315-319 (1999), and are discussed more thoroughly below.

¶ 12 We conclude that neither of these two exceptions is applicable to the facts in this case. In *Solorzano*, we stated that the law would impose a duty of reasonable care when, in the defendant’s presence, the decedent was acting in a way that clearly posed a danger to himself or herself. *Solorzano*, 2004-NMCA-136, ¶¶ 21, 23. In *Solorzano*, the defendant alleged that the decedent had committed suicide which she had no duty to prevent. Id. ¶ 6. We disagreed, reversing the summary judgment granted to the defendant. Id. ¶ 25. *Solorzano* is significantly different from the case at bar in two significant aspects. First, we held in that case that whether the defendant had committed suicide was itself a disputed material fact. Id. ¶ 15. Second, *Solorzano* did not question the general proposition that suicide could foreclose liability as an independent intervening cause of injury, but held that the defendant’s observations of decedent’s behavior could give rise to a specific duty springing from a duty of ordinary care. Id. ¶ 21. In cases where the danger is not immediately apparent, duty is not such a clear call, particularly where suicide is the undisputed cause of death.

[Laypeople cannot be reasonably expected to anticipate the mental health consequences of their acts or omissions. Whether [a stepfather] had a duty to prevent [his stepson’s] suicide depends on the...
suicide’s foreseeability, its likelihood, the magnitude of the burden of guarding against it, and the potential consequences of placing that burden on [the stepfather].

Chalhoub v. Dixon, 788 N.E.2d 164, 167 (Ill. App. Ct. 2003). We look at what Defendant knew at the time his firearm was available for Rachel to take.

 Defender asserted his belief that Rachel’s prior suicide attempt was resolved, and that her other suicidal thoughts were not out of the ordinary for a teenager. He specifically stated that prior to her death, Rachel did not act depressed, paid close attention to her appearance, and had talked about plans for her future. Rachel had never expressed any suicidal thoughts to Defendant and her death came as a “complete shock” to him. Immediately prior to her taking her life, Rachel “seemed calm and coherent” to Defendant and “did not show any signs of agitation, depression, or distress.” Plaintiff conceded those facts are undisputed, and has shown no dispute concerning Defendant’s knowledge sufficient to create a genuine issue of material fact. Defendant had no reason to suspect his stepdaughter’s intention to commit suicide with his firearm when he left it on the table.

We hold that under these circumstances, Rachel’s suicide was not foreseeable, and Defendant did not have a duty arising from the ordinary duty of care either to anticipate it or take action to prevent it.

 Plaintiff contends that Defendant had a “special relationship” with Rachel that gave rise to a heightened duty to safeguard his firearm in order to protect her from her suicide. We recognize that “special relationships,” like any other issue of a legal duty to another, are creatures of precedent and policy. They arise out of particular connections between the parties, give rise to a special responsibility, and take the case out of the general rule. See Restatement (Second) of Torts § 314 cmt. a (1999) (stating that while there is no general duty to aid or protect others, this general rule “should be read with other [Restatement] sections which follow” the general rule). “Special relationships” typically involve treatment relationships, such as mental health professionals and their patients, and persons having direct custody and control over the decedent. See English, 99 P.3d at 94. City of Belen dealt with a classic “special relationship” between a jailer and prisoner, where the duty was triggered by complete custody and control over the deceased and was heightened by the jail’s actual knowledge of his suicidal intent, and representations that they would watch him. See City of Belen, 93 N.M. at 603, 603 P.3d at 713.

New Mexico has not found such a special relationship to exist between parent and child. Plaintiff’s examples are unavailing. Moody v. Stribling, 1999-NMCA-094, 127 N.M. 630, 985 P.2d 1210, deals with fiduciary relationships between parents and children, not “special relationships” as used in the context of duties to prevent suicide.

Id. ¶ 19; see also Fernandez v. Farmers Ins. Co., 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (“[C]ases are not authority for propositions not considered.”) (internal quotation marks and citations omitted)). We are more persuaded by Chalhoub, which placed a stepfather outside of the “special relationship” category when it found that, unlike a trained mental health professional who has a “special relationship” with the patient because of his or her professional knowledge of the patient, a layperson could not “be reasonably expected to anticipate the mental health consequences of their acts or omissions.” Chalhoub, 788 N.E.2d at 167.

 Plaintiff also argues that Defendant owed his stepdaughter a statutory duty. Duties imposed by statutes exist to establish a standard of care, the violation of which constitutes negligence per se. The test for negligence per se requires the following:

(1) [T]here must be a statute which prescribes certain actions or defines a standard of conduct, either explicitly or implicitly, (2) the defendant must violate the statute, (3) the plaintiff must be in the class of persons sought to be protected by the statute, and (4) the harm or injury to the plaintiff must generally be of the type the legislature through the statute sought to prevent.

McElhanon v. Ford, 2003-NMCA-091, ¶ 32, 134 N.M. 124, 73 P.3d 827 (internal quotation marks and citations omitted). We perceive that Plaintiff seeks to establish the existence of a public policy for the safe storage of firearms, since no attempt is made to satisfy the requirements of a cause of action for negligence per se.

The statute cited by Plaintiff in the district court, NMSA 1978, § 29-19-7(A) (2003), establishes that approved weapons training courses must teach safe handling and storage of firearms. Plaintiff also cites to a statute forbidding persons under eighteen years of age to hunt with or shoot a firearm if they have not taken a hunter safety course. See NMSA 1978, § 17-2-33 (1971). There was no evidence that Defendant violated these statutes, or that they were relevant to establish a duty on his part.

 Plaintiff further relies upon the City of Albuquerque’s negligent use of weapons ordinance to show a duty not to mishandle firearms so as to endanger others. See Albuquerque, N.M., Ordinance ch.12, art. 2, § 9 (1978); see also NMSA 1978, § 30-7-4 (1993). Plaintiff’s affidavit establishes two previous instances of leaving a firearm unattended, whereas Defendant asserted that he owns firearms and is in the practice of keeping them in a safe in the house. This is not enough to establish a factual dispute sufficient to avoid summary judgment. We hold that Plaintiff has not established negligence per se by violation of statute, and whether there is a public policy favoring safe storage of firearms, it is no more than a factor to be considered generally in our analysis of Defendant’s duty. These laws do not confer a statutory duty upon Defendant if Defendant’s negligence is not a proximate cause of the injury. See Archibeque v. Homrich, 88 N.M. 527, 532, 543 P.2d 820, 825 (1975).

 As in the criminal law, liability for the suicide of another can arise from aiding another to commit suicide. See NMSA 1978, § 30-2-4 (1963); see also State v. Sexson, 117 N.M. 113, 116, 869 P.2d 301, 304 (Ct. App. 1994) (holding that the assisted suicide statute “is aimed at preventing an individual from providing someone contemplating suicide with the means to commit suicide,” but that the second degree murder statute “is aimed at preventing an individual from actively causing the death of someone contemplating suicide”). Knowing participation in a suicide is not the case before this Court, and even if a duty based on negligence per se were established by violation of statute, Defendant’s negligence was superseded by his stepdaughter’s intentional acts.

Rachel’s Suicide Was an Unforeseen Intervening Cause of Her Death

As discussed above, any consideration of foreseeability of injury is intertwined with the concept of proximate causation of that injury. “The proximate causation element . . . is concerned with whether and to what extent the defendant’s conduct foreseeably and substantially caused the specific injury that actually occurred.” Herrera, 2003-NMSC-018, ¶ 8 (internal quotation marks and citation omitted).

An intervening force may interrupt
the chain of causation, superseding the original negligence, and thus relieving the defendant of liability.

[A]ny harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always “proximate,” no matter how it is brought about, except where there is such intentionally tortious or criminal intervention, and is not within the scope of the risk created by the original negligent conduct.

Restatement (Second) of Torts § 442B cmt. b (1965); Torres, 1999-NMSC-029, ¶ 23. “An intervening force is a superseding cause if the intervening force was not foreseeable at the time of the primary negligence.” Sinder, 887 A.2d at 111.

(22) Suicide is generally regarded as an intervening cause. Suicide is “voluntary, deliberate, and intentional self-destruction by someone of sound mind.” Solorzano, 2004-NMCA-136, ¶ 14.

The voluntary, willful act of suicide is a new or intervening agency that breaks the chain of causation. This intentional act is a superseding cause of harm and relieves the defendant of liability unless such act of suicide was reasonably foreseeable or the failure to foresee such act was a factor in the original negligence.

Harrell v. City of Belen, 93 N.M. 612, 621, 603 P.2d 722, 731 (Ct. App. 1979) (Sutin, J., dissenting), rev’d by City of Belen, 93 N.M. at 605, 603 P.2d at 716. Notwithstanding the obscure provenance of this statement, the dissent’s argument in favor of reversing to allow a jury instruction on independent intervening cause even in a special relationship case was ultimately vindicated by the Supreme Court. See Harrell, 93 N.M. at 620, 603 P.2d at 732; City of Belen, 93 N.M. at 604, 603 P.2d at 715. The statement reflects that “the practically unanimous rule is that [suicide] is a new and independent agency which does not come within and complete a line of causation from the wrongful act to the death and therefore does not render defendant liable for the suicide.” McMahon v. St. Croix Falls Sch. Dist., 596 N.W.2d 875, 880 (Wis. Ct. App. 1999) (internal quotation marks and citations omitted). “As a general rule, negligence actions seeking damages for the suicide of another will not lie because the act of suicide is considered a deliberate, intentional and intervening act which precludes a finding that a given defendant, in fact, is responsible for the harm.” Edwards v. Tardif, 692 A.2d 1266, 1269 (Conn. 1997) (internal quotation marks and citation omitted). The district court recognized that Rachel’s suicide was an intervening cause in her death.

(23) Sadly, hindsight helps us in this regard. Rachel’s entries in her journal the day of her death illuminate that the illness through which her mother helped her the previous night, believing it was the flu, was actually the result of an attempted suicide by ingesting drugs. The following morning, Rachel wrote in her diary that she intended to take her mother’s firearm from her bedside table when everyone had left, and just before her death, the last diary entry indicates that having failed to obtain her mother’s firearm, she had noticed Defendant had taken his off, and she intended to get it. These notations show a definite, deliberate course of planning and accomplishment of Rachel’s intention to kill herself that we believe satisfies the standard set by Solorzano.

(24) Herrera recognizes that an independent intervening cause (also sometimes called a superseding cause) relieves a negligent party of liability unless the defendant realized or should have realized that his negligence created a situation that a third party might use to commit a crime or tort. 2003-NMSC-018, ¶ 21. In Herrera, unlike this case, expert testimony established the risk of automobile theft in Albuquerque specifically, and the likely consequences of such an intentional act that the defendant should have realized would create a risk if he enabled such a theft. Id. ¶ 22. In this case, the generalized statistics provided by Plaintiffs about teenage suicide do nothing to establish Defendant’s knowledge of a substantial risk of Rachel’s suicide on March 21, 2002. To the extent that Plaintiff seeks by its arguments to create a genuine issue of material fact by citation to statistics contained in law review articles, the arguments of counsel are not evidence. See Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue, 2006-NMCA-050, ¶ 36, 139 N.M. 498, 134 P.3d 785; cf. Herrera, 2003-NMSC-018, ¶ 3 (noting that Plaintiff’s statistical evidence derived from an affidavit submitted by an expert witness).

(25) Plaintiff contends that Solorzano has eliminated the legal bar of suicide as an independent intervening cause. See 2004-NMCA-136. Solorzano established a working definition of suicide, but our decision in Solorzano does not preclude summary judgment in this case. To the extent that Plaintiff also argues that Solorzano requires, and Defendant failed to plead, suicide as an affirmative defense, Plaintiff is mistaken. Defendant’s answer alleges his stepdaughter’s intentional act of suicide as an affirmative defense.

(26) Plaintiff’s complaint contains only one cause of action against Defendant, alleging negligence in storing his firearm: a breach of duty to “insure the safekeeping and safeguarding of firearms . . . in accordance with the standards of care required of such entities [the City of Albuquerque and Defendant] operating under similar circumstances, giving due regard to the locality involved.” Plaintiff concedes that as a general matter, “suicide has been viewed as an unforeseeable intervening cause that supersedes an original act of negligence as the sole proximate cause of an injury.” However, “[w]e require special justification in order to depart from precedent.” Herrera, 2003-NMSC-018, ¶ 15. None of the factors that would cause us to overturn prior precedent that were present in Herrera are demonstrated here by Plaintiff. The rule that suicide is generally an independent intervening cause is not intolerable or unworkable, if proper pleading and facts are present. See id.

(27) Nowhere does Plaintiff identify the factual basis for alleging that Defendant knew of either Rachel’s “troubled relationship” with her mother and Defendant or her “history of depression and instability,” or how Defendant knew that Rachel losing her job or appearing before juvenile court were “ample information” of Rachel’s “suicidal tendencies.” The Supreme Court of Idaho has held “suicidal tendencies” to mean “a present aim, direction or trend toward taking one’s own life.” Carrier v. Lake Pend Oreille Sch. Dist., 134 P.3d 655, 660 (Idaho 2006) (emphasis added). Absent demonstrating Defendant’s knowledge of a present and substantial risk of suicide, Plaintiff’s allegations are too general and conclusory to establish a material fact. Moongate Water Co. v. State, 120 N.M. 399, 406, 902 P.2d 554, 561 (Ct. App. 1995) (holding that where the record reveals noth-

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1 Contrary to Plaintiff’s assertion, we did not include a decedent’s age in that definition.
ing more than conclusory allegations summary judgment is proper); see also Portales Nat’l Bank v. Bellin, 98 N.M. 113, 117, 645 P.2d 986, 990 (Ct. App. 1982) (holding that the conclusions stated in affidavits against summary judgment which are unsupported by fact are insufficient to raise an issue of material fact); Galvan v. City of Albuquerque, 85 N.M. 42, 44-45, 508 P.2d 1339, 1341-42 (Ct. App. 1973) (holding that a conclusory opinion regarding the speed of a vehicle in an accident should not be considered because the tests performed were not identified and explained). Similarly, Plaintiff’s affidavit from Rachel’s brother, Jacob Rogers, sheds no light on his sister’s mental state at the time of her death; in fact, it makes clear that Jacob no longer resided at the house with the family and that Defendant had left his firearm unattended on no more than two occasions.

CONCLUSION

{28} There exist no facts in this case that would cause Defendant to realize that on March 21, 2001, his stepdaughter was likely to commit suicide, and having failed to kill herself with drugs, was seeking a firearm to accomplish her purpose. To the contrary, we see that the very rationale for viewing suicide as a voluntary, intentional, and deliberate act of self-destruction is present in Rachel’s actions. Taking Defendant’s firearm was the third (and horribly final) option she pursued in less than twenty-four hours to kill herself. Where another case might establish facts sufficient to impose a duty to protect against a person’s suicide, we see no reason to depart in this case from the established exceptions to imposing liability. It is undisputed in this case that Rachel’s death resulted from her suicide, which is defined in New Mexico as “voluntary, deliberate, and intentional self-destruction by someone of sound mind.” Solorzano, 2004-NMCA-136, ¶ 14. Rachel’s suicide note clearly and chillingly shows her deliberate intention to kill herself; first with drugs, and failing that, by trying to find her mother’s firearm to kill herself. Again meeting with no success, she noticed that Defendant had taken his firearm off, writing in her diary “I want it bad, really bad.” The note is haunting and heartbreaking. It is also evidence of her clear intention to end her life irrespective of Defendant’s unwitting participation. This is the situation in which the nearly universal rule of suicide as an independent, intervening cause that breaks the chain of negligence unquestionably applies.

{29} Defendant made a prima facie case in the district court that Defendant had no legal duty to prevent his stepdaughter’s suicide, and that her actions constitute an independent intervening cause of her death that breaks the causal chain of Defendant’s negligence, if any. It is the plaintiff’s burden as non-moving party to show disputed material facts to place the issues of negligence and causation before a jury. Plaintiff has failed to do so. For that reason we affirm the district court.

{30} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

IRA ROBINSON, Judge

MICHAEL E. VIGIL, Judge

Certiorari Not Applied For
From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-120

OTILIA RANGEL,
Plaintiff-Appellee,
versus
SAVE MART, INC.,
Defendant,
and
THE LOVETT LAW FIRM,
Appellant.
No. 24,769 (filed: August 11, 2006)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
ROBERT E. ROBLES, District Judge

KYLE W. GESSWEIN
Las Cruces, New Mexico
for Appellee

JASON BOWLES
B.J. CROW
BOWLES & CROW
Albuquerque, New Mexico
for Appellant

OPINION

LYNN PICKARD, Judge

{1} In this case, we determine whether the district court abused its discretion in awarding sanctions under Rule 1-011 NMRA, based on the filing of an attorney charging lien. Because we determine that the appellant’s assertion of the charging lien was colorable as a matter of law, we hold that the district court abused its discretion in imposing sanctions, and we reverse the order imposing sanctions.

BACKGROUND

{2} This dispute originated as a slip-and-fall case brought by Plaintiff; Otilia Rangel, against Save Mart. Appellant, the Lovett Law Firm (Lovett), represented Plaintiff. On the day after she sustained her injuries, Plaintiff met with staff at Lovett and signed a contingency fee contract, which stated that Lovett would be entitled to one-third of any monies recovered before the filing of a lawsuit and 40% of any monies recovered after the filing of a lawsuit. About a week later, Lovett sent a letter of representation to Save Mart’s insurance company. The insurance company responded with a letter denying fault, but stating as follows: “However, there is $5,000 in medical payment coverage that can be applied to this incident. The coverage will provide payment for any out of pocket expense.
related to this incident. . . . Please submit documentation for any medical expense that you wish us to consider.” Lovett sent Plaintiff’s medical bills, totaling $5,657, to the insurance company, which sent Lovett a check for $5,000, payable to Lovett and Plaintiff. Lovett used some of this money to pay Plaintiff’s outstanding medical bills, and he apparently retained approximately one-third of this $5,000 pursuant to the contingency fee agreement with Plaintiff. 

(3) Approximately a month later, in March of 2002, Lovett filed suit on behalf of Plaintiff. It appears from the record that some discovery took place after the filing of the complaint. Lovett answered interrogatories and participated in a deposition of Plaintiff. Lovett also participated in a formal mediation. In September and October of 2002, Lovett filed motions to withdraw as counsel for Plaintiff. The motions were granted on October 2, 2002.

(4) The district court found that (1) while Lovett was representing Plaintiff, Save Mart made a settlement offer of $15,000 and (2) subsequent to Lovett’s representation, Save Mart made a settlement offer of $18,000. It appears that Plaintiff rejected the $15,000 offer obtained by Lovett, discharged Lovett, and then a short time later accepted the $18,000 settlement offer. There is no indication in the district court’s findings or in the record that Lovett was discharged for cause.

(5) Two days after withdrawing as Plaintiff’s counsel, Lovett filed a notice of charging lien. That document states in full as follows: “COMES NOW Lovett Law Firm and respectfully notifies the Court and counsel that it is asserting an attorney charging lien in the above captioned matter. Lovett Law Firm requests that no funds be disbursed until [a] hearing is held on recovery of monies owed to the firm.” Lovett later argued that it was entitled to a charging lien for its full contingency fee.

(6) Plaintiff retained new counsel and filed a motion to strike the lien and to recover the portion of the $5,000 obtained for medical bills that Lovett had retained. The district court eventually granted the motion and struck the lien. In striking the lien, the district court made the following findings, which are substantially unchallenged on appeal:

13. Other than the $5,000.00 med pay payment made by the insurance company representing Save Mart, Attorney Lovett did not collect any funds during his representation of [Plaintiff].

15. Regarding the claim of lien, Attorney Lovett is relying on the [contingency fee] contract for his claim.

16. Attorney Lovett bases his claim upon the contract[,] not on time/work.

29. Under Save Mart’s insurance policy, they would not and did not contest medical payments.

30. Save Mart’s requirements to pay medical insurance payments were solely based on presentation of medical bills and was done without regard to fault.

The district court ruled that a charging lien can be asserted only where there is a “fund recovered by the attorney.” The court determined that the only money recovered by Lovett was the $5,000 obtained to pay medical bills and that such money did not qualify as “recovery” for purposes of a charging lien. The court also entered findings indicating that a contingency fee on medical payments is not a reasonable fee.

(7) Prior to the district court’s striking the lien, Plaintiff filed a motion for sanctions under Rule 1-011. Plaintiff argued that sanctions were appropriate because (1) the claim of lien was unfounded, since Lovett never recovered any money on behalf of Plaintiff, and (2) Lovett knowingly took an inconsistent position in a similar case. Plaintiff requested that the court impose sanctions in the form of the attorney fees incurred in opposing the lien. The court entered an order granting the motion and awarding Plaintiff the requested fees. The court did not enter findings of fact or conclusions of law with regard to the sanctions.

(8) On appeal, Lovett contends that there was no sanctionable conduct in this case. Lovett does not contest the propriety of the district court’s order striking the lien. Accordingly, we examine only whether Lovett’s conduct constituted a violation of Rule 1-011, and we do not decide whether the district court properly denied the lien. 

DISCUSSION

(9) We begin by setting forth the requirements for a Rule 1-011 violation and the appropriate standard of review. We then examine the substantive requirements for an attorney charging lien, and we address whether Lovett’s filing of the charging lien in this case violated Rule 1-011. Finally, we address several additional arguments made by Plaintiff.

1. The Rule 1-011 Standard

(10) The pertinent provision of Rule 1-011 states the following: “The signature of an attorney . . . constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer’s knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.” In this case, there is no allegation that Lovett failed to read any pleadings or that the charging lien was filed in order to cause delay or for some other improper purpose. Plaintiff did argue that courts need to control attorneys who prejudice their clients by filing unfounded liens in order to tie up the clients’ files. However, (1) the district court did not make any findings or comments along those lines, and (2) there is no evidence that such occurred in this case. Accordingly, the only question is whether “to the best of [Lovett's] knowledge, information and belief, there [was] good ground to support” the charging lien. See Rule 1-011.

(11) New Mexico courts have interpreted the “good ground” provision of Rule 1-011 to allow for sanctions where a pleading does not assert a colorable claim or, in other words, “is not warranted by existing law or a reasonable argument for its extension.” Rivera v. Brazos Lodge Corp., 111 N.M. 670, 674, 808 P.2d 480, 484 (1991). The “good ground” provision is measured by a subjective standard and is appropriate “only in those rare cases in which an attorney deliberately presses an unfounded claim or defense.” Id. (internal quotation marks and citations omitted). “Any violation depends on what the attorney . . . knew and believed at the relevant time and involves the question of whether the . . . attorney was aware that a particular pleading should not have been brought.” Id. at 675, 808 P.2d at 960. For Rule 1-011 sanctions to be appropriate, there must be “subjective evidence that a willful violation has occurred.” Lowe v. Bloom, 112 N.M. 203, 204, 813 P.2d 480, 481 (1991).

(12) Generally, appellate courts review a district court’s imposition of Rule 1-011 sanctions for an abuse of discretion. Rivera, 111 N.M. at 674-75, 808 P.2d at 959-60. “However, a district court necessarily would abuse its discretion if it based its ruling on an erroneous view of the law[.]” Id. at 675, 808 P.2d at 960. We have reviewed Hughes v. City of Fort Collins, 926 F.2d 986 (10th Cir. 1991), cited by Plaintiff, but we note that even that case holds that a district court’s Rule 1-011 decision is an abuse of discretion where the court “base[s] its ruling on an erroneous view of the law.” Id. at 988 (internal quotation marks and citation omitted).

2. The Substantive Standards Governing an Attorney Charging Lien

BAR BULLETIN - November 13, 2006 - Volume 45, No. 46
and Whether the Charging Lien Violated Rule 1-011

[13] There are four elements to an attorney charging lien in New Mexico: (1) there must be a valid express or implied contract between the attorney and the client, (2) there must be “a fund recovered by the attorney,” (3) notice of intent to assert a lien must be given, and (4) there must be a timely assertion of the lien. Sowder v. Sowder, 1999-NMCA-058, ¶ 10-14, 127 N.M. 114, 977 P.2d 1034 (internal quotation marks and citations omitted). The charging lien is a common-law right that is equitable in nature. N. Pueblos Enters. v. Montgomery, 98 N.M. 47, 49, 644 P.2d 1036, 1038 (1982). We have defined a charging lien as

the right of an attorney or solicitor to recover his fees and money expended on behalf of his client from a fund recovered by his efforts, and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of his right to the same. Sowder, 1999-NMCA-058, ¶ 9 (internal quotation marks and citation omitted).

[14] At the outset of our analysis, we reiterate that the merits of the charging lien are not before us. Accordingly, we explicitly do not decide whether Lovett was entitled to the lien. The only question we must decide is whether the lien was so non-meritorious that Lovett subjectively and willfully violated Rule 1-011 by filing the lien despite being “aware that [it] should not have been brought.” Rivera, 111 N.M. at 675, 808 P.2d at 960.

[15] In this case, the only disputed element of the charging lien is whether there was “a fund recovered by the attorney.” See Sowder, 1999-NMCA-058, ¶ 11 (internal quotation marks and citations omitted). Plaintiff argues that (1) the $5,000 earmarked to pay medical bills cannot fulfill the requirement of a recovered fund and (2) with the exception of that $5,000, it is undisputed that Lovett did not actually “recover” any money on behalf of Plaintiff because Plaintiff fired Lovett before she accepted the settlement. We do not address Plaintiff’s first argument regarding the medical expense payment because we determine that Lovett participated in Plaintiff’s ultimate recovery to a sufficient degree to make the assertion of a charging lien colorable and thus not in violation of Rule 1-011.

[16] We agree with Plaintiff that, on the surface, the situation presented here (where an attorney works on a case but is discharged before the client either wins a judgment or accepts a settlement offer) would seem insufficient to satisfy the requirement stated in Sowder that there be “a fund recovered by the attorney.” 1999-NMCA-058, ¶ 11 (internal quotation marks and citations omitted). However, we think Plaintiff reads that statement too narrowly. While most of our cases dealing with charging liens have not addressed the recovery element, some of those cases contain language supporting the proposition that it is enough for the attorney to significantly contribute to the ultimate recovery even if he or she is not the attorney of record at the time that funds are actually obtained. See Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc., 101 N.M. 656, 656, 687 P.2d 91, 91 (1984) (referring to “a fund recovered by [the attorney’s] efforts” (internal quotation marks and citations omitted)); Prichard v. Fulmer, 22 N.M. 134, 140, 159 P. 39, 40-41 (1916) (same); Cherperis v. Cherperis, 1998-NMCA-079, ¶ 8, 125 N.M. 248, 959 P.2d 973 (same).

[17] We also find Robison v. Campbell, 99 N.M. 579, 661 P.2d 479 (Ct. App. 1983), to be on point. In that case, the Sutin firm represented a client, Katz, who had sued for recission of a real estate contract. Id. at 584, 661 P.2d at 484. The trial court determined that Katz was not entitled to recission, but awarded her damages. Id. On appeal, this Court reversed the damage award, but instructed the trial court to allow Katz to rescind the contract. Id. at 582, 584, 661 P.2d at 482, 484. On remand, Katz, who was no longer represented by the Sutin firm, won a judgment based on recission. Id. The trial court also awarded the Sutin firm a charging lien. Id. at 582, 661 P.2d at 482.

[18] Katz appealed to this Court again, arguing that the Sutin firm had no claim to a charging lien because the first judgment, to which the lien had attached, was vacated and the Sutin firm had not participated in the second trial that resulted in judgment for Katz. Id. at 584, 661 P.2d at 484. We held that the charging lien, which was supported by the services rendered in the first trial, properly attached to the second judgment. Id. We noted that in the second trial, Katz had relied on evidence introduced by the Sutin firm at the first trial and that Katz ultimately prevailed on a theory of recission, which was argued by Sutin at the first trial but was erroneously rejected by the trial court. Id. Despite the fact that the Sutin firm took no part in the second trial, which was the only proceeding that ultimately resulted in judgment for Katz, we stated that “[t]he contention that the Sutin firm did not contribute to the judgment entered before trial upon remand is frivolous.” Id.; see also Robison v. Katz, 104 N.M. 133, 135, 717 P.2d 586, 588 (1986) (invoking the same case and addressing whether the Sutin firm’s lien took priority over the lien of Katz’s subsequent attorneys; holding that “the award resulted from the combined efforts of both firms, each of which was necessary but not sufficient[ , and by] balancing the equities, this Court concludes that both firms should share in the award; it would be unfair for either to reap the fruits of the other’s labors”).

[19] We also take guidance from an unpublished Tenth Circuit case that relied on New Mexico law and specifically on the Robison Supreme Court and Court of Appeals cases. See Albuquerque Technical Vocational Inst. v. Gen. Meters Corp., 17 F. App’x 870 (10th Cir. 2001) (unpublished). In that case, the Hatch firm represented General Meters in a suit brought against it by the Albuquerque Technical Vocational Institute (TVI) concerning a computer system. Id. at 871. The Hatch firm conducted discovery and, more than a year after the complaint was filed, succeeded in obtaining leave to assert a counterclaim against TVI. See id. at 872. Shortly thereafter, the Hatch firm withdrew from the case and General Meters retained new counsel. Id. The Hatch firm then filed a charging lien. Id. at 873. After a bench trial, General Meters prevailed with regard to all of TVI’s claims, and it also prevailed on its counterclaim. Id. General Meters disputed the charging lien, arguing that the Hatch firm had failed to satisfy the recovery requirement of New Mexico’s charging lien cases. Id.

[20] The Tenth Circuit relied on Robison, which it interpreted as follows: “[A] lawyer is not prevented from asserting a lien against a judgment obtained by a former client, even though the lawyer was not involved throughout the litigation and other attorneys’ efforts contributed to the recovery.” General Meters, 17 F. App’x at 876. The circuit court held that the Hatch firm’s efforts in the case were “enough to satisfy the [New Mexico] requirement that the fund recovered be the result of the attorney’s effort.” Id. The circuit court noted that the Hatch firm had worked on the case for over a year, that it had filed the counterclaim, and that some of the work entailed in defending against TVI’s claims also related to the counterclaim. Id. The circuit court concluded that the evidence in the case “clearly established that the efforts of [the Hatch firm] contributed to the counterclaim judgment.” Id. at 877.

[21] We acknowledge that the facts of this case are somewhat distinguishable.
from the facts in Robison and General Meters. We do not deem it important that this case ended in settlement whereas those cases ended in judgment. However, in both Robison and General Meters, it was undisputed that the initial attorneys put a great deal of work into the cases before being disqualified. We agree with Plaintiff that Lovett does not appear to have put a comparable amount of work into this case. Nonetheless, we think that Robison and General Meters can be fairly interpreted to support the proposition that where an attorney makes significant contributions to a case before being discharged, he or she is entitled to claim a charging lien.

(22) Plaintiff argues that Robison and General Meters are not on point because they involved “situations where the attorney produced evidence of the actual services performed unlike Mr. Lovett in the case at bar.” We disagree that there is no evidence in the record of Lovett’s working on the case. The following facts are undisputed: (1) Lovett filed a complaint on behalf of Plaintiff; (2) Lovett participated in initial discovery; (3) Lovett had contact with Plaintiff on at least seven occasions, some in person and some via telephone; (4) Lovett wrote several letters to Save Mart’s insurance company on behalf of Plaintiff; (5) Lovett attended a mediation on behalf of Plaintiff; and (6) Lovett obtained a settlement offer of $15,000 for Plaintiff. It also appears from the record, although the appellate briefing is not clear on the issue of timing, that Plaintiff discharged Lovett and then, about a week later, settled without an attorney for $18,000, only $3,000 more than the offer obtained by Lovett.

(23) Under these circumstances, and in view of Robison and General Meters, we cannot say that Lovett’s claim for a charging lien was so non-meritorious as to constitute a violation of Rule 1-011. See Lowe, 112 N.M. at 205, 813 P.2d at 482 (holding that the district court abused its discretion in imposing Rule 1-011 sanctions where a pleading’s chances of success constituted “a question on which reasonable lawyers and judges could differ”).

(24) Our holding is also supported by cases from several other jurisdictions that have explicitly allowed charging liens in circumstances similar to those present in this case. See, e.g., Afrageh v. Miami Elevator Co. of Am., 769 So. 2d 399, 400-01 (Fla. Dist. Ct. App. 2000) (holding that where an attorney was fired without cause after obtaining a settlement offer that the client declined, that attorney was entitled to enforce a charging lien against a settlement procured by a new attorney); Ambrose v. Detroit Edison Co., 237 N.W.2d 520, 522 (Mich. Ct. App. 1975) (holding that attorneys had a valid charging lien where they withdrew for good cause after obtaining a settlement offer that the client rejected, and the client later accepted a “nearly identical” offer; stating that “[t]he law creates a lien of an attorney upon the judgment or fund resulting from his services . . . [, and] where an attorney is justified in refusing to continue in a case, he does not forfeit his lien for services already rendered” (internal quotation marks and citation omitted)); cf. Klein v. Eubank, 663 N.E.2d 599, 600 (N.Y. 1996) (“[W]e conclude that an attorney need not be counsel of record at the time the judgment or settlement fund is created in order to be entitled to [a lien under New York’s charging lien statute]. . . . [A]n attorney’s participation in the proceeding at one point as counsel of record is a sufficient predicate for invoking the statute’s protection[.]”).

(25) We recognize that the standard of review for an order imposing Rule 1-011 sanctions is generally very deferential. However, as we noted above, a district court necessarily abuses its discretion when it “base[s] its ruling on an erroneous view of the law.” Rivera, 111 N.M. at 675, 808 P.2d at 960. In this case, the district court appears to have based its decision on the erroneous view that Lovett did not have a colorable claim for an attorney charging lien under New Mexico law. Having determined that decision to be incorrect as a matter of law, we reverse the order imposing sanctions.

(26) We also note that reversal appears to be appropriate in this case because the district court’s oral ruling on the motion for sanctions indicates that the court applied the wrong Rule 1-011 standard. We normally do not predicate error on oral remarks made by the district court. See Ledbetter v. Webb, 103 N.M. 597, 603, 711 P.2d 874, 880 (1985). However, when sanctions are involved, a district court is generally required to enter findings. See Rest. Mgmt. Co. v. Kidde-Fenwal, Inc., 1999-NMCA-101, ¶ 22-23, 127 N.M. 708, 986 P.2d 504 (discussing the district court’s inherent authority to impose sanctions for spoliation of evidence and holding that the district court must enter findings of fact before imposing such sanctions). Because the district court in this case did not enter written findings, we will consider the court’s oral comments. In granting the motion, the court stated: “On the other hand, I agree with [Plaintiff’s] attorney about the lien. It should have been clear that there was no lien that should have been filed. To that extent, I agree the motion should be granted, which leads to the sanctions.” (Emphasis added.) As we have detailed above, New Mexico uses a subjective standard for Rule 1-011. See Rivera, 111 N.M. at 674, 808 P.2d at 959 (holding that sanctions are appropriate “only in those rare cases in which an attorney deliberately presses an unfounded claim or defense” (internal quotation marks and citations omitted)). The district court’s comment that it “should have been clear” that the lien was inappropriate strongly indicates that the court erroneously applied an objective Rule 1-011 standard. We also note that, with the exception of Plaintiff’s assertion that Lovett knowingly advanced conflicting positions in two different cases (which we address below), the record is devoid of any indication that Lovett did anything to deliberately or willfully press an unfounded claim or that Lovett otherwise attempted to improperly circumvent the rules. Nor did the district court give any indication that it found willfulness in this case. Under these circumstances, the district court’s oral remarks provide further support for our decision to reverse the order imposing sanctions. We now proceed to address Plaintiff’s remaining arguments.

3. Lovett Did Not Violate Rule 1-011 by Filing a Pleading That Requested an Unreasonable Fee

(27) Plaintiff next argues that, based on the amount of work that Lovett performed in this case, the contingency fee requested in connection with the lien was an unreasonable fee. Without citation to any authority concerning Rule 1-011, Plaintiff appears to argue that merely filing a pleading that requests an unreasonable fee could be grounds for Rule 1-011 sanctions. We assume without deciding that filing such a pleading could constitute a violation of Rule 1-011, but we hold that the contingency fee claimed by Lovett in this case was not so unreasonable as to constitute a violation of Rule 1-011. We note that there is no indication in the record that the district court actually ruled on this basis. However, because the unreasonable fee issue was argued below, and because we can affirm the district court if it was right for any reason, we will briefly address Plaintiff’s argument.

See Melboom v. Watson, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (noting that we will affirm if the trial court was right for any reason, as long as it would not be unfair to do so).

(28) We first note that, as with our discussion of “recovery” in connection with a charging lien, we need not decide whether the fees requested by Lovett were actually reasonable. We are only required to address
whether they were so unreasonable as to constitute a violation of Rule 1-011, and we express no opinion on whether Lovett was actually entitled to collect the full contingency fee.

{29} Plaintiff appears to argue that the contingency fee was unreasonable because (1) all Lovett did was to collect the $5,000 that was earmarked for payment of medical expenses and (2) the collection of that money entailed little work and no risk. We reject this argument. As we held above, Lovett was entitled to claim a charging lien based on the work performed in this case (including filing a complaint, sending letters, conducting discovery, meeting with Plaintiff, and negotiating on her behalf), not just on the money actually recovered. Here, similarly think that the question of the reasonableness of the fee claimed by Lovett must be answered by taking into consideration all the work performed in the case, not just the work involved in securing the medical payment.

{30} We disagree with Plaintiff that the contingency fee claimed by Lovett was so unreasonable as to constitute a violation of Rule 1-011. It is undisputed that Lovett and Plaintiff entered into a contract whereby Lovett was to receive one-third of all funds obtained before the filing of a lawsuit and 40% of all funds obtained after the filing of a lawsuit. The general rule is that “courts should enforce contingency fee contracts as made.” {31} Lozano v. GTE Lenkurt, Inc., 122 N.M. 103, 109, 920 P.2d 1057, 1063 ( Ct. App. 1996); see also Lucero v. Aladdin Beauty Colls., Inc., 117 N.M. 269, 272, 871 P.2d 365, 368 (1994) (“We take judicial notice of the standard 33-1/3% of the total recovery ... that attorneys typically receive when retained on a contingency fee contract.”). Given this general rule and the amount of work Lovett performed in this case, we do not think that Lovett’s claim to the full contingency fee was so unreasonable as to constitute a violation of Rule 1-011.

{31} We do note that it appears to be the general rule in other jurisdictions that discharged attorneys are reimbursed on a quantum meruit basis, even when there is a contingency fee contract. See, e.g., Sequa Corp. v. GBJ Corp., 156 F.3d 136, 148 (2d Cir. 1998) (noting that under New York law, the amount recoverable by a discharged attorney under the charging lien statute is based on quantum meruit); Searcy v. Denney, Scarola, Barnhart & Shipley; P.A. v. Poletz, 652 So. 2d 366, 368 (Fla. 1995) (noting that under Florida law, an attorney under a valid contract who is discharged without cause after performing substantial services “is entitled to the reasonable value of the services rendered on the basis of quantum meruit, but recovery is limited to the maximum fee set in the employment contract”); see also N. Pueblos Enters., 98 N.M. at 48-49, 644 P.2d at 1037-38 (holding that because a charging lien is an equitable remedy, the trial court is free to award an amount smaller than that provided for in the fee contract).

{32} Despite these authorities, we cannot conclude that Lovett willfully violated Rule 1-011 by claiming the full contingency fee. Again, the question is not whether the fees Lovett requested were actually reasonable; rather, the question is whether Lovett actually knew that the requested fees were “not warranted by existing law or a reasonable argument for its extension.” {33} Rivera v. 111 N.M. at 674, 808 P.2d at 959. Plaintiff argues that “[i]t should not have taken much hard thinking on the part of Attorney Lovett to determine whether their one-third contingency fee was reasonable.” However, as we have noted, Rule 1-011 requires proof of the attorney’s subjective state of mind and does not entail a “knew or should have known” analysis. Thus, even if we could say that Lovett should have known that most jurisdictions only allow quantum meruit recovery under circumstances like those in this case, such a failure on Lovett’s part would not constitute a violation of Rule 1-011. There is simply no evidence in the record that Lovett willfully claimed the full contingency fee despite the knowledge that such a claim was unfounded.

{33} We also note that the cases relied on by Plaintiff are not on point, as they all involve circumstances far more egregious than those present in this case. See In re Roberts-Hohl, 116 N.M. 700, 702, 866 P.2d 1167, 1169 (1994) (requiring restitution where an attorney neglected a case so egregiously that the case was dismissed for failure to prosecute, and stating that “[b]y accepting a $5,000 retainer and taking no discernable [sic] action apart from filing a complaint, [the attorney] also charged a clearly excessive fee”); In re Cherryhomes, 115 N.M. 734, 734, 736, 858 P.2d 401, 401, 405 (1993) (requiring an attorney to pay restitution to client where attorney charged the client $7,500 to represent him in a criminal matter that had already been dismissed sua sponte by the prosecutor, and the attorney’s only action on the case was to fax his client a copy of the dismissal that the attorney had had no part in procuring); In re Martinez, 108 N.M. 252, 253-55, 771 P.2d 185, 186-88 (1989) (disbarring an attorney and requiring restitution where the attorney had no part in procuring); In re Roberts-Hohl, 116 N.M. 700, 702, 866 P.2d 1167, 1169 (1994) (requiring an attorney to pay restitution to client where attorney charged the client $7,500 to represent him in a criminal matter that had already been dismissed sua sponte by the prosecutor, and the attorney’s only action on the case was to fax his client a copy of the dismissal that the attorney had had no part in procuring); In re Cherryhomes, 115 N.M. 734, 734, 736, 858 P.2d 401, 401, 405 (1993) (requiring an attorney to pay restitution to client where attorney charged the client $7,500 to represent him in a criminal matter that had already been dismissed sua sponte by the prosecutor, and the attorney’s only action on the case was to fax his client a copy of the dismissal that the attorney had had no part in procuring).

4. We Do Not Consider the Purported Settlement Reached in Another Case

{35} Plaintiffs have attached two documents to their answer brief that do not appear in the record proper. These documents appear to represent (1) a settlement agreement entered into in another case by Plaintiff, Lovett, and other parties and (2) an agreement adopting the settlement agreement. The documents appear to have been filed in the Third Judicial District Court on September 21, 2004, and September 10, 2004, respectively. Plaintiff argues that by virtue of these documents, Lovett is barred under principles of res judicata from asserting the validity of the charging lien in this case.

{36} We do not consider matters not of record. In re Mokiligon, 2005-NMCA-021, ¶ 7, 137 N.M. 22, 106 P.3d 584 (“[T]his Court will not consider and counsel should not refer to matters not of record in their briefs.” (internal quotation marks and citation omitted)); see also id. (“[I]t is improper to attach to a brief documents which are not part of the record on appeal.” (internal quotation marks and citation omitted)); State v. Wood, 117 N.M. 682, 687, 875 P.2d 1113, 1118 (Ct. App. 1994) (refusing to consider a criminal defendant’s double jeopardy argument because the argument relied on facts not of record and refusing to consider exhibits attached to the defendant’s appellate briefing). Accordingly, we decline to address Plaintiff’s res judicata argument. However, even if we were to consider the argument, we note serious problems with any application of res judicata in this case, not the least of which is that the order attached to the brief appears to have been entered after the trial court entered the final order imposing sanctions in this case. See Salas v. Bolagh, 106 N.M. 613, 615,
Accordingly, we reject Plaintiff’s argument that Lovett violated Rule 1-011 because the position advanced in the other case shows that Lovett knew that the claim asserted in this case was unfounded. We also note that Plaintiff has not directed us to any authority indicating that an attorney is not permitted to argue inconsistent positions on behalf of different clients, as long as both positions are colorable. Here, as we have explained above, there is clearly a colorable argument under New Mexico law that attorneys can assert charging liens even though they were discharged before a case actually came to fruition; conversely, there is also a colorable argument that attorneys cannot assert charging liens under such circumstances. Thus, we are not persuaded that Lovett did anything inappropriate in asserting purportedly inconsistent positions, both of which were at least colorable. Nor are we convinced that there was any impropriety regarding the issue of itemization. Plaintiff has not indicated how that issue has any bearing on whether the sanctions were properly imposed in this case.

Finally, Plaintiff argues that (1) as part of the previously mentioned settlement agreement that is attached to the answer brief, Lovett admitted that it should not have taken a contingency percentage of fees earmarked for paying medical bills; (2) that the settlement was accorded to and filed before Lovett filed the docketing statement in this case, and the docketing statement argued in part that the permissible collection of medical-bill funds supported a charging lien; and (3) as a result, Lovett has violated the Rules of Professional Conduct regarding meritorious claims and candor to this Court and should be required to pay Plaintiff’s appellate attorney fees. We reject Plaintiff’s argument. As we have noted, we will not consider the settlement agreement and order that are attached to Plaintiff’s answer brief because those documents are not of record in this case.

CONCLUSION

{40} We hold that Lovett did not violate Rule 1-011 because the assertion of the charging lien in this case was at least colorable. Accordingly, we reverse the order imposing sanctions.

{41} IT IS SO ORDERED.

LYNN PICKARD, Judge
WE CONCUR:
CEILA FOY CASTILLO, Judge
RODERICK T. KENNEDY, Judge

OPINION

MICHAEL E. BUSTAMANTE, CHIEF JUDGE

{1} In this case we discuss a variant of co-employee immunity from common law suits under the Workers’ Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2005) (the Act). Specifically, we address whether a contractor that is the direct employer of special employees is immune under the Act from common law suits brought by other special employees working for the same special employer, but under a different contract with a different direct employer. We hold that the contractor is not a special employee in this case, is not a co-employee for purposes of the Act, and thus is not immune from suit.

BACKGROUND

{2} Plaintiff Doris Street was an employee of Technadyne Engineering Consultants, a subsidiary of Jobs Plus. Plaintiff provided administrative support services at Sandia Corporation (Sandia) pursuant to a contract between Jobs Plus and Sandia. Defendant Alpha Construction Services (Alpha) is a roofing company that provides employees

Certiorari Granted, No. 29,922, September 21, 2006

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-121

DORIS STREET and MICHAEL STREET,
Plaintiffs-Appellants,
versus
ALPHA CONSTRUCTION SERVICES,
Defendant-Appellee.
No. 25,540 (filed: June 22, 2006)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
GERALDINE E. RIVERA, District Judge

JAMES P. LYLE
LAW OFFICES OF
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for Appellants

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CIVEROLEO, GRALOW, HILL & CURTIS
Albuquerque, New Mexico
for Appellee

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to Sandia to do roofing jobs through a contract between Sandia and Alpha. Alpha employees work at Sandia, under the supervision of Sandia almost every day of the year. Alpha employees report to work at Sandia, perform their jobs under the direction of a Sandia supervisor, receive safety training at Sandia, and use Sandia-supplied equipment and materials for the roofing projects.

3 On April 9, 2003, Plaintiff was working in a building at Sandia. On that same day, the roof of that building was being repaired by employees of Alpha. The roofers, named only as “John Doe” Defendants, applied a roofing material, later determined to be Geogard, to the roof. Plaintiff alleged that she smelled an unusual odor in the building, and as the smell became stronger she felt burning in her airway. Plaintiff further alleged that as a result of inhaling chemicals from the roofing material, she sustained permanent airway and respiratory system injury. Plaintiff received treatment for injuries allegedly sustained from inhaling fumes from the roofing materials. Plaintiff applied for and was denied workers’ compensation coverage under her direct employer, Technadyme. Plaintiff did not appeal the denial of workers’ compensation benefits.

4 Plaintiff filed suit for damages against Sandia and Alpha, alleging that she suffered injuries from inhaling the fumes of the roofing material, and that Sandia and Alpha were negligent in the use of the roofing materials. Sandia and Alpha both moved for summary judgment. Alpha argued that it was a co-employee of Plaintiff for purposes of the Act, and therefore entitled to immunity from suit. The district court granted summary judgment in favor of Alpha, and Plaintiff appeals. In a related appeal, we affirmed by memorandum opinion the district court’s grant of summary judgment in favor of Sandia, holding that Sandia was a special employer of Plaintiff, and therefore her exclusive remedy against Sandia was through the Act.

DISCUSSION

5 Plaintiff argues that the district court erred in granting summary judgment to Alpha because in New Mexico, contractors who employ employees who in turn share the same special employer through different contractual relations are not “co-employees” of the other special employees under the Act, and therefore are not entitled to protection from suit under the exclusivity provisions. This appears to be an issue of first impression in New Mexico. Plaintiff also raises several other arguments on appeal, essentially arguing that summary judgment was improper because Plaintiff was not allowed adequate discovery. Because we reverse the grant of summary judgment on the first issue, we do not reach the discovery issues.

6 “Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. The issue on appeal is whether [Defendant] was entitled to [judgment] . . . as a matter of law. We review these legal questions de novo.” Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 (citation omitted). Although Plaintiff makes allegations of disputed material facts based on a lack of discovery, none are material to the resolution of the case. In this case, we must determine whether Plaintiff and Alpha are co-employees under the Act. To the extent this requires us to interpret the Act, we do so de novo. See Morgan Keege Mortgage Co. v. Candelaria, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066 (stating that interpretation of a statute is a question of law which an appellate court reviews de novo).

7 We begin with the proposition that the Act “provides the exclusive remedy against employers for injuries incurred on the job.” Vigil v. Digital Equip. Corp., 1996-NMCA-100, ¶ 7, 122 N.M. 417, 925 P.2d 883. The exclusivity of compensation under the Act rests on the existence of the employment relationship. Rivera v. Sagebrush Sales, Inc., 118 N.M. 676, 680, 884 P.2d 832, 836 (Ct. App. 1994). The Act provides that an employer who complies with the act “shall not be subject to any other liability whatsoever . . . and all causes of action . . . and common-law rights and remedies . . . are hereby abolished except as provided in the [Act].” Section 52-1-8. Alpha’s argument, which the district court embraced, is based on the fact that employees are also immune from suit in tort by co-employees under the exclusivity provisions of the Act. See §§ 52-1-6(E), and -8. “[A]n employee of an employer who has complied with the requirements of the Act is not subject to liability under the common law for the injury or death of a coemployee.” Matkins v. Zero Refrigerated Lines, Inc., 93 N.M. 511, 517, 602 P.2d 195, 201 (Ct. App. 1979). The purpose of the Act is to ensure “that injured workers are adequately compensated and that employers may avoid excessive tort liability.” Vigil, 1996-NMCA-100, ¶ 7. However, an employee “may seek redress from a third party even after the employee has received workers’ compensation benefits from the employer.” Id.

8 Plaintiff argues that the district court erred in granting summary judgment because special employees and a contractor, such as Plaintiff and Alpha, are not co-employees under the Act. Plaintiff relies on Romero v. Shumate Constructors, Inc., 119 N.M. 58, 888 P.2d 940 (Ct. App. 1994), rev’d in part and aff’d in part by Harger v. Structural Services, Inc., 121 N.M. 657, 669, 916 P.2d 1324, 1336 (1996), for the proposition that statutory co-employees of a general contractor do not enjoy immunity from common law actions against each other under the Act, and therefore the same rule applies to special employees. Plaintiff relies on the following language in Romero:

There is no New Mexico precedent creating a concept of co-statutory employee or using the co-employee concept in a context where an employee of one subcontractor of a general contractor sues another subcontractor in tort. There is also very little support for this idea in other jurisdictions. 2A Larson, supra § 72.32. The reason as given by Professor Larson is that “the general contractor has a statutory liability to the subcontractor’s employee, actual or potential, while the subcontractor has no comparable statutory liability to the general contractor’s employee.” Id. § 72.32, at 14-269 to -274. In other words, the quid pro quo for the protection afforded to the workers, whether that protection is used or not, provides the basis for the immunity granted by the Act.

Id. at 70, 888 P.2d at 952. Although in Romero we addressed the issue of statutory employees, we see no reason why the reasoning would not apply to the special employee situation as well. Importantly, Alpha does not provide any meaningful distinction or explanation why this language in Romero should not apply equally to special employees.

9 Larson’s Workers’ Compensation Law states that:

The reason for the employer’s immunity is the quid pro quo by which the employer gives up its normal defenses and assumes automatic liability, while the employee gives up his or her right
to common-law verdicts. This reasoning can be extended to the tortfeasor coemployee, who also is involved in this compromise of rights. Perhaps, so the argument goes, one of the things the coemployee is entitled to expect in return for what he or she has given up is freedom from common-law suits based on industrial accidents in which that coemployee is at fault.

6 Arthur Larson, Larson’s Workers’ Compensation Law § 111.03[2], at 111-12 to -13 (2005).

{10} Stated another way, liability for workers’ compensation benefits “runs up the ladder” but “not down.” Thompson v. Mehlhaff, 698 N.W.2d 512, 518 (S.D. 2005). The special or statutory employer is on the hook to provide benefits to an employee, and therefore receives the quid pro quo of immunity from suit from special or statutory employees. See id. (stating that the general contractor receives immunity because it is the “back-up provider of worker’s compensation coverage”). However, the same is not true of employers of either statutory employees or special employees. In cases where an employee of a general contractor or a subcontractor sues another subcontractor in negligence, the majority of jurisdictions hold that the subcontractor being sued is a third party amenable to suit. Id. The reason, as stated in Larson’s, is that while the general contractor has a statutory liability to the subcontractor’s employee, the subcontractor has no comparable statutory liability to the general contractor’s employee. Larson, supra, § 111.04[2] - [3] (2002) (footnote omitted). In short, immunity follows responsibility to pay compensation under the Act.

{11} Similarly, a special employer has a workers’ compensation liability to the direct employer’s employees, and therefore receives the quid pro quo of immunity from suit. However, direct employers—such as Alpha and Technadynex here—have no comparable liability to each other’s employees, or to the employees of other subcontractors, and therefore are not entitled to the quid pro quo of immunity from suit. In this case, Sandia, as the special employer of both Plaintiff and Alpha’s employees, has a potential liability to each for workers’ compensation benefits, and therefore is afforded protection from suit as the special employer. However, Alpha has no comparable liability to Technadynex or Plaintiff, and therefore is not entitled to the quid pro quo of immunity from suit. Applying this rationale to the present case, and considering our holding in Romero, we conclude that the subcontractor or direct employer, in this case Alpha, who neither provided nor was required to provide insurance protections for employees of Technadynex, is not entitled to immunity from suit under the exclusivity provisions of the Act. This outcome comports with Larson’s explanation of who are generally considered “persons in the same employer,” Larson, supra, § 111.03[4]. Referring to persons such as Alpha’s and Technadynex’s employees, Larson notes:

A lent employee is a coemployee of the employer’s employees if the conditions of lent employment are met. But subcontractors on the same project and their employees are not immune as coemployees of an employee of the general contractor, nor is a wholly owned subsidiary of the corporate employer, conducting business for the employer. The employee of a general contractor or higher-tier subcontractor may be immune as a coemployee from suit by an injured employee of a lower-tier subcontractor, however.

Larson, supra, § 111.03[4][e], at 111-18 to -19 (footnotes omitted).

{12} Alpha argues that the district court’s grant of summary judgment should be upheld because the plain language of the Act and the purpose of the Act support a finding that special employees are co-employees for purposes of the Act. According to Alpha, to hold otherwise eliminates rights conferred to by the Act, and goes against the policy enunciated by the Legislature in the Act. We disagree.

{13} The plain language of the Act does not provide for immunity between special employees and direct employers of other special employees. In addressing this issue, Larson notes that the typical workers’ compensation statute:

takes all the time and words it needs to say precisely what it means. If it wants to say that the employer is immune from common-law suit, it says so in plain English. If it wants to go further and say that coemployees shall also be immune, it is easy enough to say that in plain English also. And if it wants to go still further and say that all contractors, subcontractors and their employees on the same project are immune, the English language is quite capable of rising to the task of expressing that intention in unmistakable terms. Why then, when a statute has gone no further than the first of these three types, should courts take it on themselves to announce that the legislature really meant to say what is contained in the second type, or even the third type? Larson, supra, § 111.04[3], at 111-44 (footnote omitted). The plain language of our Act goes as far as the second of these types. It does not, however, support Alpha’s position that special co-employees are afforded protection under the exclusivity provisions or the dissent’s “umbrella of immunity” for all workers on the same project. Absent express language in the Act, and agreeing with existing precedent, we conclude that the holding in Romero is applicable in this case. We therefore hold that Alpha and Plaintiff are not co-employees for purposes of the Act. Alpha is not entitled to protection from common law suit by Plaintiff under the exclusivity provisions of the Act, and therefore we remand for proceedings consistent with this opinion. Since we remand on this issue, we do not need to address Plaintiff’s other claims of error in the grant of summary judgment.

{14} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Chief Judge

I CONCUR:
LYNN PICKARD, Judge
RODERICK T. KENNEDY, Judge (dissenting)
KENNEDY, Judge (dissenting).

{15} Where liability may go up and down the metaphorical ladder, the majority will not let it do so if employees are on different ends of a rung. I would decline to open tort liability between co-employees of a general contractor, where the general contractor is arguably the special employer of the employees of any number of subcontractors, who themselves are apparently required to obtain coverage under the Workers’ Compensation Act.

{16} Plaintiff and Alpha do not have an employment relationship under the Act. Alpha has not insured against its liability to pay compensation benefits to Plaintiff should it injure her. Current case law only deals with but one rail of the metaphorical ladder. For example, Harger involved the distinction between independent contractors and employees, where injured workers...
were trying to pursue remedies and liability up the ladder. Harger, 121 N.M. at 667, 916 P.2d at 1334. Another example is Chavez, where the general contractor was attempting to extend immunity from all persons down the ladder, and the case between the plaintiff and the other contractor had settled. 1996-NMSC-046, ¶¶ 1-3, ¶ 2 n.1. These single rail cases do not reflect the current state of business where a general contractor or large special/statutory employer may employ many subcontractors to handle different aspects of its work, requiring all to procure compensation coverage under the Act, or doing so itself. The question of first impression is whether an employee, covered by her special employer under the Act, can proceed in tort against another special employee only because that contractor, who is also an employee, did not procure workers’ compensation coverage for injuries to employees who were not their own.

{17} “The Act provides the exclusive remedy against employers for employees injured on the job.” Vigil, 1996-NMCA-100, ¶ 7. “[A] practical objective served by these statutes is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers.” Chavez, 1996-NMSC-046, ¶ 17 (internal quotation marks and citation omitted). Chavez applies this to the hierarchy of general and subcontractors; I see no reason that it should not apply to all parallel hierarchies of employment.

{18} Workers can have multiple employers, each of which is immune from suit. Rivera, 118 N.M. at 677, 884 P.2d at 833. In this case, both Plaintiff and Alpha are employees of Sandia. Employees of the same employer are as immune as the employer from any cause of action that would be covered under the Act, as long as the employer is insured under the Act. Sections 52-1-6(E), -8. The payment for insurance under the Act by an employer, whether directly or indirectly through a contractor, triggers the immunity. Vigil, 1996-NMCA-100, ¶ 8.

{19} I cannot agree to establishing third-party tort liability against Alpha for Plaintiff’s benefit. Because Alpha is a contractor, I believe Alpha is also a special co-employee. Even under the current scheme, Sandia or its insurer would be entitled to reimbursement for any damages it paid to Plaintiff (if Plaintiff were to recover from Alpha). See, e.g., Matkins, 93 N.M. at 513, 602 P.2d at 197. However, while Matkins deals with liability of third parties, Alpha, Technadyme, and Plaintiff are all employed by Sandia. Within an employment relationship, where Sandia is ultimately responsible for benefits, there is no reason to institute a new system of third-party liability within the umbrella of Sandia’s coverage. All co-employees enjoy immunity under the Act. “[O]ne of the things the coemployee is entitled to expect in return for what he or she has given up is freedom from common-law suits based on accidents in which that coemployee is at fault.” Larson, supra, § 111.03[2]; see also § 52-1-6(E), -8. Emphasizing that liability “runs up the ladder” but “not down,” the majority have failed to acknowledge that the relationship between Plaintiff and Alpha is horizontal across the rungs. Maj. Op. ¶ 10. Both look up, Plaintiff for benefits, Alpha for relief from liability.

{20} Here, the majority wants to regard Alpha as outside the umbrella of immunity between co-employees because the Act does not specifically include parallel subcontractors as “co-employees” in order to confer immunity under the Act. Maj. Op. ¶ 13. However, all workers give up the right to claim damages in tort under the Act as their part of the quid pro quo of employment with covered employers like Sandia. When neither the subcontractor nor the general contractor in a purely vertical case has provided workers’ compensation insurance coverage, the injured employee may sue under the Act or, alternatively, sue in tort. Harger, 121 N.M. at 666, 916 P.2d at 1333. Contractual relationships in a big operation can extend to many subcontractors, and all of whose employees can be special employees of the top contractor. Absent the majority’s reliance on Larson as a shibboleth for allowing parallel subcontractors to be sued in tort, there is no basis for doing so. The majority’s reliance upon a lack of inclusion in the statute, also based on Larson, is likewise no reason to assume an exclusion of subcontractors, particularly when they are co-employees.

{21} The majority also conveniently ignore the workers’ explicit sacrifice of a remedy in tort for presumptive coverage for injuries sustained at work. See § 52-1-6 (C), (D) (worker is presumed to accept provisions of the Act and agree to forego all tort remedies if his or her employer is covered under the Act). When the employee who is injured at work is covered under the Act, and an employer provides coverage, the language of the Act provides an exclusive remedy for workers injured on the job. See id. “[E]xclusive” should be just that. Coverage should extend from the general special employer to the bottom of every hierarchy - if the “plain language” of the Act failing to contain specific reference to subcontractors, their employees, or “special co-employees” is all we have to go on, the majority’s discussion where Alpha is subject to third-party liability because they did not specifically insure is unnecessary. It is included just to create a distinction without a difference. The Act itself makes self-insuring against inter-employee liability superfluous by giving immunity to co-employees.

{22} My reading of the Act says that all special co-employees enjoy among themselves the special employer’s immunity from suit as long as that special employer has complied with the Act, and all co-employees are doing the master’s bidding. Whether that co-employee is direct, special, lent, or statutorily employed, or a natural, corporate or otherwise legally-defined person, is not material. If Plaintiff, as Sandia’s employee, had slipped and fallen on the job in a puddle left by Sandia’s own janitor, the result should be no different. The majority, however, would allow third-party liability against Sandia’s janitorial service. Sections 52-1-6(E), -8, are sufficiently specific to make exclusive remedies and immunity from suit apply between co-employees of any stripe. Alpha, as a co-employee under the Act, has as much a right to look “up the ladder” to ensure its immunity from suit as Plaintiff has the right to payment of benefits under the exclusive provisions of the Act.

RODERICK T. KENNEDY, Judge
Certiorari Denied, No. 29,994, September 18, 2006

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-122

STATE OF NEW MEXICO, Plaintiff-Appellee, versus JACKLYN KOVACH, Defendant-Appellant. No. 25,274 (filed: August 7, 2006)

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY SILVIA CANO-GARCIA, District Judge

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Attorney General
ANN M. HARVEY
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

JOHN BIGELOW
Chief Public Defender
WILL O’CONNELL
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

OPINION

JONATHAN B. SUTIN, JUDGE

{1} Defendant Jacklyn Kovach appeals her conviction on two counts of embezzlement over $2500, in violation of NMSA 1978, § 30-16-8 (1995). Defendant asserts that there was insufficient evidence that she was entrusted with the pre-signed checks which were the instrumentality of the embezzlement. She also argues that the alleged conversion of funds occurred in Texas, not New Mexico, and that if there were a crime, it was not subject to prosecution in New Mexico. We agree that there was insufficient evidence of entrustment and reverse. Because we reverse based on the first issue, we do not reach Defendant’s second issue.

BACKGROUND

{2} Defendant worked for the accounting department of Ace Conditioning Experts (ACE), located in Sunland Park, New Mexico. Rick Bacchus was one of several owners, and was the chief operating officer and vice president of ACE. His wife, Phyllis Bacchus, was the office manager for ACE and supervised the accounting department. Defendant’s responsibilities included helping Mrs. Bacchus with payroll, performing data entry, printing checks for payroll and accounts payable, preparing cash receipts, writing up deposits, making bank deposits, cashing petty cash checks for the company, filing payroll items in a locked personnel filing cabinet, and writing memos. When Defendant would print checks she would then take them to Mrs. Bacchus for signature. Only Mr. and Mrs. Bacchus were authorized to sign checks for ACE.

{3} Mrs. Bacchus kept a filing cabinet in the accounting department, which contained employee files, titles, records, and payroll materials. The filing cabinet was kept locked. There is a discrepancy in the testimony as to whether only Mrs. Bacchus had a key or whether Federico Ramirez, another employee, also had a key to the filing cabinet. Only Mrs. Bacchus, Defendant, and Mr. Ramirez were allowed access to the filing cabinet. Defendant, as part of her duties, filed copies of checks and letters to employees in the filing cabinet; however, in order to do so, Defendant would ask Mrs. Bacchus for the key.

{4} When the Bacchuses would both leave town, they would leave pre-signed but otherwise blank checks with Mr. Ramirez and instruct him to keep the checks safe. Mr. Ramirez stored the pre-signed checks in the locked filing cabinet. Mrs. Bacchus was not certain, but she assumed that Mr. Ramirez kept the pre-signed checks in the locked filing cabinet, and Mr. Bacchus was not sure as to where the pre-signed checks were kept. Mrs. Bacchus testified that Defendant had “access” to ACE’s bank account and was “entrusted” with the contents of the locked filing cabinet. However, Mrs. Bacchus also testified that Defendant was not “entrusted” with the pre-signed checks and that she was not “supposed to have them.”

{5} Defendant was charged with embezzlement contrary to Section 30-16-8. Defendant was accused of taking two of the pre-signed checks from ACE, filling out each check to include an amount and a payee, and then enlisting the help of accomplices in El Paso, Texas to cash the checks.

{6} At the completion of the State’s case, Defendant moved for a directed verdict, arguing that there was insufficient evidence to establish the entrustment element of embezzlement because there was no evidence that Defendant had been entrusted with the checks that she was accused of embezzling. The district court denied the motion for directed verdict, stating that the question of entrustment is one for the jury and that there was evidence that Defendant was “either entrusted with the contents of the filing cabinet which would include, arguably, presigned checks, and/or [Defendant was] entrusted with the finances of the company because of her position as being the one who types and writes out checks of various natures for the business.” In support of the directed verdict motion, Defendant also argued that New Mexico lacked jurisdiction because the checks were cashed in Texas and the checks had no monetary value until that time. The court denied the motion on this ground because the court found that sufficient actions were taken in New Mexico.

DISCUSSION

Standard of Review

{7} A motion for a directed verdict challenges the sufficiency of evidence . . . . In reviewing for the sufficiency of the evidence, the question is whether substantial evidence exists of either a direct or circumstantial nature to support a verdict of guilty beyond a reasonable doubt with respect to each element of the crime. The evidence is viewed in the light most favorable to the verdict and all conflicts are resolved in favor of the verdict.


There was Insufficient Evidence of Embezzlement

{8} On appeal, Defendant asserts that the State did not prove entrustment, which is an element of embezzlement, in that it did not prove Defendant was in lawful possession of the property when she converted it to her own use. She asserts that “[n]either the checks, nor the ability to access funds, had been ‘committed or surrendered’ to
had turned the device over to the defendant possession of the device because the State was in a position of trust, which established had implied authority over the checks and the various funds.

tempt to cross-audit or even cross-check available to him.

those records that the defendant . . . made of the records every five or six months, checks” and making a cursory examination of the records every five or six months, checks or the bank account. Nor was Defendant in a position of authority over the bank account or the pre-signed checks. She could not sign checks and she was not given possession of the pre-signed checks.

Defendant only had access to the pre-signed checks because Mr. Ramirez stored them in the filing cabinet.

However, more as in Stahl where the defendant was in charge of the store but not entrusted with the drop-box, and more particularly as in Batin where the defendant was given access to the inside of the slot machine but was not entrusted with the currency in the machine, in the present case, Defendant had access to the filing cabinet but she was not given dominion over the pre-signed checks within the filing cabinet. “[A] showing that a defendant was given mere access to the property converted is insufficient.” 26 Am. Jur. 2d Embezzlement § 23 (2006).

It is not enough that Defendant was in a position of trust as an employee, or had access to the filing cabinet in which the pre-signed checks were kept. Defendant had access to the pre-signed checks solely because of her access to the filing cabinet for other specific purposes. Mrs. Bacchus entrusted and gave control of the pre-signed checks to Mr. Ramirez only, thereby expressly not entrusting the checks to Defendant. Although Defendant would fill out checks as part of her duties, Mrs. Bacchus had to sign them after they were filled out. Defendant had no discretion or authority in regard to pre-signed checks. We hold that there was insufficient evidence of entrustment. Because we find the entrustment issue dispositive, we do not reach Defendant’s second point on appeal.

CONCLUSION

The judgement and sentence entered by the district court is reversed and the case is remanded for entry of a judgment of acquittal as to the embezzlement charges.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge
MICHAEL E. VIGIL, Judge
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Precise and Conscientious Legal Research Terence Grant. Qualifications: J.D. (magna cum laude) and J.C.L. canon law (magna cum laude). 3 years experience as litigation attorney. Full-time research for New Mexico attorneys since 1997. My resources include LEXIS and the State Supreme Court Law Library. Phone: 505-989-4173. Fax: 505-989-8619.

Transcriptions
For your tape, CD and digital transcription needs, call Legal Beagle @ 883-1960

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Backgrounds, locate people, asset searches, military, civil and much more. Affordable rates. Confidential. Call 24 hours/7 days 1-800-250-8885, USRECORDSEARCH.COM

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For Sale
Conference room table for sale, app. 6 1/2 by 3 feet. 6 adjustable chairs, $700; two conference room-type framed art pieces. Call 830-0600 to inquire.

For Sale
New Mexico Reports Volumes 1 through 138 and complete set of New Mexico Statutes. Please contact 242-9982.

Xerox Copier

Desk
5 Drawer Medium Oak Executive Desk for sale. $300. 30” H, 67” W, 37”D. Call 821-8817.
REGISTRATION – The Cybersleuth’s Guide to the Internet
Wednesday, December 6, 2006
State Bar Center, Albuquerque
6.0 General CLE Credits

Presenters: Carole Levitt, Esq. & Mark Rosch

Join these two successful authors on Internet research as they show you time-saving and cost-effective ways to use the Internet to find the information you need – when you need it. Levitt and Rosch have written numerous articles and books about Internet research to include their recently updated ABA publication, The Lawyer’s Guide to Fact Finding on the Internet, and the text included for this course, Cybersleuth’s Guide to the Internet: Conducting Effective Investigative and Legal Research on the Web. If you are interested in learning more about using the Internet for FREE research and you want to learn how to use some of the same tools as skip tracers & private investigators, this is a seminar you won’t want to miss.

8:30 a.m. Registration
9:00 a.m. Search Like a Pro by Learning Super Search Strategies
How do search engines work? Which search engines are the best? Which search strategies are best?
10:00 a.m. How the Internet REALLY Works and How to Make It Work for You
What is the invisible Web? How does it differ from the Visible Web? Where do Web pages come from? Where do old Web pages go (and how do you track them down)?
10:30 a.m. Break
10:45 a.m. Learn Browser Tricks, Tool Bar Tips, And Desktop Search Techniques
11:15 a.m. Skip-Tracing: Locating People
Find Missing People and Witnesses. Discover phone numbers, addresses, and neighbors.
Noon Lunch (provided at the State Bar Center)

1:00 p.m. Unearth Background Information About People
Find out How to Dig Up Dirt About Anyone
Uncover Information to Attack Someone’s Credibility
Seek out the Smoking Gun
Mine the Web for information
Locate aliases, employer names, political persuasion
Glean Personal Information from user postings, google, free newspaper and magazine archives.
Locate experts
2:30 p.m. Break
2:45 p.m. Investigative Research: Free Public Records and More – National and New Mexico
Discover Quick and Easy Methods to Access Public Records including birth & death records, social security numbers, liens, judgments, UCCs, bankruptcies, dockets, business ownerships, criminal backgrounds, professional licenses, marriage & divorce records, gravesites & obitutuaries, property records, and low cost public record and investigative databases.
4:30 p.m. Adjourn
2006 Paralegal Institute
State Bar Center, Albuquerque
Monday, December 11, 2006
5.7 General and 1.0 Ethics CLE Credits
Paralegals $99
Co-Sponsor: Paralegal Division

8:00 a.m.  Registration
8:30 a.m.  Legal Research, Part I: Real World Legal Research in the Internet Age: First Decade Recap and Future Trends
           Robert Mead, New Mexico Supreme Court Law Librarian
           2:30 p.m.  Break
           2:45 p.m.  Break Out Sessions

10:00 a.m. Break
10:15 a.m. Legal Research, Part II
           Robert Mead

Noon    Lunch (provided at the State Bar Center)
1:00 p.m. Break Out Sessions
           Electronic Court Access and E-Filing Using the Internet
           Stephen T. Wright, Project Manager, CM/ECF, U.S. District Court
           Wills, Trusts, and Estate Administration for Paralegals – An Introductory Guide to Probate and Estate Planning
           Patricia McMillan, AVP, CTFA, Wells Fargo Bank
           3:45 p.m.  Break
           4:00 p.m.  Ethical Essentials for the Paralegal/Lawyer Team
           Leigh Anne Chavez, Esq., Instructor, Paralegal Studies, CNM

2:30 p.m.  Power Point for Litigation Paralegals
           Dai Nguyen, Chair, Paralegal Studies, Central N.M. Community College

2:45 p.m.  Break

3:00 p.m.  Break Out Sessions
           Casemaker
           Veronica Cordova, Assistant Director, Administration, State Bar of New Mexico
           Employment Law in a Nutshell
           Agnes Padilla, Esq., Butt Thornton & Beahr PC
           Business Organizations: A Primer
           Suzanne Odom, Esq., White, Koch, Kelly & McCarthy, P.A.
           5:00 p.m.  Adjourn

REGISTRATION – 2006 Paralegal Institute
Monday, December 11, 2006 • State Bar Center, Albuquerque
5.7 General and 1.0 Ethics CLE Credits
Paralegals - $99

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The Narvaez Law Firm, P.A. is pleased to announce the opening of a Las Cruces office!

Raúl A. Carrillo, Jr. and the Hon. Larry Ramirez (Ret.) will staff the Las Cruces branch of the firm located at the corner of Lohman Ave. and Espina St.

The Physical Address is:

937 East Lohman Avenue
Las Cruces, New Mexico 88001

and new Las Cruces mailing address is:

P.O. Box 457
Las Cruces, New Mexico 88004

Las Cruces phone number: (505) 647-3200
Las Cruces fax number is: (505) 647-1463

The firm will continue to practice in the areas of civil rights, labor and employment, business and commercial litigation, and insurance defense.

Thank you to our clients, and the members of the Bar in southwestern New Mexico for their warm welcome and kind wishes.