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2006-NMSC-050, No. 29,183: State v. Bernal
2006-NMSC-051, No. 30,039: Johnson v. Vigil-Giron
2006-NMCA-129, No. 25,930: Bankers Trust Co. v. Woodall
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Special Insert:

New Mexico Lawyer
Equal Access to Justice:
Unlocking Doors

2007 State Bar Budget Disclosure
Available online at www.nmbar.org
Printed copies available upon request
See the Oct. 30 Bar Bulletin.

www.nmbar.org
THE "LAST CHANCE" SEMINAR
THE BEST OF THE BEST
Half-Day of Video Highlights of Top Rated Speakers
Professionalism Option

NEW MEXICO TRIAL LAWYERS' FOUNDATION

4.8 CLE CREDITS
INCLUDING 2.7 GENERAL, 1.0 ETHICS PLUS 1.1 PROFESSIONALISM CREDIT OPTION

DECEMBER 15, 2006

ALBUQUERQUE
UNM Continuing Education Conference Center
1634 University Blvd. NE
G&H Classrooms

SANTA FE
Ghost Ranch in Santa Fe
401 Old Taos Highway
Perea Room

Program Schedule

8:00 a.m.  Check-in/Registration
8:30 a.m.  Insurance Roundup
            Maureen Sanders, Esq.
9:30 a.m.  Punitive Damages:
            The World After State Farm v. Campbell
            Ronald Morgan, Esq.
10:15 a.m. Immunities We Don’t Know and Won’t Love
            Ray Vargas, Esq.
10:45 a.m. Current Issues Involving Minors
            and Statutes of Limitations
            David Jaramillo, Esq.
11:15 a.m. Ethical Scenarios
            Ethical Dilemmas and a Lawyers Duty
            Lawyer Panel
12:15 p.m. Adjourn

Additional Option

1:00 p.m.  Current Professional Scenarios
            Professional scenarios presented to the audience for
            solutions and discussion with the panel.
            Lawyer Panel
2:10 p.m.  Adjourn

Please return to: New Mexico Trial Lawyers’ Foundation
P.O. Box 301, Albuquerque, NM 87103-0301

Location:   ☐ Albuquerque  ☐ Santa Fe
TUITION (After December 8, 2006 increases by $10)
I am an NMTLA Member and want to register for the:
☐ Program Only (8:30 a.m. - 12:15 p.m.) ........................................... $70.00
☐ Program PLUS Professionalism Option (8:30 a.m. - 2:10 p.m.) .......... $110.00
☐ Professionalism Option Only (1:00 p.m. - 2:10 p.m.) ...................... $50.00
I am an NON NMTLA Member and want to register for the:
☐ Program Only (8:30 a.m. - 12:15 p.m.) ................................. $95.00
☐ Program PLUS Professionalism Option (8:30 a.m. - 2:10 p.m.) ......... $135.00
☐ Professionalism Option Only (1:00 p.m. - 2:10 p.m.) ...................... $60.00
I am an JUDGE and want to register for the:
☐ Program Only (8:30 a.m. - 12:15 p.m.) ........................................... $70.00
☐ Program PLUS Professionalism Option (8:30 a.m. - 2:10 p.m.) .......... $110.00
☐ Professionalism Option Only (1:00 p.m. - 2:10 p.m.) ...................... $50.00
I am an JUDICIAL CLERK and want to register for the:
☐ Program Only (8:30 a.m. - 12:15 p.m.) ........................................... $70.00
☐ Program PLUS Professionalism Option (8:30 a.m. - 2:10 p.m.) .......... $110.00
☐ Professionalism Option Only (1:00 p.m. - 2:10 p.m.) ...................... $50.00
I am an APPELLATE LAW CLERK and want to register for the:
☐ Program Only (8:30 a.m. - 12:15 p.m.) ................................. $70.00
☐ Program PLUS Professionalism Option (8:30 a.m. - 2:10 p.m.) ......... $110.00
☐ Professionalism Option Only (1:00 p.m. - 2:10 p.m.) ...................... $50.00

Payment ☐ Check Enclosed ☐ Visa ☐ MasterCard ☐ Amex
To register with a credit card complete registration form including credit card
information and fax form to 243-6099 or call 243-6003.

Card No. ____________________________
Exp. Date: ___________ CVC Code: ___________
Billing Address: ____________________________
City/State/Zip: ____________________________
Signature ____________________________
(cardholder signature required)
In Practice: ☐ Less than 5 years ☐ 5-10 years ☐ Over 10 years
Name ____________________________
NM Bar ID No. ____________________________
Firm ____________________________
Mailing Address ____________________________
City/State/Zip: ____________________________
Phone: ____________________________
Fax: ____________________________
E-mail ____________________________
Get Involved in
State Bar Committees

By joining you will:

• Help Strengthen the Legal Profession
• Work on Legal Causes of Interest
• Increase Access to the Legal System

Each year the State Bar president appoints members to committees that accomplish these goals. Review
the descriptions and complete the form below to request an appointment.

Please check the committee(s) you wish to join.

☐ Alternative Methods of Dispute Resolution (ADR) – Promotes and provides legal education and training in the use of alternative dispute resolution processes.

☐ Delivery of Legal Services to People with Disabilities – Provides information and assistance to ensure access to counsel for persons who have a disability.

☐ Diversity in the Legal Profession – Promotes opportunities for minorities in the legal profession and encourages participation by minorities in bar programs and activities.

☐ Ethics Advisory – Assists attorneys with interpretation and application of the Rules of Professional Conduct.

☐ Historical – Acquires, maintains and submits for publication historical information relating to the bar.

☐ Issues Facing the Profession Committee – Addresses current topics facing the legal profession and how the State Bar might respond.

☐ Law Office Management – Develops and provides resources for attorneys, especially solo and small firm practitioners and young lawyers, to more effectively manage law practices.

☐ Lawyers Assistance – Provides confidential peer assistance to State Bar members in need of help because of substance abuse, mental illness or emotional distress.

☐ Lawyers Professional Liability – Advises the State Bar regarding risk management activities.

☐ Legal Services and Programs – Facilitates cooperation and coordination of the legal services provided by various segments of the legal community and focuses on access to justice issues.

☐ Membership Services – Evaluates and makes recommendations regarding in-house programs. Advises the State Bar on alliance program agreements with vendors of products and services.

☐ New Mexico Medical Review Commission: Attorney and physician panel members screen medical malpractice claims.

☐ Public Legal Education – Provides information and education about the legal profession, the law and services available through the State Bar and other law-related entities.

☐ Quality of Life – Examines issues such as depression, dissatisfaction and balance in order to provide recommendations that will help to alleviate the stress of modern law practice.

☐ Technology Utilization – Assists with the development and promotion of electronic technology applications for the legal profession.

☐ Women and the Legal Profession – Addresses issues affecting women as lawyers and judges and monitors substantive issues of women served by the legal system.

Name: _____________________________________________

Address: ___________________________________________

City/State: ______________________ Zip: ___________

Telephone: _______________ Fax: _______________

E-mail: __________________________

Mail To: State Bar of New Mexico,
Membership and Communications Department,
PO Box 92860, Albuquerque, NM 87199-2860
Fax: (505) 828-3765
Request by E-mail: membership@nmbar.org
SEMINAR REGISTRATION FORM
CLE PROGRAMS - State Bar Center

DECEMBER 12 - VIDEO REPLAYS

Immigration Fundamentals:
Keeping Families Together
State Bar Center
Tuesday, December 12 • 9:00 a.m. – Noon
3.0 General CLE Credits
$109

Diversity - Why Bother? Can We Find Answers in Ethics and Professionalism?
State Bar Center
Tuesday, December 12 • 2:00 – 4:00 p.m.
1.0 Ethics & 1.0 Professionalism CLE Credits
$79

Lurking Dangers and What Lawyers Should Know About the New Mexico Real Estate Contract
State Bar Center
Tuesday, December 12 • 9:00 a.m. – 10:00 a.m.
1.0 General CLE Credits
$49

Pro Se Can You See
State Bar Center
Tuesday, December 12 • 10:30 a.m. – 12:30 p.m.
1.0 Ethics & 1.0 Professionalism CLE Credits
$79

Avoiding and Resolving Fee Disputes: What You Must Do; What You Should Do
State Bar Center
Tuesday, December 12 • 1:00 – 4:00 p.m.
1.0 General, 1.0 Ethics, 1.0 Professionalism CLE Credits
$109

Animals: Our Laws, Their Lives!
State Bar Center
Tuesday, December 12 • 9:00 a.m. – 3:00 p.m.
5.4 General CLE Credits
$179

Bridge The Gap 2006
State Bar Center
Tuesday, December 12 • 8:30 a.m. – 4:30 p.m.
5.5 General, 1.0 Ethics, & 1.0 Professionalism CLE Credits
$239

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 __________________________

Name ____________________________________________
NM Bar # _____________________________________
Street ___________________________________________
City/State/Zip ___________________________________
Phone ___________________ Fax __________________
E-mail __________________________________________
Professionalism Tip

With respect to parties, lawyers, jurors and witnesses:
I will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

Meetings

December

4
Attorney Support Group,
5:30 p.m., First Methodist Church

6
Employment and Labor Law Section
Board of Directors, noon, State Bar Center

6
Membership Services Committee,
noon, via teleconference

7
Health Law Section Board of Directors,
noon, State Bar Center

8
Board of Editors,
8:30 a.m., State Bar Center

13
Children’s Law Section Board of Directors,
noon, Juvenile Justice Center

13
Criminal Law Section Board of Directors,
noon, State Bar Center

13
Quality of Life Committee,
noon, State Bar Center

State Bar Workshops

December

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

7
Consumer Debt/Bankruptcy Workshop,
5:30 p.m., Branigan Library, Las Cruces

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227, or visit the SBNM Web site, www.nmbar.org.
N.M. Supreme Court
2006 Holiday Closures
All judicial branch courts and agencies will be closed on Dec. 22 and Dec. 29 from 1 to 5 p.m.

2007 Legal Public Holidays
The following legal public holidays will be observed by the judicial branch of government in 2007.

New Year’s Day will be observed on Jan. 1
Dr. King’s Birthday will be observed on Jan. 15
President’s Day will be observed on Nov. 23
Memorial Day will be observed on May 28
Independence Day will be observed on July 4
Labor Day will be observed on Sept. 3
Columbus Day will be observed on Oct. 8
Veterans’ Day will be observed on Nov. 12
Thanksgiving Day will be observed on Nov. 22
Christmas Day will be observed on Dec. 25

Address Changes
All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information should be e-mailed to the Supreme Court at suprvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 92648 Albuquerque, NM 87199-2648.

Board of Legal Specialization
Comments Solicited
The following attorneys are applying for recertification as specialists in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon any of the applicant’s qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Fred Abramowitz
Natural Resource/Water Law
Barbara G. Stephenson
Employment and Labor Law
Donald E. Swaim
Taxation Law
John W. Utton
Natural Resource/Water Law
Laurie A. Vogel
Employment & Labor Law

Judicial Performance Evaluation Commission
Upcoming Meeting
The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluation also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next meeting will be from 8 a.m. to 5 p.m., Dec. 8, at the State Bar Center. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

Law Library
Open Monday–Friday, 8 a.m.–6 p.m.
Closed Saturdays and Sundays
Holiday Closures:
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; Website: www.supremecourtlawlibrary.com.

The Rules of Civil Procedure Committee is considering whether to recommend proposed amendments to the Rules of Civil Procedure for the District Courts for the Supreme Court’s consideration.

Rule 1-050: Comments must be received by the Clerk on or before Dec. 11 to be considered by the Court. For reference, see the Nov. 20 (Vol. 45, No. 47) Bar Bulletin.

Rule 1-088: Comments must be received by the Clerk on or before Dec. 18 to be considered by the Court. For reference, see the Nov. 27 (Vol. 45, No. 48) Bar Bulletin.

The Rules of Criminal Procedure Committee is considering whether to recommend proposed amendments to the Rules of Criminal Procedure for the District Courts for the Supreme Court’s consideration.

Rule 5-501: Comments must be received by the Clerk on or before Dec. 11 to be considered by the Court. For reference, see the Nov. 20 (Vol. 45, No. 47) Bar Bulletin.

Rule 5-604: Comments must be received by the Clerk on or before Dec. 18 to be considered by the Court. For reference, see the Nov. 27 (Vol. 45, No. 48) Bar Bulletin.

To comment on the proposed amendments before they are submitted to the Court for final consideration, send written comments by the dates indicated to:
Kathleen J. Gibson, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, New Mexico 87504-0848

First Judicial District Court
Destruction of Exhibits
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 1975 to 1989, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning Oct. 19 to Dec. 28. Attorneys who have cases with exhibits should verify exhibit information with the Archives and Special Services Division, (505) 841-7596/5452, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel of record for the defendant(s) and defendant's exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Second Judicial District Court
Destruction of Exhibits
Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy exhibits filed with the Court in 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, included 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 of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Fifth Judicial District Court Retirement Reception
The judges and employees of the 5th Judicial District Court cordially invite the legal community to attend a retirement reception to honor Court Administrator Jean Willis for 60 years of service to the judiciary. The reception will be from 2 to 4 p.m., Dec. 8, at 400 N. Virginia, Chaves County Courthouse, Roswell.

U.S. District Court for the District of New Mexico Proposed Amendments to Local Civil Rules
Proposed amendments to the Local Civil Rules of the United States District Court for the District of New Mexico are being considered. The proposed amendments are to D.N.M.LR-Civ. 5.5(a) Electronic Filing Authorized, 7.6(a) Timing of and Restrictions on Responses and Replies, 16.1 Joint Status Report, 26(3)(d) Required Initial Disclosure, 83.1(a) Prohibition Against Cameras, Transmitters, Receivers, and Recording Equipment, 83.2 Bar Admissions, Membership and Annual Dues, 83.3 Appearance and Admission of Attorney, 83.4 Entry of Appearance, 83.8 Withdrawal of Appearance, and 83.12 Complaints of Judicial Misconduct or Disability. “Redlined” versions (with proposed additions underlined and proposed deletions stricken out) as well as “clean” versions are posted on the Court’s Web site at www.nmcourt.fed.us. Members of the State Bar may submit comments by e-mail to lrciv@nmcourt.fed.us or by mail to U.S. District Court, Clerk's Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: LRCiv, no later than Jan. 2, 2007.

Replacement of the Initial Pretrial Report (IPTR)
At U.S. District Court, the Initial Pretrial Report in all civil cases is being replaced by a Joint Status Report and Provisional Discovery Plan (JSR). The Court will soon be ordering JSRs, rather than Initial Pretrial Reports, in all civil cases. For more information, including the JSR form, visit the Court's Web site at www.nmcourt.fed.us.

STATE BAR NEWS
Attorney Support Group
The United States trustee will be conducting a brown bag meeting on problems encountered with the completion of the Means Test Form and also an overview of the Debtor Audit System. The meeting will be held at noon, Dec. 8, at 500 Gold Ave, SW, Room 12411, Albuquerque (Creditors Meeting Room). Contact Michele Lombard, Michele.Lombard@usdoj.gov, with questions.

Bankruptcy Law Section
Brown Bag Meeting
The United States trustee will be conducting a brown bag meeting on problems encountered with the completion of the Means Test Form and also an overview of the Debtor Audit System. The meeting will be held at noon, Dec. 8, at 500 Gold Ave, SW, Room 12411, Albuquerque (Creditors Meeting Room). Contact Michele Lombard, Michele.Lombard@usdoj.gov, with questions.

Board of Bar Commissioners
Commission on Access to Justice 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. 11 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. 11 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 Dec. 7 to Dorma Seago, dseago@nmbar.org, or by mail to PO Box 92860, Albuquerque, NM 87199.

Business Law Section Annual Meeting and Business Lawyer of the Year Award
The Business Law Section will hold its annual meeting and reception from 5:30 to 7 p.m., Dec. 6, at the Albuquerque Country Club. Agenda items should be sent to Chair Colin Adams, Colin.Adams@pnmresources.com. The 5th Annual Business Lawyer of the Year Award will be presented at the reception. All section members are invited to attend. Hors d’oeuvres will be served.

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.

Employment and Labor Law Section Board Meetings Open to Section Members
The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, Dec. 6, at the State Bar Center. Lunch is not provided. For information about the section, visit the State Bar Web site, www.nmbar.org., or call Carlos M. Quiñones, section chair, (505) 248-050.

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 Nov. 20 (Vol 45, No. 47) 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 Oral History Project Meeting/Reception
The Senior Lawyers Division board of directors will meet at 4:30 p.m., Dec 21, at the State Bar Center. Excerpts from a DVD oral history of John Robb from the Rodey Law Firm will be shown. All division members and Elder Law Section members are invited to attend. A reception will follow at 5 p.m. R.S.V.P. by Dec. 19 to membership@nmbar.org.

Young Lawyers Division/UNM Mock Interview Program Volunteers Needed
The Young Lawyers Division is seeking 25 volunteer attorneys to serve as interviewers at the 17th Annual Young Lawyers Division-UNM Mock Interview Program. The interviews will be held at the UNM Law School Clinic from 9 a.m. to 1 p.m., Feb. 24. A training session on the “dos and don’ts” of interviewing prospective attorneys will be held preceding the interviews from 8:15 to 8:50 a.m. The program allows UNM law students to experience mock interviews with attorneys from around the state to prepare them for actual interviews, with constructive critiques following. Attorneys are needed from small and large commercial and civil firms, solo practitioners, the district attorney’s office, the public defender’s office and public interest firms. Judge volunteers are also needed. Interested attorneys should contact Briana Zamora at bhzamora@btblaw.com or Martha Chicoski at Martha@robleisrael.com.

Other Bars
Albuquerque Bar Association Annual Meeting Luncheon
Join the Albuquerque Bar Association in honoring its 2006 outstanding judge and lawyer at its annual meeting luncheon at noon, Dec. 5, at the Albuquerque Petroleum Club. New Mexico District Court Judge Linda M. Vanzi (2nd Judicial District) has been named Outstanding Judge and Michael B. Browde has been named Outstanding Lawyer of the Year.

The CLE (1.0 general CLE credit) will be from 1:30 to 2:30 p.m. Gregory Biehler will present New Jury Instructions: Operation, Application and Litigation Strategy.

Lunch only: $20 members/$25 non-members; lunch and CLE: $40 members/$55 non-members; CLE only: $20 members/$30 non-members

Register for lunch by noon, Dec. 4. Register at www.abqbar.com; by e-mail abqbar@abqbar.com; by mail to ABA, 400 Gold SW, Suite 620, Albuquerque, NM 87102; by fax to (505) 842-0287; or call (505) 842-1151 or (505) 243-2615.

American Bar Association Center for Professional Responsibility Michael Franck Award
Applications are now being accepted for the 2007 Michael Franck Professional Responsibility Award. The award spotlights individuals whose career contributions to public service at large firms, solo practitioners, the district attorney’s office, the public defender’s office and public interest firms. Judge volunteers are also needed. Interested attorneys should contact Briana Zamora at bhzamora@btblaw.com or Martha Chicoski at Martha@robleisrael.com.
Inspire public confidence in the legal profession. The 2007 award will be presented during the 33rd National Conference on Professional Responsibility, May 31, 2007 in Chicago, Illinois. The deadline for nominations is Dec. 15. Visit http://www.abanet.org/cpr/awards/franck.html for a nomination form and more information about the award and past recipients or e-mail the Center for Professional Responsibility, cpr@abanet.org.

UNM SCHOOL OF LAW

Library Winter Break Hours

Sun. Dec. 17 Closed
Dec. 18–Dec. 21 8 a.m. to 6 p.m.
Dec. 22–Jan. 2  Closed
Jan. 3–Jan. 5 8 a.m. to 6 p.m.
Jan. 6  9 a.m. to 6 p.m.
Jan. 7  Closed
Jan. 15 Closed
Phone: (505) 277-6236

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.

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.


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

The State Bar of New Mexico

2006-2007

Bench & Bar Directory

Order extra copies online at www.nmbar.org

To request an order form call the State Bar of New Mexico at (505) 797-6000 or e-mail sbnm@nmbar.org

By Veronica Cordova,
Assistant Director of Administration

This month, users are directed to “Attorney Services/Practice Resources” on the State Bar Web site. This area lists various services and resources available to members. A complete listing of resources is provided below.

• Attorney-Firm Finder
• Career Center
• Casemaker
• Client-Attorney Assistance Program (CAAP)
• Commission on Professionalism
• Ethics Advisory Opinions
• Interprofessional Relationships
• Law Office Management
• Lawyers Assistance Committee
• Legal Forms Center
• Lending Library
• Membership Services: State Bar
• Membership Services: Alliance Program Participants
• Mentorship Program
• New Horizons Computer Learning Center
• Products and Services Directory
• Public Information Pamphlets
• Publications
• Risk Management
• Summer Law Clerk Program

Users can bookmark this page so access to information is readily available. Members are encouraged to take advantage of services and resources made available as part of membership benefits. Send comments to vcordova@nmbar.org or call (505) 797-6039. Look for this column next month.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Location</th>
<th>Duration</th>
<th>Contact Information</th>
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</thead>
<tbody>
<tr>
<td>5</td>
<td>21st Annual Bankruptcy Year in Review</td>
<td>State Bar Center</td>
<td>November</td>
<td>Center for Legal Education of NMSBF</td>
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**General (G)**, **Ethics (E)**, **Professionalism (P)**, **Video Replay (VR)**

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 Fe, NM 87504-0848 • (505) 827-4860

Effective December 4, 2006

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PETITION FOR WRIT OF CERTIORARI DENIED:

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### Published Opinions

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COLLABORATIVE PRACTICE
Resolving Disputes Respectfully
The History of Legal Aid Around the Country and in New Mexico

By Sarah Singleton

The first legal aid society in the United States began in 1876 when the predecessor to the New York Legal Aid Society was formed. By 1965 every major city in the United States had a legal aid program.1 New Mexico saw its first legal aid organization in the 1950s when the Legal Aid Society of Albuquerque was formed. By and large the legal aid societies, suffering from lack of resources and a surfeit of eligible clients, provided service to some individual clients but did not have a lasting effect on the low income community.2

In the 1960s legal aid advocates began to envision a new form of organization that would advocate for the poor. This vision included the concepts that law, particularly litigation, could be used as part of an over-all anti-poverty effort to effect “orderly and constructive social change.”3 The 1964 Economic Opportunity Act (OEO) for the first time made federal money available for legal aid for the poor.4 DNA-People’s Legal Services was formed in 1967 and other legal aid programs, including Indian Pueblo Legal Services, were formed in the 1960s under the Office of Economic Opportunity. Under OEO, priority in funding was given for law reform work.

In 1974 Congress passed and President Nixon signed the Legal Services Corporation Act.5 Shortly afterward, Northern New Mexico Legal Services (LSC) was formed by combining the legal aid programs from Santa Fe, Taos and Sandoval counties. By 1981 the budget for LSC had grown to $321.3 million.6 LSC originally carried forward the basic mission of the OEO-funded programs and expansion continued. However, after the election in 1980, federally funded legal services were the subject of hostility, and in 1982 Congress reduced LSC appropriation by almost one-third. In response, the LSC had grown to $321.3 million.6 LSC originally carried forward the basic mission of the OEO-funded programs and expansion continued. However, after the election in 1980, federally funded legal services were the subject of hostility, and in 1982 Congress reduced LSC funding by 25 percent. Dramatic cutbacks included a number of services, the closing of offices and the laying off of staff. Congress also limited representation of certain aliens and imposed requirements on class action work.7

During this era, Interest on Lawyers Trust Accounts (IOLTA) programs were created, which provided some help for legal aid programs; but these new revenues were insufficient to overcome federal cutbacks and inflation. By 1990, there were fewer legal aid advocates than there had been in 1981.8 In New Mexico the number of attorneys working for the programs that now comprise New Mexico Legal Aid went from 68 in 1980 to 38 in 2003.

Again in 1994 federally funded legal aid sustained significant cutbacks when Congress cut LSC appropriation by almost one-third. In response, the legal aid community began to rethink its mission. LSC undertook a program of restructuring which resulted in the consolidation of numerous programs so that the 325 LSC-funded programs in 1995 were reduced to 160 by 2003.4 Four programs (Legal Aid Society of Albuquerque, Indian Pueblo Legal Services, Northern New Mexico Legal Services and Southern New Mexico Legal Services) that existed in 2000 were eventually restructured into one: New Mexico Legal Aid. Other providers were also created to fill the void left by the restrictions placed on the LSC-funded providers.

New Mexico’s efforts to improve the availability of legal aid for low income people were a joint effort by the legal aid providers and the State Bar. In July 1995, the State Bar held the first statewide symposium on issues affecting access to legal assistance for the poor. A State Bar task force created a plan for New Mexico civil legal services and an “access model” for legal services that proposed the elements of a comprehensive system for the provision of a broad range of legal services throughout New Mexico. The access model adopted stressed the critical need for effective use of a helpline model for telephone intake, advice and brief service. The helpline was to work in conjunction with a range of providers which would offer full representation. The access model also emphasized the critical importance of face-to-face representation by staff attorneys and other volunteer members of the Bar. The model, however, documented the fact that (1) there will never be enough staff or volunteer attorneys to provide an attorney for every legal need in low income households; and (2) many low income people, at least initially, want information about their legal need (and, especially, about the consequences if they do nothing) rather than representation.

A 1998 study evaluated the methods for conducting intake, case assessment and brief services in the existing legal services program and reviewed emerging trends in New Mexico and throughout the United States of telephone and technology-based help lines. As a result of this study, a plan was developed to implement a statewide intake, advice and brief service hot-line (later named Law Access New Mexico) to explore funding options to support these services.

In 2001 the Civil Legal Services Act created the Civil Legal Services Fund and the Civil Legal Services Commission (“CLSC”).10 The fund collects money from a surcharge on filing fees in district, metro and magistrate courts. The commission awards contracts to eligible legal service providers assisting low-income New Mexicans in New Mexico. To date, the commission has awarded over $8 million in contracts to support low-income civil legal service providers.

This influx of state funding was insufficient to meet the unmet legal needs of low income New Mexicans. In response, the Supreme Court of New Mexico created the New Mexico Commission on Access to Justice (ATJ) in May 2004 to act as an independent statewide body dedicated to expanding and improving civil legal assistance. Since September of that year the commission has been working on several fronts to improve access to justice, including statewide hearings, the Ten Step Plan for Improving Pro Bono in New Mexico and a recent report to the Supreme Court on the status of access to justice.

In April 2006 the Court entered an order that adopted many of the commission’s recommendations proposed in its April report. Since then, the ATJ Commission, members of the Court, legislators, the State Bar, legal aid providers and other members of the State Bar have been working to implement the Court’s order.

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New Mexico’s Civil Legal Services System

By Richard Spinello

New Mexico has developed a multi-pronged approach to providing civil legal services for its poor population. This approach includes structured legal service providers, private attorneys, leadership and coordination. Legal service providers range from statewide attorney-staffed programs to smaller providers assisting with a specialized legal issue or a particular group of individuals. The private bar is being mobilized under a new ten-step plan for improving access to justice, which will increase the pro bono legal assistance that private attorneys already provide. Leadership and coordination for the legal service system is being directed by the Supreme Court’s Access to Justice Commission, the New Mexico Civil Legal Services Commission and the State Bar of New Mexico. Each piece is a critical part of the civil legal services network.

New Mexico has several statewide legal service providers and referral programs.
- New Mexico Legal Aid provides general civil legal services to low-income individuals in every New Mexico county except San Juan.
- DNA Peoples Legal Services provides general civil legal services to San Juan County and the people on the Navajo and Jicarilla reservations.
- Law Access New Mexico operates a statewide telephone helpline providing advice, brief services and referrals.

Smaller issue-oriented providers are also active.
- Advocacy Inc. assists with uncontested legal guardianship services in Albuquerque.
- The Fair Lending Center provides education, referral, technical assistance, outreach and advocacy to curb predatory lending abuses.
- Legal FACS provides assistance to people representing themselves without the assistance of an attorney and also advocates for victims of domestic violence in Bernalillo and surrounding counties.
- New Mexico Center on Law and Poverty provides legal advocacy to generate systemic improvements to policy, regulations and programs that affect low-income New Mexicans.

Other service providers are focused on specific groups.
- Catholic Charities and Enlace Comunitario provide legal services to immigrants.
- The Lawyer Referral for the Elderly Program assists residents age 55 and older through a legal helpline, referrals to the private bar and community outreach.
- Pegasus Legal Services for Children provides services to children and their families in the greater Albuquerque area.
- Protection and Advocacy serves disabled clients.
- The Senior Citizens Law Office assists elderly people age 60 and over in Bernalillo County.

These providers represent the vast majority of the civil legal assistance available in New Mexico; however, it is not an exhaustive list. Other organizations such as the Albuquerque Bar Association, the UNM Law School, Christian Legal Aid, the CNM Paralegal Law Center and the courts, through pro se services, also provide civil legal assistance.

Another approach includes involvement and coordination of private attorneys, who have traditionally been generous with their time and talents. Rule 16-601 NMRA guides attorney involvement in pro bono publico and charges attorneys with aspiring to render at least 50 hours of pro bono publico legal services per year. The New Mexico Ten Step Plan for Improving Access to Justice calls for a comprehensive coordination which involves the judiciary, establishes judicial district committees, provides for a state-wide legal service coordinator, revises the rules for professional conduct to strengthen pro bono services and to provide MCLE credit, and lastly, expands participation through recruitment, a Web-based pro bono case system and promotion among law students, new lawyers and law firms.

Leadership and coordination are the keys to a successful system as New Mexico seeks to strengthen its commitment to access to justice. Currently, the Supreme Court’s Access to Justice Commission is working on additional recommendations for improving access to justice in New Mexico. The commission is working on a re-draft of the state plan for providing civil legal services and also addressing the issue of self-represented litigants. The state’s Civil Legal Services Commission is distributing money collected through the civil legal services fund to eleven civil legal service providers for projects throughout the state. The State Bar of New Mexico has sought to fulfill its mission, including improving the relationships between the legal profession and the public, encouraging and assisting in the delivery of legal services to all in need of such services and fostering and maintaining high ideals of public service. The State Bar provides financial resources and administrative support for a number of public service programs and projects as a part of the New Mexico State Bar Foundation. Services include two legal helplines and two referral programs, public education workshops and state-wide outreach. The new state-wide legal services coordinator implementing the Ten Step Plan, improving pro bono and coordinating access to justice issues has just begun her work within the State Bar Foundation. That coordinator seeks to improve the delivery of civil legal services by facilitating the integration and coordination of services provided by legal service providers, pro bono programs, local bar associations and private attorneys. The Bar Foundation is also starting a new venture in assisting the Equal Justice Campaign in fundraising within the legal community and other private sources to provide increased funding for civil legal services to low-income people throughout New Mexico.

The Legal Services and Programs Committee of the State Bar has been active in improving access to justice for over a decade. Most recently it provided a pro bono plan to the Access to Justice Commission, which became the basis for the Ten Step Plan. Its current efforts are designed to raise awareness of the need for state funding for civil legal services in New Mexico. It is coordinating a legislative funding effort for the 2007 legislative session.
10 Steps to Better Serve New Mexico’s Poor

By Rosalie Fragoso, Esq.

Early last spring, the New Mexico Supreme Court adopted the recommendations contained in the Ten Step Plan for Improving Access to Justice (the plan), which, as directed by the Court, was submitted by the Commission on Access to Justice. The ten steps are divided into three central elements: 1) involvement of the judiciary, 2) change of the rules, and 3) expansion of pro bono participation.

Step One: Involvement of the Judiciary
The Commission recommends Supreme Court oversight on the plan. Furthermore, the Commission will receive and evaluate reports and requests on the Court’s behalf and will then report its findings. This step resolves issues surrounding central oversight and coordination of a pro bono plan. Lack of oversight and coordination are key reasons other programs have failed.

Step Two: Change of the Rules
Pro bono committees will be established in each judicial district. The chief judge in each district will initially chair the committee or appoint a chairperson. Consequently, by the summer of 2008, 13 pro bono committees will be created. Each committee is required to submit a plan to the Supreme Court addressing the legal needs of its district and how those needs will be met. Of course, no one expects that each legal need of the poor will be met. The vision is to increase awareness within the legal community of the need for increased pro bono service, thereby increasing participation through a coordinated system.

Step Three
The Commission received funding from the New Mexico Legal Services Commission and the State Justice Institute. This funding is currently being utilized to support the pro bono plan implementation within each judicial district. A legal services coordinator (the position I currently hold) was created as part of step three. As of the printing of this article, committees have been formed in the 1st, 2nd, 3rd, 4th, 5th, and 11th judicial districts. The 2000 census indicates that 32,000 people fall below the federal poverty level in the 1st Judicial District, 102,000 in the 2nd Judicial District, 57,000 in the 3rd Judicial District, 12,000 in the 8th Judicial District, and 64,000 in the 11th Judicial District.

Step Four
Coordination of pro se services has been incorporated into a separate committee within the Commission. That committee will present its recommendations to the Commission at a future date.

Steps Five, Six and Seven
These steps concern the revision of rules. Specifically, the proposed revision of Rule 16-601 of the Rules of Professional Conduct requires reporting of pro bono hours and increase in the amount of the suggested contribution as an alternative to providing pro bono assistance to the poor. The suggested contribution component of the proposed rule change allows for a graduated contribution. According to the Commission’s research, states which have adopted required reporting of pro bono hours have experienced a more accurate representation of those providing pro bono services and an increase in pro bono participation by attorneys. Further, a proposed rule change to the MCLE rules seeks to create an incentive for attorneys who provide pro bono work. If the MCLE Board adopts the rule change, one CLE credit for every five 60-minute hours may be awarded up to a maximum of four CLE credits for providing pro bono legal services. Hopefully, these changes will encourage increased direct pro bono work for financially qualified individuals or an increase in financial contributions, used to support pro bono programs.

Step Eight
Once judicial district committees are formed and plans are in place, we can begin recruiting individual attorneys to participate in pro bono services. New Mexico is not lacking in potential pro bono clients, and there must be a pool of attorneys who are willing to help. A coordinated recruitment effort is key to the success of any plan. Attorneys must be willing to assist with the needs of the poor in order for any district’s plan to be a success. Gratefully, many attorneys are already providing pro bono services. These numbers need to be quantified in a central location.

Step Nine
The Commission will assist in establishing an Internet-based pro bono case recruitment program via a Web site or e-mail. This will be a coordinated effort among the Bar Foundation, district committees and service providers. This recruitment program will permit attorneys to provide limited legal assistance to a large number of clients throughout the state, particularly in rural areas.

Step Ten
Step Ten provides for the recruitment of law students, new lawyers and law firms. Clients will gain by being represented by legal counsel, the courts will be able to move cases through the system more efficiently and the legal profession will be viewed in a more positive light. A law firm can create an internal pro bono policy that utilizes new attorneys as part of its training program.

If you are interested in volunteering to participate in a local pro bono committee, contact Rosalie Fragoso, Esq., rfragoso@nmbar.org, or (505) 797-6074.

About the Author
Rosalie Fragoso is an attorney with the State Bar of New Mexico and is its legal services coordinator. She is a graduate of the UNM School of Law and is the immediate past president of the New Mexico Hispanic Bar Association. Raised in the village of Quemado in southwestern New Mexico, she has first hand knowledge of the problems faced by New Mexico’s rural poor.

Unlocking Doors
Catherine struggled with AIDS. Zofran, taken three times a day, was the only drug that controlled her nausea and kept her from dying of starvation. The drugs were paid for by Medicaid until the new Medicare prescription drug law went into effect. When Medicaid patients who also qualified for Medicare transferred to Medicare coverage, the company to which Catherine was assigned refused to supply the drugs, saying the FDA only approved the drug for use 12 times a month. A massive effort by attorneys of the Senior Citizen’s Law Office bought Catherine a limited supply of tablets. After more intense negotiations, the case recently settled. This is an issue that will affect many other patients who were on Medicaid and have been forced by legislation to switch to Medicare. There is no legal help available for such clients outside legal services offices, particularly SCLO.

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New Mexico Lawyer 5
THE RIGHT
THING TO DO

What motivates attorneys to give their
services to distressed people with no
resources to pay a lawyer?

“Look,” he said. “We lawyers are the only ones who can
help these people—the poor and the vulnerable.”

Jack, a solo practitioner in Farmington, stopped to gather
his thoughts as we talked on the phone. In the background I
could hear the faint sound of his pen tapping the top of his desk.

“The way I look at it,” Jack continued. “A lot of people out there
desperately need legal help. And yet, we made the rules.” He paused,
sensing that he’d lost me. “What I mean is that we lawyers have made
the rules about who can practice law. We made them so that nobody else
could have legal help. And yet, we made the rules.” He paused,
noting the faint sound of his pen tapping the top of his desk.

He couldn’t remember how many pro
bono cases he’s handled over the past
two years. “Some of them real tearjerkers,” he said, “and some of them
don’t take much effort, though some do.” One of the memorable ones
involved an elderly lady who had sold
her home on a real estate contract a
couple of years before.

“She was so nice. She didn’t push
when the payments stopped, though
she made a few phone calls to the
buyer. Then—nada. For two whole
years she held off, figuring the guy
had been having some financial
trouble himself.

“That dear little lady needed those
payments to live on. That and a little
Social Security was all she had. But
she didn’t want to hurt anybody’s
feelings,” Jack said. “So she was sent
to me by one of the agencies because
she had no way of paying a lawyer. All
I did was write a demand letter, and
the buyer caught up his payments.
She was so grateful. She brought me
a batch of home-made cookies. I was
touched. Just yesterday I had a call
from a local agency asking if I’d help a woman who’d just been sued.
I told them to send her in. She needs a lawyer and can’t pay, so I’ll
handle it. She sold her house three years ago. Now, the guy she sold
it to says he just found out there’s a leak in the basement. After three
years he finds it. Says she concealed its condition, so he sued her. She
needs help, but she doesn’t have any money. There’s no place else for her to go.”

Jack sees a recurring theme in many of the pro bono
cases he’s handled. “One of the parties to some kind of a
transaction makes accusations. The other party doesn’t have money to
pay a lawyer, doesn’t know how to respond, so does nothing, hoping
it’ll go away. That leads to more accusations by the first party, and his
demands continue to be ignored. But there’s still no money to pay
for legal advice. So the first guy files suit. Now there’s been an escalation
that can’t be overlooked any longer.”

“Yep,” he said, recalling words he’d used earlier in our conversation.
“It’s the right thing to do.”

Jack isn’t alone in his willingness to accept pro bono
referrals from New Mexico law-related agencies. One agency, the Lawyer
Referral for the Elderly Project, says it has a current roster of over five
hundred pro bono lawyers on its list of New Mexico attorneys currently
accepting cases. The counts kept by other agencies are not so precise,
but all of them have one thing in common: they need more volunteer
lawyers.

That is exactly why the New Mexico Supreme Court’s Access to
Justice Commission is activating access to justice committees within
each judicial district. The commission’s research has disclosed that
over 18,000 New Mexicans are turned away from non-profits offering
civil legal services to low-income persons each year, leaving them with
impaired access to justice or no access at all. Soon, every lawyer will
be made aware of the dimensions of the needs of these low-income
New Mexicans and how all New Mexico lawyers can help fulfill those
needs.

The district committees will devise legal services recruitment and
delivery systems within each judicial district in cooperation with that
district’s chief judge. Soon you, too, will find it is easier than ever to
do the right thing.

About the Author
Stan Sager is a retired Albuquerque lawyer who practiced in the private
sector. His pro bono services on behalf of low income New Mexicans date
back to the early 60’s. He has co-chaired task forces studying the legal needs
of low income New Mexicans, and currently he is a commissioner on the
Supreme Court’s Access to Justice Commission.

Endnotes
1Not his real name. Like many lawyers who do pro bono work, “Jack” prefers
anonymity, saying, “I don’t do it for glory.”
Legislative Update
Legal services programs request funding from N.M. Legislature

By Kim Posich and Kathleen Brockel

In 2005, non-profit organizations provided direct civil legal services to over 13,000 low-income New Mexicans. However, 18,000 were turned away because the programs didn’t have enough money to serve them. Tens of thousands of others who needed help didn’t even apply for assistance. The New Mexico Supreme Court has unanimously called for immediate action to address what it calls a severe shortage of civil legal assistance available to low-income New Mexicans (Supreme Court of New Mexico Order No. 06-8500). The Access to Justice Commission, established by the New Mexico Supreme Court, has estimated that less than twenty percent of the legal needs of low-income New Mexicans are being met.

People in poverty need legal assistance more often than do higher income earners, and the resolution of such needs has a much larger impact on their lives. In fact, getting legal assistance can often make the difference in whether a person is able to begin climbing out of poverty or not. The kinds of issues that can require legal assistance and that can have a major impact on a person or a family include domestic violence matters; consumer problems such as debt collection, scams and predatory lending; housing, such as landlord-tenant problems, foreclosures and unsafe housing conditions; family law, including child support and child custody issues; and health care, such as accessing Medicare and Medicaid programs.

The steadiest and most reliable source of help for these folks is a network of non-profits that provide civil legal services for the poor. These organizations, such as New Mexico Legal Aid, DNA People’s Legal Services, Law Access New Mexico and Protection and Advocacy Services are like the emergency room of the legal system. They literally rescue people from impending harm and are used by people who have no other access to assistance. Unlike the emergency room, however, the assistance costs the state virtually nothing. These organizations are largely funded by private foundations, individual donations and the federal government; yet the state benefits enormously from their work.

For 30 years the New Mexico Legal Aid and DNA, the two largest providers in the civil legal services system, has survived largely through federal—not state—funding.

The state began to address this issue in 2001 with the creation of the Civil Legal Services Commission. The commission annually collects about $1.4 million from court filing fees and then contracts with non-profit legal aid programs to provide legal services. Now it is time for the legislature and the governor to get further involved to address this crisis. As the federal government reduces its support, it is time for New Mexico to take on the responsibility of ensuring equal justice for all in our state.

Agencies, organizations and individuals who recognize the importance of equal access to justice have joined efforts to request a $4 million recurring appropriation from the New Mexico Legislature. Supreme Court Justice Edward Chávez and Justice Petra Maes are volunteering their time in support of the effort. Volunteer lobbyists Tom Horan and Peter Mallory are also donating time and expertise to the effort. The Board of Bar Commissioners has given great support to the Legal Services and Programs Committee (LSPC) to help organize the effort. LSPC Co-Chair Judge Frank Sedillo is volunteering his leadership and expertise as well.

You can help! Contact your local legislator and state that you support the $4 million recurring appropriation. Tell your legislator about the many poor people who contact your office but cannot afford legal assistance. Newspapers are writing articles, editorials or publishing op-ed pieces about the funding request. Write to your local newspaper and state that you support the funding.

About the Authors
Kim Posich is the director of the New Mexico Center on Law and Poverty and Kathleen Brockel is the director of Law Access New Mexico.

Unlocking Doors

Sixteen-year-old Sandy needed help getting her one-year-old son back from his paternal grandparents who had taken the child, refused to let Sandy see him, and moved to obtain guardianship. An immigrant from Mexico, Sandy was without help or support. A staff attorney at Pegasus Legal Services for Children convinced the judge to dismiss the guardianship petition and order that the child be returned immediately to his mother.

* * *

Jeff, a 17-year-old young man whose father recently passed away from cancer, moved in with his aunt and tried to enroll in the nearby high school. He was denied entrance because there was no parent or legal guardian to authorize his enrollment. Jeff missed two months of school before he and his aunt consulted a Pegasus lawyer who told them about the federal law that says that children living with relatives can enroll in school without parental permission. With one phone call to the right people at the school district, John was enrolled the next day.
Bench and Bar Conference Generates Positive Energy for Change

By Kathleen Brockel

The 2006 Bench and Bar Conference brought together attorneys and judges to generate new ideas to improve equal access to justice for poor people in New Mexico. The key topics for discussion were increasing funding of civil legal services, developing recommendations to better assist self-represented litigants and improving pro bono services.

**Unlocking Doors**

A disabled man living in San Miguel County called Law Access because the U.S. Department of Education wanted him to sign promissory notes on two defaulted student loans. He could not pay the debt because he is disabled and his only income is from Supplemental Security Income. Law Access determined that his loan was eligible for discharge because the school should never have accepted him as a student because he had only a 9th grade education—not the required diploma or GED. Law Access assisted him in completing an application under the “inability to benefit” provision. His loan obligation was discharged and he received a $2,000 check for the amount he had already paid.

Program presenters from around the country included the Honorable Howard Dana of the Maine Supreme Court and a nationally known Access to Justice leader; the Honorable Lora Livingston of the 261st Judicial Civil District Court in Texas; and Bob Echols and Meredith MCBurney, directors of the American Bar Association (ABA) Resource Center for Access to Justice Initiatives. New Mexico presenters included Justice Petra Jimenez Maes, Justice Edward L. Chávez, Senator Michael Sanchez, Senator Cisco McSorley and Sarah Singleton.

Bob Echols reported that the majority of Americans believe in and support access to justice, but they have little understanding of the issues. Five years ago the ABA conducted a poll which showed that 89 percent of Americans support the concept of civil legal aid—that low income people should have access to an attorney for help—but only 13 percent knew of legal aid programs and 33 percent believed that low income people have a hard time getting legal help.

The New Mexico Access to Justice Commission Co-Chairs Sarah Singleton and Justice Maes presented information from the 2006 report, which was presented to the New Mexico Supreme Court earlier this year. The report details the findings of several public hearings on access to justice in New Mexico and outlines proposed improvements for pro bono services (outlined elsewhere in this publication). The report encourages increasing funding for civil legal services, improving pro bono services and options for self-represented litigants. The report and subsequent Supreme Court order can be found at www.nmbar.org.

**Increasing Funding for Civil Legal Services**

Securing a substantial, recurring state legislative appropriation is top priority for improving funding for legal services. Senator McSorley reported that there are only about a dozen attorneys in the New Mexico legislature. What this means is that all legislators must be educated about the importance of civil legal services. Attorneys should call their local legislator, take him or her to lunch, and offer an explanation about the kinds of legal problems faced by poor people and what attorneys can do to resolve those problems. Talk about the high number of poor people who call your office seeking free legal help. Senator McSorley reminded the audience that we have a volunteer legislative body. Legislators are very accessible and are interested in meeting with their constituents. The senator said attorneys often contribute to campaigns but then don't follow up and meet with the legislator once elected.

According to Senator McSorley and Senator Sanchez, we are primed for a historic change in the state funding of legal services. The legal services coalition is requesting $4 million in recurring funds, but this expenditure will save millions of dollars in judicial time. Another example is in domestic violence cases. If legal services attorneys are available to resolve civil domestic violence cases and stabilize the family, this may prevent further encounters with the police, the courts and the criminal justice system, all of which cost more money. Senator Sanchez reminded the audience that the funding proposal must be a priority in the governor's budget as well as the legislative budget. He encouraged attorneys to contact the governor's office and request his support.

Another funding topic of interest was increasing IOLTA funding for civil legal services. Thirty one states require IOLTA accounts and some states now have “comparability” rules, which require banks to pay a competitive rate of interest on IOLTA accounts. Texas projects a $30 million increase in IOLTA due to these changes.

**Improving Options for Self-Represented Litigants**

Tina Sibbit and Joey Moya co-chair the Access to Justice Commission self-represented litigants working group, which is looking at developing recommendations for the commission on several topics: unified court forms and user-friendly instructions for family law and other legal areas; problems pro se litigants experience in complying with civil procedure rules and local rules; clarifying the role of court clerks when informing self-represented litigants; training court clerks and judges in their interactions with pro se litigants; and expanding “unbundled” legal services offered by private attorneys.

Judge Livingston talked about improvements enacted by her court and the Texas Access to Justice Commission. For example, she noticed her court had virtually no direction signs in the building and the pro se assistance office was not on the main floor. She recommended that all courts take a critical look at the physical layout of their buildings and make changes so that self-represented litigants have information and directions when they walk in the door. Also in Texas, more and more attorneys are offering unbundled legal services. Will Hornsby wrote an ABA white paper on this topic (available on the ABA Web site).

About the Author

Kathleen Brockel is executive director of Law Access New Mexico. She serves as co-chair of the State Bar of New Mexico Legal Services and Programs Committee and is a commissioner on the Access to Justice Commission. Previously, she was assistant director at the ACLU of New Mexico and executive director of the Atlanta AIDS Survival Project. She graduated cum laude from Georgia State University School of Law.
Law Access Resource Directory

This resource list of free and low-cost legal services has been compiled by Law Access New Mexico and the Pro Se Division of the Bernalillo County Metropolitan Court. All efforts have been made to ensure the accuracy of telephone numbers and Web links, but there is no guarantee that numbers or addresses have not changed since the time of publication or printing. Check for the most recent version at www.lawhelpnewmexico.org

Civil Legal Services

Including consumer, employment and unemployment, family law (child support, custody and visitation, divorce, domestic violence, guardianships), housing and landlord-tenant, and public benefits.

New Mexico Legal Aid

Statewide civil legal representation for low-income New Mexicans
Albuquerque: (505) 245-7871
Clove: (505) 769-2326
Gallup: (505) 722-4417
Las Vegas: (505) 425-3514
Las Cruces: (505) 541-4800
Roswell: (505) 523-9669
Santa Ana: (505) 867-3391
Santa Fe: (505) 882-9886
Silver City: (505) 388-0091
Taos: (505) 758-2218

Legal Access New Mexico

Statewide civil legal telephone helpline for low-income New Mexicans. Weekdays 9 a.m. to 3 p.m. Spanish, English, other languages
Statewide (505) 340-9771
Albuquerque (505) 988-4529

DNA-People’s Legal Services

Civil Legal Services in San Juan Co and Native American Services in northwestern New Mexico
Crownpoint (505) 786-5277
Farmington (505) 325-8886
Shiprock (505) 368-3200
www.dnalegalservices.org

New Mexico Center on Law and Poverty

Monitors fair and effective administration of public policies, laws and practices aimed at problems of those living in poverty
Albuquerque (505) 255-2840
www.nmpovertylaw.org

Specific Legal Services

Abuse/Neglect Adults

Adult Protection Services Statewide (800) 797-3260
www.nmaging.state.nm.us/Adult_Protection_Services раздел.html

Abuse/Neglect Children

Children’s Youth & Families Statewide (800) 797-3260
www.cyfnd/index.htm

Adult Guardianships

Office of Guardianship Services Statewide (800) 311-2229
ARC of New Mexico Statewide (800) 358-6493
Albuquerque (505) 863-4630 www.arcnm.org

Child Support

Child Support Enforcement Statewide (505) 288-7207
https://eink.hsd.state.nm.us/clink/

Child Kinship Guardianship

Guardianship Legal Helpline of Pegasus Legal Services and Law Access New Mexico Legal advice and representation for non-parent caregivers of children seeking guardianship. Statewide: (800) 980-1165
Albuquerque (505) 217-1660
www.pegasuslaw.org

Children’s Legal Services

Advocacy Inc. Guardian ad litem services; uncontested kinship guardianships Statewide (888) 376-9625
Albuquerque (505) 256-9369 www.nrnadvocacy.org

Pegasus Legal Services for Children

Civil legal needs of children, including health care guardianship, emancipation, special education
Albuquerque (505) 244-1101
www.pegasuslaw.org

Children’s SSI/ Medicaid

ARC of New Mexico Statewide (800) 358-6493
Albuquerque (505) 863-4630 www.arcnm.org

Disability Services

Education, employment, rehabilitation, healthcare, mental health, abuse/ neglect

Protection and Advocacy (but NO SSI/SSDI appeals; guardianship/ conservatorship; domestic relations)
Statewide (800) 432-4682
Albuquerque (505) 256-3100
www.nmpanda.org

Native American Protection and Advocacy Project Legal services to Native Americans with disabilities Statewide (800) 862-7271
Farmingtown (505) 566-5880

DNA People’s Legal Services

New Mexico Attorney General’s Office of Consumer Protection Statewide (800) 578-1508
www.ago.state.nm.us/divs/cons/cons.htm

New Mexico Project for Financial Literacy Credit Counseling Albuquerque (505) 994-4686 www.mmpfl.org

State Bar of New Mexico Debt Workshops Statewide (800) 876-8227 www.nmbar.org/Public Resources/Services

Federal

Federal Public Defenders Albuquerque (505) 946-2489
Las Cruces (505) 527-8530

NM Coalition Against Domestic Violence Statewide (877) 974-3400
Albuquerque (505) 246-9240 www.nmcaadv.org

Grandparent Visitation

High Income Benefits and Counseling (HIBAC) Statewide (888) 451-2901
www.nmaging.state.nm.us/benes.html

Senior Citizens Law Office (See above)

Housing / Landlord-Tenant

DNA People’s Legal Services (See above)

New Mexico Legal Aid (See above)

New Mexico Fair Housing Center (See above)

United South Broadway Foreclosure counseling Albuquerque (505) 764-8867

Immigration

Catholic Charities of Central New Mexico Albuquerque (505) 247-9521
Santa Fe (505) 424-9789 www.catholiccharitiesnm.org

Diocesan Migrant & Refugee Services El Paso (915) 532-3975
www.epasdiocese.org/dmrs/dmrs.htm

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New Mexico Lawyer 9
Civil Legal Services continued from page 4

The mandates of pro bono publico on the profession are clear and the profession has a vested interest in improving access to justice throughout the state. The bringing together of stafﬁed programs, private attorneys, the organized State Bar, the Supreme Court and the state legislature creates a hopeful future that includes improved organization, additional resources and greater access to the judicial system in New Mexico.

About the Author

Richard B. Spinello is the director of Public and Legal Services at the State Bar of New Mexico. Formerly the managing staff attorney for the Lawyer Referral for the Elderly Program, he previously operated a law ﬁrm in Rio Rancho, practicing in family law, estate panning and adult guardianships. He has a bachelor’s degree in political science from UNM and a J.D. from Thomas M. Cooley Law School.

10 Steps continued from page 5

Endnotes

1To review the Ten Step Plan and the Supreme Court’s Order, visit www.nmbar.org.

2Pro Bono Hours 0 5 10 15 20 25 30 35 40 45 50+
Suggested Contribution $500 $450 $400 $350 $300 $250 $200 $150 $100 $50 $0

3Ethics and professionalism credit will not be available for participation in pro bono CLE activities.

History of Legal Aid continued from page 3

About the Author

Sarah Singleton is a shareholder in Montgomery and Andrews, P.A., in Santa Fe. A former president of the State Bar of New Mexico, Singleton is a member of the board of the Legal Services Corporation, co-chair of the New Mexico Commission on Access to Justice and the chair of the New Mexico Civil Legal Services Commission, which distributes state funds to legal aid organizations. She served two terms on the ABA Standing Committee on Legal Aid and Indigent Defendants and as chair of the ABA SCLAIID Task Force on Revising the ABA Standards for the Provision of Civil Legal Aid. She also served as co-chair of the State Bar Legal Services and Programs Committee.

Endnotes


2Id. at 4.

3Id. at 4-5 (quoting Attorney General Nicholas Katzenbach).

4Id. at 7.


6Id. at 22.

7Id.

8Id at 32.

9Id. at 38.

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The judge instructed the juror to “just than one hour later, Defendant was convicted of a unanimous jury. The Court of Appeals determined that the communication was improper. State v. Jofola, 2005-NMCA-119, ¶ 24, 138 N.M. 459, 122 P.3d 43. Concluding that the State failed to rebut the presumption of prejudice that attached to the improper communication, the Court of Appeals reversed Defendant’s conviction. Id. ¶ 25. The Court of Appeals, however, did not address Rule 5-610(D) NMRA, which prohibits ex parte communications between judge and jury. We affirm the Court of Appeals but write further to clarify our case law and to describe the history and rationale of Rule 5-610(D).

I. BACKGROUND

1. The State tried Defendant on four alternative theories of child abuse resulting in death or great bodily harm. After receiving their instructions, the jurors left the courtroom to deliberate at 11:40 a.m. The judge went back on the record at 4:20 p.m. to report a private conversation he had had with a juror in chambers. The transcript reflects the following dialogue between the judge, the two prosecutors, and the defense lawyer:

THE COURT: I just need to report there is a juror, and I believe she is the foreperson, I’m not sure, but a juror whom I believe to be the foreperson came to my office and she was complaining that one juror had committed perjury that she was the juror that had had a disagreement with that police officer about some ticket and that this juror—

[PROS. 1]: What police officer about a ticket?

THE COURT: That she doesn’t believe the expert and that she is not going to change her mind and that they could be there for two months and she was not going to change her mind. She reported that to me and I told her, well, just report—you know, just report that you are hung and I told her I’ll take it from there. So I guess—

[PROS 2]: Which juror approached you, Judge?

THE COURT: I believe she’s

[DEFENSE]: I guess it wouldn’t matter if we know, does it?

THE COURT: I think for the record we need to know. I think she is the foreperson, Rochelle Smith or I think she is Rochelle Smith, yeah. She is sitting right here.

. . .

THE COURT: What she said was kind of in relation to what the last—what the note said so it’s a continuation of that and I’m trying to summarize what she told me. But I told her to continue and do whatever she had to do and just report—just report to me and I could handle it from there.

[PROS 2]: Is she going to send a note out?

THE COURT: She said, well, I’ll just indicate to you that we’re hung.

THE COURT: What I’m going to do—what I propose to do is I will ask my usual questions and probably I may send them home and ask them to come back tomorrow.

[PROS 2]: Okay. That would be our preference I think at this
point, Judge.

THE COURT: We just received information from the bailiff indicating that the juror had said to disregard the previous situation, the previous information and they said—and they sent out a note indicating we need additional time after 5:00 p.m. Thank you . . .

[PROS 2]: Do we want to let them continue just to deliberate?

THE COURT: We don’t have a choice . . .

[PROS 2]: We can tell them to go home at 5:00, Judge.

THE COURT: No, they’re asking to stay beyond 5:00. I cannot tell them to go home.

[PROS 2]: Sure you can. You can do anything. You are the judge.

(Note: Bench conference concluded.)

Shortly thereafter, the jury returned a verdict of guilty of all four alternative counts of child abuse resulting in death or great bodily harm. The record reflects that the trial court went into recess at 5:16 p.m.

II. THE STATE MUST OVERCOME THE PRESUMPTION OF PREJUDICE THAT ARISES WHEN A JUDGE HAS AN EX PARTE COMMUNICATION WITH A JUROR ABOUT AN ISSUE RELATING TO THE CASE

{3} Established precedent and the New Mexico Rules of Criminal Procedure provide guidance in determining whether a judge’s ex parte communication with a juror is acceptable in the first instance, and whether reversal is warranted on appeal. In 1981, Criminal Procedure Rule 43(d), later codified as Rule 5-610(D) NMRA, was promulgated “to clarify the procedure for communications between the judge and the jury, after the jury has retired to consider the verdict, without recalling the jury.” NMSA 1978, Crim. P. Rule 43(d) committee commentary (Repl. Pamp. 1985). At its inception, and at the time of Defendant’s trial, the rule stated:

Communications between the judge and the jury may be made in writing without recalling the jury after notice to the attorneys and an opportunity for objection. Unless requested by counsel for the defendant, communications not relating to issues of the case at trial may be made without recalling the defendant.

Rule 5-610(D) NMRA 2002. The rule made a distinction between communications “relating to issues of the case” and those not. Read in its entirety, the rule required all communications relating to issues of the case to be made in open court and in the presence of the defendant or, with the consent of the lawyers, in writing. Even if not related to issues of the case, the rule did not allow for oral communications between judge and juror after the jury had begun deliberations. Our precedent, which also recognizes this distinction as to the substance of the communication, determines the consequences of violating this rule.

{4} As far back as 1884, our territorial court recognized in Territory v. Lopez, 3 N.M. 156, 2 P. 364 (1884) that a criminal defendant has a right to be present when the judge reconvenes the jury for instruction after deliberations have begun. In Lopez, we stated that “the proper practice would be to send for the prisoner and his counsel, and as soon as they come into court to have the names of the jurors called, and if all are found to be present, the court will then receive any communication they have to make, and instruct them accordingly.” Id. at 165, 2 P. at 368. In State v. Hunt, 26 N.M.160, 170, 189 P. 1111, 1115 (1920), the Lopez rule was extended to “any communication between the judge and the jury respecting the case.” In Hunt, we went as far as holding that there was an irrebuttable presumption of prejudice when there was any “unauthorized communication” between a judge and a juror. This bright-line rule was tempered in State v. Costales, 37 N.M. 115, 119-20, 19 P.2d 189, 191 (1933), where the trial judge had simply informed the jury as to whether they could write their recommendation for clemency on the verdict form. In Costales, we modified Hunt to hold that reversible error does not occur “where it affirmatively appears that the defendant was not prejudiced by the communication between court and jury.” Id. at 121, 19 P.2d at 192. The genesis of the two-part analysis that guides us in determining whether a trial court committed reversible error in communicating with a juror is found in State v. Beal, 48 N.M. 84, 146 P.2d 175 (1944). In that case, after determining that there was an “improper communication” between the judge and the jury, we stated: “It now becomes necessary to determine whether this communication was prejudicial to the rights of appellant.” Id. at 91, 146 P.2d at 179. However, we also recognized in Beal that a presumption of prejudice arises on the showing of an improper communication and that the State has the burden of overcoming this presumption. Id. at 91-92, 146 P.2d at 180. Finally, in State v. Neely, 112 N.M. 702, 711, 819 P.2d 249, 258 (1991), we clarified that “there are two prongs to the analysis: (1) a determination of error, and (2) if there is error, analysis of whether the state has rebutted the presumption of prejudice.”

{5} As to whether all communications between judge and juror are “improper,” thereby establishing the presumption of prejudice, we recognize that we have not always been clear. In State v. Orona, 92 N.M. 450, 456, 589 P.2d 1041, 1047 (1979) (emphasis added), we said: “[I]t is improper for the trial court to have any communication with the jury concerning the subject matter of the court proceedings, except in open court and in the presence of the accused and his counsel.” Just one year later, we cited Orona when making the overly-broad statements that “any communication by a trial court with the jury must be in open court in the presence of the accused and his counsel” and that “[w]hen communications occur in the absence of the accused, a presumption of prejudice arises.” State v. McCarter, 93 N.M. 708, 711, 604 P.2d 1242, 1245 (1980) (emphasis added); see also State v. Stephens, 93 N.M. 458, 460, 601 P.2d 428, 430 (1979) (citing Orona in stating that “[i]t is highly improper for the trial court to have any communication with the jury except in open court and in the presence of the accused and his counsel”). Neely, however, clarified that not every ex parte communication between judge and juror is “improper.” In Neely, a juror called the court asking to be excused because she was ill with chicken pox. Before dismissing the juror, the judge acted appropriately in making a record, discussing the problem with counsel for both parties, and ensuring that the defendant had waived his right to be present during the conference. We held there that when a communica-
tion concerns a “housekeeping matter” and the judge takes steps to consult with counsel and make a record of the conversation, the communication is not “improper” and, hence, no presumption of prejudice arises. Neely, 112 N.M. at 711, 819 P.2d at 258.

{6} From this historical analysis, it is clear that: (1) a presumption of prejudice which the State must dispel only arises from an “improper communication” between judge and juror; (2) an “improper communication” occurs when the substance of the ex parte communication “relates to the issues of the case”; and (3) a communication that does not “relate to the issues of the case” (that is, a “housekeeping matter”) generally does not give rise to a presumption of prejudice. What is not clear, and is left to be decided in a more appropriate case, is whether a defendant may nonetheless make a showing of prejudice when the judge’s ex parte communication with a juror is a “housekeeping matter.” See Costales, 37 N.M. at 121, 19 P.2d at 192 (suggesting, in a case arguably involving a “housekeeping matter,” that reversible error may be found where it affirmatively appears that the defendant was prejudiced).

{7} When Rule 5-610(D) was promulgated, it incorporated these principles from our case law. Although Rule 5-610(D) has been amended since Defendant’s trial, its impetus and rationale remains the same. We discuss the current version of the rule in order to guide trial courts in the future. Effective September 1, 2005, the rule now states:

The defendant shall be present during all communications between the court and the jury unless the defendant has signed a written waiver of the right to be personally present. All communications between the court and the jury must be in open court in the presence of the defendant and counsel for the parties unless the defendant waives on the record the right to be present or unless the communication involves only a ministerial matter. Unless requested by counsel for the defendant, communications between the court and the jury on a ministerial matter may be made in writing after notice to all counsel without recalling the defendant.

Rule 5-610(D) NMRA. The current rule still preserves the distinction between communications regarding issues relevant to the case and those not; moreover, it provides a safeguard to preserve a defendant’s right to be present at all stages of trial. See State v. Baca, 1997-NMSC-059, ¶ 39, 124 N.M. 333, 950 P.2d 776 (“A judge violates a defendant’s right to be present at every stage of his trial only if the judge’s discussion with the juror concerns the subject matter of the case.”) (emphasis omitted); Hovey v. State, 104 N.M. 667, 671-72, 726 P.2d 344, 348-49 (1986) (Walters, J., specially concurring) (arguing that New Mexico precedent has long recognized that a defendant’s right to be present when a judge communicates with a juror on issues relating to the subject matter of the court proceedings “is a constitutional right that may not be waived by the attorney”).

{8} The rule now provides that all communications between judge and jury relevant to the case occur in open court and in the presence of the defendant, unless presence is waived in writing. Not only does this insure that all communications relevant to the case occurring between judge and jury are captured by a stenographer or other recording device, it also avoids the problem of a judge having to decide solely on the basis of defense counsel’s representations whether a defendant voluntarily, knowingly, and intelligently waived his right to be present. See Hovey, 104 N.M. at 670-71, 726 P.2d at 347-48. Regarding issues not relevant to the case (that is, “housekeeping” or “ministerial” matters) the rule does not allow for private, oral communications between a judge and an individual juror. Such communications must occur in open court and in the presence of the defendant if the defendant requests it. Even if the defendant does not request to be present, such communications are to occur only in writing. This insures that a proper record is made of the communication.

{9} Whether a communication is relevant to the case or a ministerial matter is a factual determination for the trial court. Suffice it to say that issues relating to a juror’s personal comfort or responding to a simple request for an extra copy of the written jury instructions already provided to the jury are ministerial. See, e.g., Ford v. State, 690 N.W.2d 706, 712-13 (Minn. 2005). In determining whether a communication is a ministerial matter, the best practice is for the trial court to confer with counsel for both sides and, if there is any doubt, to err on the side of concluding that it is not. See id. at 713 (“We caution, however, that any doubt regarding whether a communication relates to a housekeeping or substantive matter should be resolved in favor of defendant’s presence.”). At the same time, we emphasize that “[a] judge does not risk error every time he answers a phone . . . . [I]f a juror calls to say she is ill and the court cannot take steps to prevent the communication, there is not error without more.” Neely, 112 N.M. at 711, 819 P.2d at 258 (emphasis added).

Even this type of brief encounter between judge and juror, though, should be made a part of the record. See Rule 5-610 NMRA committee commentary (“All communications between the judge and jury should be made a part of the record, whether made in the presence of defense counsel and defendant or not.”). If a juror approaches a judge with a request to speak privately—about any matter—the proper procedure is for the judge to immediately stop any discussion and explain to the juror that his or her concerns may be raised in open court in the presence of the defendant, defense counsel, and the prosecution, or that the juror may place his or her concerns in writing to be read in open court in the presence of all parties.

{10} The primary concern we have with ex parte communications between judge and juror is not the competency or good faith of the trial judge, but rather the lack of a record and the potential harm that may arise from “having one juror serve as a conduit for communicating instructions to the whole panel.” United States v. U.S. Gypsum Co., 438 U.S. 422, 461 (1978); see also Costales, 37 N.M. at 120, 19 P.2d at 192 (“[T]he place for the judge is on the bench when he communicates with the jury, in order that there may be a record . . . .”). As the United States Supreme Court stated in U.S. Gypsum Co., “Any ex parte meeting or communication between the judge and the foreman of a deliberating jury is pregnant with possibilities for error.” 438 U.S. at 460. The Court offered at least two reasons
why private communications with a juror may present problems, even for experienced judges:

First, it is difficult to contain, much less to anticipate, the direction the conversation will take at such a meeting. Unexpected questions or comments can generate unintended and misleading impressions of the judge’s subjective personal views which have no place in his instruction to the jury—all the more so when counsel are not present to challenge the statements. Second, any occasion which leads to communication with the whole jury panel through one juror inevitably risks innocent misstatements of the law and misinterpretations despite the undisputed good faith of the participants.

Id. at 460-61.

{11} In the present case, the only record of the conversation that we have is what the judge offered to the parties after the conversation had already taken place. While we have no reason to doubt the accuracy of the judge’s report, we are left to speculate about how the juror interpreted the judge’s comments and gestures and about what the juror reported to the rest of the jury back in the jury room. The juror may have interpreted the judge’s statement to “do whatever [you have] to do” as an ultimatum to reach a verdict and may have relayed such an ultimatum to the rest of the jury. If so, the juror, inadvertently for sure, might have done what the judge would never have done—issue a so-called “shotgun” instruction. The use note for this instruction provides: “No instruction on this subject shall be given.” UJI 14-6030 NMRA. Since at least 1980 “[t]his Court has specifically prohibited the use of such instructions, recognizing that they have been held to be coercive.” McCarter, 93 N.M. at 711, 604 P.2d at 1245.

{12} Importantly, though, even if the juror did not issue a shotgun instruction to the rest of the jury, the private conversation related to the case because it “concerned the jury’s deliberations” and “the inner workings of the jury room and the jurors’ view of the evidence.” Jojola, 2005-NMCA-119, ¶ 24. The communication did not occur in open court and in the presence of Defendant; therefore, Rule 5-610(D) was violated and the communication was improper. Having determined the communication was improper, a presumption of prejudice arises which the State must rebut. Here the State relies exclusively on its argument that the communication was not improper. We affirm the Court of Appeals’s ruling that reversal is warranted because the State failed to rebut the presumption of prejudice that arose from the improper communication. Id. ¶ 25; see also Orona, 92 N.M. at 456, 589 P.2d at 1047 (noting that because “[t]he State made no attempt whatsoever to overcome” the presumption of prejudice, the Court had no choice but to “hold that the judge’s communications with the jury were prejudicial and entitled defendant to a new trial”).

III. CONCLUSION

{13} Judges must follow the procedures laid out in Rule 5-610(D) in communicating with juries and individual jurors. The private conversation between the judge and juror in the present case amounted to an improper communication. Because the State did not rebut the presumption of prejudice that arises from an improper communication, we remand to the district court for a new trial.

{14} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
From the New Mexico Supreme Court

**Opinion Number: 2006-NMSC-049**

**Topic Index:**
- Constitutional Law: Fourth Amendment; and Suppression of Evidence
- Criminal Procedure: Search and Seizure
- Evidence: Exclusion of Evidence; and Suppression of Evidence

**STATE OF NEW MEXICO,**

**Plaintiff-Petitioner,**

**versus**

**RANDY JOHNSON,**

**Defendant-Respondent.**

No. 28,660 (filed: October 17, 2006)

**ORIGINAL PROCEEDING ON CERTIORARI**

ALBERT S. “PAT” MURDOCH, District Judge

PATRICIA A. MADRID
Attorney General
ARTHUR W. PEPIN
Assistant Attorney General
Santa Fe, New Mexico
for Petitioner

JOHN BIGELOW
Chief Public Defender
TRACE L. RABERN
Assistant Appellate Defender
Santa Fe, New Mexico
for Respondent

**OPINION**

PETRA JIMENEZ MAES, JUSTICE

{1} Defendant Randy Johnson was charged with trafficking by manufacturing methamphetamine and possession of drug paraphernalia. Defendant moved to suppress the evidence on the basis that the officers violated the requirement that officers must knock and announce their presence and purpose when executing a search warrant. After the trial court denied the motion, Defendant appealed the issue. The Court of Appeals reversed the trial court’s denial of the motion, concluding that no exigent circumstances existed and in the absence of exigency, the police knocked and announced the police’s presence and purpose for at least ten seconds before forcibly entering Defendant’s motel room. Under the totality of the circumstances, this interval was a reasonable length of time to conclude that they were being denied admittance.

1. Background

{2} At 6:15 a.m. on a Saturday morning, several Bernalillo County deputies executed a valid warrant to search Defendant’s motel room. Detective John Sharkey initiated the search by knocking forcefully on Defendant’s door, shouting “Sheriff’s Department” and “Search Warrant” repeatedly as he did so. After a period of at least ten seconds with no response from inside the room, a second officer, Detective Chavez, began using a battering ram to break the locked door. During the period of approximately twelve seconds, it took Detective Chavez to break open the door, Detective Sharkey continued to announce the officers’ presence and purpose. After at least six swings with the battering ram, the door gave way and the officers entered the room.

{3} When the officers entered, Defendant was standing just inside the door. The officers testified that a haze was emanating from the bathroom. Inside the bathroom, the officers found methamphetamine as well as the makings of a methamphetamine lab, including chemicals, tubing, glassware, and containers.

{4} Defendant filed a motion to suppress all evidence seized, arguing that police did not wait a reasonable amount of time before forcibly entering his motel room and that no exigent circumstances existed to justify the shortened waiting time. The trial court conducted a hearing on the motion. In that hearing, police witnesses testified that they had obtained the search warrant three days before it was executed. The warrant was based on information the officers received indicating that methamphetamine was being sold out of the room, which police then confirmed by conducting two controlled buys. In the affidavit accompanying the search warrant, Detective Sharkey stated that methamphetamine would be found in the room, in addition to materials for “packaging, distribution, weighing, diluting, cooking, injection, sale or other possession.” The warrant did not contain any information relating to weapons or the possibility of violence by Defendant. Police did not request that a “no-knock” provision be included in the warrant.

{5} The trial court denied the motion to suppress, finding that the circumstances surrounding the search justified the police officers’ forcible entry. The trial court emphasized that Detective Sharkey knocked and announced the officers’ presence and lawful purpose for at least ten seconds before the battering began. The court found that there was a minimum of twelve additional seconds during which the door was being battered and noted that during the entire period before the door was forced open, there was no verbal or physical response from within the room. As a result, the court concluded that “[w]hile there [was] no absolute refusal to open the door, . . . there was constructive refusal.” The court noted the small size of the motel room, with dimensions of approximately twelve feet by twelve feet, and the fact that the bed was within three or four feet of the doorway. The trial court also stated that because it took Detective Sharkey only a few steps to walk through the room, a shorter period of time was required for response before forced entry. Therefore, the trial court found that the officers acted reasonably and appropriately in executing the search warrant and entering Defendant’s motel room.

{6} After the trial court denied the suppression motion, Defendant entered a conditional guilty plea to the trafficking charge. The possession charge was dropped. Defendant reserved the right to appeal the suppression issue.

{7} On appeal, the Court of Appeals first determined that the trial court erred in including the time during which the officers were battering the door in its calculation of the total wait time. *State v. Johnson*, 2004-NMCA-064, ¶ 11, 135 N.M. 615, 92 P.3d 61. Thus, the Court of Appeals determined that the officers waited ten seconds before entering, not the twenty-two to thirty seconds...
found by the trial court. Second, the Court of Appeals concluded that there was no particularized information indicating that the officers had an objectively reasonable belief of exigent circumstances. Id. ¶ 11. Finally, the Court found that ten seconds was an unreasonable period of time for the officers to infer that Defendant refused to open the door. Id. ¶ 15. Based on these findings, the Court held that the search was not constitutionally reasonable and the evidence should have been suppressed. Id. ¶ 8 The State argues that the Court of Appeals erred in failing to afford proper deference to the trial court’s factual finding that the time frame before forcible entry was twenty-two to thirty seconds. The State also argues that even if the officers only waited ten seconds before using force to enter, this was a reasonable period of time under the totality of the circumstances.

II. Discussion

¶ 9 “The standard of review for suppression rulings is whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party.” State v. Lopez, 2005-NMSC-018, ¶ 9, 138 N.M. 9, 116 P.3d 80 (quoting State v. Jason L., 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856). “The appellate court must defer to the district court with respect to findings of historical fact so long as they are supported by substantial evidence.” Jason L., 2000-NMSC-018, ¶ 10 (citing State v. Attaway, 117 N.M. 141, 144, 870 P.2d 103, 106 (1994)). “[A]ll reasonable inferences in support of the [district] court’s decision will be indulged in, and all inferences or evidence to the contrary will be disregarded.” Id. (quoting State v. Werner, 117 N.M. 315, 317, 871 P.2d 971, 973 (1994)). Referring to the trial court with respect to factual findings and indulging all reasonable inferences in support of the trial court’s decision to deny the motion to suppress, we review the constitutional question of the reasonableness of a search and seizure de novo. See Attaway, 117 N.M. at 144-46, 870 P.2d at 106-08.

¶ 10 The general rules governing United States Constitution Fourth Amendment search and seizure issues are fairly well established. “In New Mexico, law enforcement officers are constitutionally required to knock and announce their identity and purpose, and wait a reasonable time to determine if consent to enter will be given prior to forcefully entering a [dwelling] in order to execute a search warrant.” State v. Vargas, 1996-NMCA-016, ¶ 5, 121 N.M. 316, 910 P.2d 950 (citing Attaway; 117 N.M. at 150-51, 870 P.2d at 112-13). The knock-and-announce rule serves multiple purposes. It helps to protect the constitutional right of citizens to be free from unreasonable searches and seizures, while also providing law enforcement with clear standards of conduct in the execution of search warrants and the seizure of evidence. Attaway, 117 N.M. at 149, 870 P.2d at 111. The rule also serves the more specific purposes of “preventing needless destruction of private property, eliminating unnecessary intrusions upon privacy, and reducing the risk of violence both to police and occupants.” Id. at 150, 870 P.2d at 112. Compliance with the rule may be excused if exigent circumstances exist. Id. at 149-50, 870 P.2d at 111-12 (citing State v. Baca, 87 N.M. 12, 13-14, 528 P.2d 656, 657-58 (N.M. Ct. App. 1974)). The ultimate question regarding an alleged search and seizure violation is whether the search and seizure was reasonable. Attaway, 117 N.M. at 149, 870 P.2d at 111 (citing State v. Martinez, 94 N.M. 436, 440, 612 P.2d 228, 232 (1980)).

¶ 11 We first consider whether the Court of Appeals erred in its determination that the officers waited only ten seconds after knocking and announcing and before forcing entry, as opposed to the twenty-two to thirty seconds calculated by the trial court. See Johnson, 2004-NMCA-064, ¶ 8. We agree with the Court that as soon as the officers began forcibly battering the door, one of the stated purposes of the knock-and-announce requirement, the prevention of needless destruction of property, was no longer served. See id. The State’s argument that hitting the door with a battering ram was merely a “louder, more aggressive contact with the door,” which was “part of the knock and announce process,” is illogical. Defendant could not reasonably be expected to open the door while it was being battered. When the officers began hitting the door with the battering ram, they ceased “knocking” and began “entering.” See United States v. McClendon, 127 F.3d 1284, 1289 n.2 (10th Cir. 1997) (“[O]ur review of precedent indicates that the reference point for the reasonableness determination is the amount of time between when the officers begin to announce their presence and when the officers hit the door with a battering ram or other implement which could destroy the door and allow them entry.”). We affirm the Court of Appeals’ decision to exclude the twelve to twenty seconds of battering from the overall wait time of the officers.

¶ 12 Proceeding with the relevant time interval of ten seconds, we must next determine whether this was a reasonable amount of time for the officers to wait before forcing entry. As stated above, if exigent circumstances exist, noncompliance with the knock-and-announce rule may be justified. Absent exigent circumstances, officers must knock and announce their purpose and identity, then wait a reasonable period of time to determine if consent to enter will be given before forcefully entering. We agree with the Court of Appeals that in this case no exigent circumstances existed; therefore, the entry was reasonable only if ten seconds was a sufficient amount of time for the officers to infer that Defendant refused to answer the door.

¶ 13 In deciding this issue, there are no bright-line rules. See United States v. Jenkins, 175 F.3d 1208, 1213 (10th Cir. 1999) (“This court has not established a clear-cut standard by which to determine the amount of time officers must wait after knocking and announcing before forcibly entering a [dwelling].”). We must look at the totality of the circumstances. See United States v. Banks, 540 U.S. 31, 36 (2003) (“Instead, we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case . . . .”); Lopez, 2005-NMSC-018, ¶ 16 (“[W]e wish to clarify that the facts of this case or any . . . case should not be pigeonholed into a set category; instead, each case must be viewed under the totality of the circumstances present.”).

¶ 14 There is no New Mexico case law directly on point. Courts in other jurisdictions also look at the totality of the circumstances when determining this issue. The United States Tenth Circuit Court of Appeals, while finding three seconds to be unreasonable, has found that ten seconds is reasonable. See Jenkins, 175 F.3d at 1213 (contrasting prior cases). In Jenkins, the court found that the district court properly denied the motion to suppress based on the district court’s holding that the amount of time was reasonable under the circumstances. Id. at 1215. The court stated that it had not established a “clear-cut standard” to determine how long officers must wait after knocking and announcing before forcibly entering. Id. at 1213. Again in United States v. Knapp, 175 F.3d 1026 (10th Cir. 1993), the Tenth Circuit Court of Appeals affirmed the trial court’s denial of the defendant’s motion to suppress, finding that the officers waited a reasonable amount of
time before forcing entry. The court stated that “there is no concrete rule requiring the officers to wait a specific period of time before entry.” Id. at 1030. “It was plausible for the officers to conclude that they were affirmatively refused entry after a ten to twelve second interval without a verbal or physical response.” Id. at 1031.

(15) In the present case, the trial court found the following: (1) the size of the motel room was no larger than twelve feet by twelve feet; (2) the bed was within three or four feet of the door; (3) the officers knocked while announcing presence, identification of authority, and statement of lawful purpose for at least ten seconds before using the battering ram; (4) Defendant must have been within twelve feet of the door at the time of the attempted entry; and (5) there was no response from inside the room during the entire time the officers were knocking and announcing. Based on these facts, the court found that there was constructive refusal to answer the door.

(16) Our Court of Appeals held that ten seconds was an insufficient amount of time to infer that Defendant refused to answer the door. The Court admitted that “[c]ase law provides no magic number of seconds after which officers may constitutionally enter,” Johnson, 2004-NMCA-064, ¶ 13, but then compared the facts of this case to the facts in Attaway, stating:

This case presents a similar number of seconds and time of day as in Attaway, which characterized ten to fifteen seconds at 6:00 a.m. on a Saturday as “extremely short” but ultimately acceptable because of exigent circumstances. Subtracting the exigency from the equation, we are left with an interval of time that is too short altogether.

Id. ¶ 15 (internal citation omitted). While in Attaway this Court held that the interval of time that the officers waited was extremely short but justified due to exigency, it was not our intention to create a rule that absent exigency, ten seconds is unreasonable per se, or that ten seconds can never be a sufficient amount of time to infer denial of entry. The dissent states that the Court of Appeals in the present case did not apply a bright-line rule from Attaway. However, the language above indicates that the Court of Appeals “decide[d] the question in Defendant’s favor” by comparing the facts in this case to the facts in Attaway and then “subtracting the exigency from the equation.” Id.

(17) Viewing the totality of the circumstances in the present case, particularly the small size of the motel room and the fact that Defendant did not respond in any way, we agree with the trial court that it was reasonable for the officers to believe that they were being denied entrance after at least ten seconds of repeated knocking and announcing their purpose and identity. Refusal to consent to enter does not have to be explicit. “If the occupants do not admit the officers within a reasonable period of time [after they have knocked and announced their presence and purpose], the officers may be deemed to be constructively refused admittance, and they may then enter by force.” Jenkins, 175 F.3d at 1213 (quoted authority and quotation marks omitted).

(18) The dissent advances a different possibility, stating “it is plausible that Defendant was asleep when officers knocked on his motel room door . . .” and that “it is not clear that the officers were aware of how small the room was or where the bed was located or where Defendant was before they entered.” However, it is also plausible that Defendant, even if asleep when the officers arrived, awoke when they began to knock and announce their identity, and intentionally remained silent. Additionally, it is reasonable to assume that the officers were aware of the size of the motel room before they entered. As indicated in the affidavit for the search warrant, Detective Sharkey executed two controlled purchases of methamphetamine from Defendant’s motel room, one with a narcotics agent and one with Detective Chavez, where they witnessed the confidential source enter and exit the room. Even though Detective Sharkey testified that after he entered the room, he realized it was “very, very small,” there is no indication that he and the other officers were completely unaware of the approximate size of the room prior to entering. It was reasonable for them to infer that the room was small, and that Defendant and the bed would be in close proximity to the door. Because we indulge in all reasonable inferences to support the trial court’s decision to deny the motion to suppress, and disregard any contrary inferences, we affirm the trial court on this issue. See State v. Duran, 2005-NMSC-034, ¶ 19, 138 N.M. 414, 120 P.3d 836.

III. Conclusion

(19) We agree with the Court of Appeals that this case represents a close call. We conclude that the trial court erred in including the period of time during which the officers were using the battering ram as part of the knock and announcement, but that it was correct in refusing to suppress the evidence obtained as a result of the search. Accordingly, we affirm the Court of Appeals on the issue of excluding the battering time, and we reverse the Court of Appeals on the issue of constructive refusal and affirm the district court’s denial of Defendant’s motion to suppress.

IT IS SO ORDERED.

PAMELA B. MINZNER, Justice (concurring in part and dissenting in part)

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PATRICIO M. SERRA, Justice
EDWARD L. CHÁVEZ, Justice
PAMELA B. MINZNER, Justice (concurring in part and dissenting in part)

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

(21) I concur in part and dissent in part. I concur in the standard of review applied by the Majority Opinion and I concur in affirming the Court of Appeals’ determination that the officers waited only ten seconds after knocking and announcing and before forced entry. Maj. Op. ¶¶ 1, 9, 11. I also concur in affirming the Court of Appeals’ determination that no exigent circumstances existed. Id. ¶ 12. I dissent from the Majority Opinion that ten seconds was a sufficient amount of time for the officers to infer that Defendant refused to answer the door, or to find a constructive refusal to admit. Id. ¶ 17. Therefore, I believe the Court of Appeals did not err in reversing the trial court’s order denying Defendant’s motion to suppress. I would affirm the Court of Appeals’ Opinion in its entirety.

(22) Under the totality of circumstances I believe a ten-second wait was not sufficient to conclude that the officers were constructively denied admittance. In ¶ 17, the Majority Opinion relies on “the totality of the circumstances . . . particularly the small size of the motel room and the fact that Defendant did not respond in any way,” to repeated knocking and announcing. In my opinion, however, our totality of circumstances analysis also should include the fact that the search warrant was executed on a dark Saturday morning at 6:15, Detective Sharkey testified that he could not recall if there were any lights on in the room when the warrant was executed, and there was no verbal or physical response from within the room after the officers announced their presence. Furthermore, Detective Sharkey
testified as follows:

The reason I do serve search warrants at such an early time of the day was several fold. The one reason that is of utmost concern is there is a very strong possibility that the person who is going to be the subject of the actual search warrant being served will be resting, be asleep, and it would take them a little bit longer if they were to choose to arm themselves.

Absent evidence indicating that Defendant was awake, it is plausible that Defendant was asleep when officers knocked on his motel room door and shouted “Sheriff’s Department!” and “Search Warrant.” See State v. Johnson, 2004-NMCA-064, ¶ 15, 135 N.M. 615, 92 P.3d 61 (noting “the officers heard no sounds suggesting that Defendant was awake—either to answer the door or to destroy evidence”). Even though Defendant was standing just inside the door when the officers entered, see Maj. Op. ¶ 3, the officers did not know where Defendant was before they entered the room. Detective Sharkey also could not recall whether Defendant was dressed or in his underwear when officers entered the motel room. It is possible that Defendant was asleep, heard the commotion outside, was awakened, and tried to put some clothes on before the officers broke his door down. Just as we are not sure whether Defendant was awake when the officers announced their entry, the officers also did not know whether Defendant was awake.

{23} The Majority Opinion notes that the trial court found that the motel room was no larger than twelve feet by twelve feet, the bed was within three or four feet of the door, and Defendant must have been within twelve feet of the door at the time of the attempted entry; however, it is not clear that the officers were aware of how small the room was or where the bed was located or where Defendant was before they entered. See Maj. Op. ¶ 18. In fact, Detective Sharkey testified, “As I went through the hotel room, I realized it was a very, very small hotel room.” Based on his testimony, it seems reasonable to conclude that the small size of the room was not apparent until after the officers entered Defendant’s room.

{24} The early hour on a Saturday, the possibility that Defendant was asleep, and the officers’ lack of knowledge that the room was so small are all factors that should be weighed in our analysis. In my opinion, a ten-second wait under the totality of circumstances was not sufficient and the officers’ noncompliance with the knock and announce rule was not justified.

{25} The Court of Appeals analogized the present case to State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994). See Johnson, 2004-NMCA-064, ¶ 15. In Attaway, the police waited ten to fifteen seconds at 6:00 a.m. on a Saturday. Id. In the present case, the police waited ten seconds at 6:15 a.m. on a Saturday. Id. The Court of Appeals then distinguished the two cases because in Attaway this Court ultimately concluded that ten to fifteen seconds was acceptable due to exigent circumstances, while there was no exigency in this case. Id. The Court of Appeals concluded that because this Court stated in Attaway that ten to fifteen seconds at 6:00 a.m. on a Saturday was an “extremely short” period of time, id. (quoting Attaway, 117 N.M. at 153, 870 P.2d at 115), and because no exigencies existed in the present case, “[t]he search was not constitutionally reasonable, and the results of the search should have been suppressed.” Id. I agree with the Court of Appeals’ reasoning and conclusion.

{26} In discussing Attaway, the Majority Opinion states “it was not our intention to create a rule that absent exigency, ten seconds is unreasonable per se, or that ten seconds can never be a sufficient amount of time to infer denial of entry.” Maj. Op. ¶ 16. I agree and I do not think the Court of Appeals was relying on Attaway as a bright-line rule that absent exigent circumstances, ten seconds would never be sufficient. Rather the Court of Appeals was comparing the relevant facts in this appeal with the relevant facts in Attaway. As a matter of law, the Court of Appeals could not determine a constructive refusal to admit based on the facts of this case.

{27} Applying a totality of circumstances analysis, I also am not persuaded that ten seconds was a sufficient amount of time to conclude that Defendant refused to answer the door. For this reason, I am not able to join the Majority Opinion in its entirety. I concur in part and I dissent in part.

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

Opinion Number: 2006-NMSC-050

Topic Index:
Attorneys: Effective Assistance of Counsel
Constitutional Law: Double Jeopardy
Criminal Law: Felony Murder; and Robbery
Criminal Procedure: Double Jeopardy

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
MARIO BERNAL,
Defendant-Appellant.
No. 29,183 (filed: October 17, 2006)

APPEAL FROM THE DISTRICT COURT OF VALENCE COUNTY
WILLIAM A. SANCHEZ, District Judge

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OPINION

RICHARD C. BOSSON, CHIEF JUSTICE

[1] In this direct appeal from Defendant’s conviction of felony murder, attempted armed robbery, and several other crimes, Defendant presents certain double jeopardy arguments, challenging his attempted armed robbery conviction as being the predicate for his felony murder conviction. In the course of addressing those arguments, we decide, for the first time, whether the single-larceny doctrine applies to the crime of attempted armed robbery. Addressing that issue and others regarding double jeopardy, as well as Defendant’s claim of ineffective assistance of counsel, we affirm Defendant’s convictions.

BACKGROUND

[2] In the early morning of September 3, 2000, two masked gunmen broke into Felipe Giron’s house in Belen, intent on robbing him. The gunmen had apparently learned that Giron had nearly $10,000 in cash at his home, purportedly the proceeds of illegal drug sales. They entered Giron’s bedroom where he and Giron’s live-in girlfriend, Carey Romero, were sleeping. Almost immediately, one of the men shot Giron in the head with a rifle, killing him.

[3] The men then pointed their guns at Romero and demanded she produce the money. Initially, Romero huddled under the covers of the bed for safety. The gunmen forced her out of bed, poked her with their weapons, and demanded that she find the money. At gunpoint, Romero was forced to look through the drawers in the bedroom, but did not find any money. She then turned on the lights in the house and proceeded through the living room to the dining room. During the entire time, one of the gunmen followed her closely with a gun. The gunmen continually yelled at her to hurry and threatened to kill her. She looked through a desk in the dining room, and then started searching a closet. She could not reach the top shelf of the closet, so the gunmen both attempted to reach the shelf. This distracted the gunmen enough to allow Romero to escape through the front door of the house and flee to a neighbor’s house, where she called police. The two men left the house without finding any money.

[4] Romero was not able to identify the gunmen and no immediate arrests were made. Over two years later, Eric Jaramillo, a former gang member, was arrested on an unrelated charge of armed robbery. He told police that he knew who killed Giron. In exchange for leniency on his charge, Jaramillo testified that Defendant had confessed to the attempted robbery and murder of Giron. Based upon Jaramillo’s testimony, Defendant was indicted on charges of first-degree murder on the alternative theories of willful and deliberate murder, NMSA 1978, § 30-2-1(A)(1) (1994), or felony murder, NMSA Section 30-2-1(A)(2), two counts of attempted armed robbery, NMSA 1978, § 30-16-2 (1973), and various other crimes. At trial, both the prosecution and defense acknowledged that Jaramillo’s testimony was the only direct evidence linking Defendant to the crime.

[5] A jury found Defendant guilty of felony murder, both counts of attempted armed robbery, and other charges. Prior to sentencing, the trial court dismissed Defendant’s conviction for the attempted armed robbery of Giron because, according to the court, that count represented the predicate felony for the felony murder conviction. The court sentenced Defendant for the attempted armed robbery of Romero. Defendant received a sentence of life imprisonment plus twenty-nine years for the murder, the attempted robbery of Romero, and the other remaining convictions. He now appeals directly to this Court from the trial court’s judgment and sentence. See Rule 12-102(A)(1) NMRA (direct appeal to Supreme Court of convictions in which sentence of life imprisonment imposed).

DISCUSSION

Double Jeopardy

[6] Defendant appeals on double jeopardy grounds asking us to reverse his conviction for the attempted armed robbery of Romero. A double jeopardy claim is a question of law that we review de novo. State v. Andazola, 2003-NMCA-146, ¶ 14, 134 N.M. 710, 82 P.3d 77.


1Originally two other individuals were also indicted for their roles in the crime based upon Jaramillo’s testimony, and the three cases were joined. The State subsequently decided that it could proceed only with the prosecution of Defendant and severed the cases for trial.
criminal statutes, and “unit-of-prosecution” claims, in which an individual is convicted of multiple violations of the same criminal statute.  Id.  at 8, 810 P.2d at 1228.

Defendant advances two arguments. First, he claims that his remaining conviction for the attempted armed robbery of Romero was a predicate felony for the felony murder conviction and, like the attempted robbery of Giron, was unitary with the felony murder and must be dismissed. Second, Defendant claims he committed only one continuous attempted armed robbery which involved two victims, with only one object—Giron’s money. There being only one crime, Defendant argues that since the conviction for attempted armed robbery of Giron was dismissed, the conviction for the attempted armed robbery of Romero must be dismissed as well.

For his first argument, Defendant states a double-description claim because he claims that he was wrongfully convicted under two different statutes for unitary conduct: attempted armed robbery and felony murder. For double-description claims, this Court follows the two-part test identified in Swafford, 112 N.M. at 13-14, 810 P.2d at 1233-34. First, we examine whether the conduct was unitary, meaning whether the same criminal conduct is the basis for both charges. Id. If the conduct is not unitary, then the inquiry is at an end and there is no double jeopardy violation. Id. at 13, 810 P.2d at 1233.

Felony murder has its own particular double jeopardy analysis. If the predicate felony and felony murder are unitary, then the predicate felony must be dismissed because it is subsumed within the elements of felony murder. State v. Contreras, 120 N.M. 486, 491, 903 P.2d 228, 233 (1995); see § 30-2-1(A)(2) (“Murder in the first degree is the killing of one human being . . . in the commission of or attempt to commit any felony . . . .”). Since Defendant claims a double jeopardy violation for the predicate felony of attempted armed robbery and felony murder, we examine only whether the conduct underlying these two convictions was unitary.

The facts of this case indicate that, unlike the attempted robbery of Giron, the attempted robbery of Romero was not unitary with Giron’s murder. Most significantly, the murder of Giron was complete before the would-be robbers turned their attention to Romero and began to use force and threatened force against her. See State v. DeGraft, 2006-NMSC-011, ¶ 27, 139 N.M. 211, 131 P.3d 61 (“In our consideration of whether conduct is unitary, we have looked for an identifiable point at which one of the charged crimes had been completed and the other not yet committed.”). The facts of record indicate that the murder of Giron took place almost immediately after the break-in occurred. Once Giron was shot, the felony murder was complete. Only after did the intruders turn to Romero and threaten her in an effort to find the money. Because the attempted robbery of Romero began after the murder of Giron was complete, the acts were not unitary, and Defendant’s double-description claim must fail under the traditional Swafford analysis for double-description claims.

We turn now to Defendant’s second argument: that only one attempted robbery occurred, involving two victims. Since the trial court dismissed one attempt, Defendant argues no conduct remains to sustain a second attempted robbery count. Defendant asserts that only one continuing attempted robbery took place because the assailants moved from Giron to Romero with the single intent of stealing Giron’s money. If only one attempted robbery occurred, then there was only one predicate felony, which, as we have seen, must be dismissed as the predicate to the felony murder. However, if two attempted robberies occurred, one of Giron and one of Romero, then the conviction for the attempted robbery of Romero can stand because that robbery was not unitary with the murder of Giron.

To determine whether two attempted robberies occurred, we must undertake a unit-of-prosecution analysis. For unit-of-prosecution challenges, the only basis for dismissal is proof that a suspect is charged with more counts of the same statutory crime than is statute authorizes. Herron v. State, 111 N.M. 357, 359, 805 P.2d 624, 626 (1991). The inquiry is to determine whether the legislature intended multiple punishments for one continuing act. Id.

The unit-of-prosecution analysis is done in two steps. First, we review the statutory language for guidance on the unit of prosecution. State v. Barr, 1999-NMCA-081, ¶¶ 13-14, 127 N.M. 504, 984 P.2d 185. If the statutory language spells out the unit of prosecution, then we follow the language, and the unit-of-prosecution inquiry is complete. Id. ¶ 14. If the language is not clear, then we move to the second step, in which we determine whether a defendant’s acts are separated by sufficient “indicia of distinctness” to justify multiple punishments under the same statute. Id. ¶ 15. In examining the indicia of distinctness, courts may inquire as to the interests protected by the criminal statute, since the ultimate goal is to determine whether the legislature intended multiple punishments. See State v. Alvarez-Lopez, 2004-NMSC-030, ¶ 42, 136 N.M. 309, 98 P.3d 699. If the acts are not sufficiently distinct, then the rule of lenity mandates an interpretation that the legislature did not intend multiple punishments, and a defendant cannot be punished for multiple crimes. Barr, 1999-NMCA-081, ¶ 14.

Our first opinion to frame the unit-of-prosecution indicia of distinctness under the modern analysis was Herron, 111 N.M. at 361, 805 P.2d at 628. In Herron, a defendant was charged with nineteen counts of criminal sexual penetration for the repeated rape of a victim, in various manners and in various rooms of a house, over the course of an hour. Id. at 358, 805 P.2d at 625. This Court found the statutory language unclear regarding the proper unit of prosecution, and we therefore analyzed the events for distinctness using factors culled from various other states that had examined the issue. Id. at 361, 805 P.2d at 628. Those factors were (1) temporal proximity of penetrations, (2) location of the victim during each penetration, (3) existence of an intervening event, (4) sequencing of penetrations, (5) defendant’s intent as evidenced by his conduct and utterances, and (6) the number of victims. Id.

The Herron unit-of-prosecution factors were cited in Swafford, a double-description case, and adopted as part of the double-description, unitary-conduct inquiry. See Swafford, 112 N.M. at 14, 810 P.2d at 1234. This underscores the fact that we are doing a substantially similar analysis when we conduct a unitary conduct inquiry in double-description cases as when we conduct a unit-of-prosecution inquiry. In each case, we attempt to determine, based upon the specific facts of each case, whether a defendant’s activity is better characterized as one unitary act, or multiple, distinct acts, consistent with legislative intent. This Court in Swafford noted that “[t]he case law is replete with failed attempts at judicial definitions of the same factual event.” Id. at 13, 810 P.2d at 1233. Instead of laying out a mechanical formula for determining whether conduct is unitary, this Court sought instead to provide “general principles” to aid in the analysis. Id. We stated that, in general terms, “[t]ime and space considerations” would help to determine distinctness. Id. at 13-14, 810 P.2d at 1233-34. If time and space consider-
atios cannot resolve the case, then a court may look at the “quality and nature of the acts,” or the “objects and results involved.” *Id.* at 14, 810 P.2d at 1234.


{18} The number of victims has been a particularly significant indicator in determining whether acts are distinct. *See State v. Dominguez, 2005-NMSC-001, ¶ 23, 137 N.M. 1, 106 P.3d 563 (stating that the number of victims is important for crimes of violence); Morro, 1999-NMCA-118, ¶ 26 (stating that the general rule in unit-of-prosecution cases is that multiple punishments are appropriate when there are multiple victims); Barr, 1999-NMCA-081, ¶ 16 (quoting *Herron*, 111 N.M. at 361, 805 P.2d at 628 for the same proposition). While the existence of multiple victims does not, itself, settle whether conduct is unitary or distinct, it is a strong indicator of legislative intent to punish distinct conduct that can only be overcome by other factors. *Barr, 1999-NMCA-081, ¶ 22.*

{19} We turn now to the specific statutes for attempted robbery. Section 30-16-2 (robbery); NMSA 1978, § 30-28-1 (1963) (attempt). If the statutory language for attempted robbery were clear regarding the unit of prosecution, then the language would control, and the unit-of-prosecution analysis would be complete. In New Mexico, “Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.” *Section 30-16-2. Therefore, the two basic elements of robbery are theft and the use or threatened use of force. *Id*.; UJI 14-1620 NMRA. The statute provides no guidance on the number of prosecution units regarding either the number of thefts or use of force. Attempted robbery is “an overt act in furtherance of and with intent to commit [robbery] and tending but failing to effect its commission.” *Section 30-28-1. This statute likewise does not provide guidance as to the proper unit of prosecution for multiple attempts. Thus, we look to the indicia of distinctness factors to determine whether Defendant committed one or two attempted robberies.

{20} In this case, the indicia of distinctness are more than sufficient to justify convicting Defendant of two attempted robberies. Importantly, there were two victims, and most notably, each victim suffered separate and distinct harms at the hands of Defendant. As we mentioned in examining Defendant’s double-description argument, the first attempted robbery was clearly completed at the time Defendant burst into Giron’s bedroom and Giron was shot, suggesting distinct conduct. *See DeGraff, 2006-NMCA-011, ¶ 27.* At the point of the shooting, the jury could reasonably have concluded that Defendant had the intent to steal Giron’s money, and he and his confederate used force to try and take that money from Giron by shooting him. After this point, there was a clearly identifiable second crime—the attempted robbery of Romero, which occurred after the felony murder was completed.

{21} As further evidence of distinct conduct, the assailants used a different type of force against Romero than against Giron—poking her with guns and threatening her with violence, as opposed to firing a weapon. *Cf. Herron, 111 N.M. at 362-63, 805 P.2d at 629-30 (holding that different manner of sexual penetrations indicated distinct sexual assaults).* Force was used against Romero in different parts of the house. *See id.* at 362, 805 P.2d at 629 (stating that acts against the victim at different locations can indicate separate acts); *cf. id.* at 362-63, 805 P.2d 629-30 (holding that sexual assaults that took place after moving into a different room were distinct).

{22} Perhaps aware of these points of distinct conduct, Defendant argues that he only had one criminal intent—to rob Giron’s money—and therefore, there could be only one attempted robbery. Defendant draws an analogy to the single-larceny doctrine. *See State v. Brown, 113 N.M. 631, 634, 830 P.2d 183, 186 (Ct. App. 1992)* (explaining that a defendant can only be convicted of one count of larceny, even if property is taken from multiple owners, when the property is taken at one time, at one place, in a continuous sequence of events). He argues that when a defendant has only the intent to steal from one owner during a robbery, as with the single-larceny doctrine, there can be only one robbery conviction, regardless of the number of victims. In short, Defendant argues the unit of prosecution for robbery should be controlled by the accused’s intent.

{23} This raises an issue of first impression in New Mexico. We have not previously addressed the proper unit of prosecution for robbery (or attempted robbery) when more than one victim is involved, but the defendant only intended to steal money from a single person. Accordingly, we look to other jurisdictions for guidance. We note a split on the question of whether multiple robbery convictions are allowed when force is used against multiple victims, but the assailant has the single intent to steal property held in common or belonging to only one of the victims. *Fa con v. State, 796 A.2d 101, 122-25 (Md. Ct. Spec. App. 2002), rev’d on other grounds, 825 A.2d 1096 (Md. 2003)* (discussing cases from other jurisdictions and noting a split in approaches). We do not attempt to conduct an exhaustive survey of every state’s position. Instead, we review several representative cases from each side of the split for the persuasiveness of their reasoning.

{24} Some jurisdictions, like Maryland, California, and Virginia, have allowed multiple charges of robbery when multiple victims are present. In a case that bears some similarity to this case, the Maryland Court of Appeals upheld multiple robbery convictions when a thief killed a husband and wife in separate acts and then took money from a wallet they kept in their house. *Borchardt v. State, 786 A.2d 631, 664-65 (Md. 2001).* The Maryland court found that the robbery had components of both larceny and assault, but that it could be treated like assault for unit-of-prosecution purposes, allowing for multiple punishments when multiple victims are harmed. *Id.*

{25} The California Supreme Court took a similar view when it upheld multiple robbery convictions where assailants, in the course of robbing a fast food restaurant, shot one employee and bludgeoned another. *People v. Ramos, 639 P.2d 908, 929 (Cal. 1982), rev’d in part in other grounds, 463 U.S. 992 (1983).* The California court ruled that robbery is a crime of violence and fits into the general rule that multiple victims of violence can give rise to multiple convictions. Similarly, the Virginia Court of Appeals affirmed multiple robbery convictions when a defendant ordered multiple employees of a fast food restaurant to give him money from various cash registers located throughout the restaurant, reasoning that the gravamen of robbery is the use of violence against a person, and thus multiple victims can give rise to multiple convictions. *Jordan v. Commonwealth, 347 S.E.2d 152, 156 (Va. Ct. App. 1986).*

{26} Expressing a contrary view, some
jurisdictions have limited the unit of prosecution for robbery when the defendants exhibit a single intent. The Indiana Supreme Court disallowed multiple robbery convictions when criminal assailants took money from multiple tellers in a credit union, reasoning that the essence of robbery is the taking of property, and therefore property stolen from one owner should constitute one robbery. Allen v. State, 428 N.E.2d 1237, 1240 (Ind. 1981). The West Virginia Supreme Court of Appeals allowed only a single attempted robbery conviction when a man entered a convenience store, ordered one employee to lie on the ground, and shot another employee. The court reasoned that robbery is an aggravated form of larceny and thus subject to the single-larceny doctrine. State v. Collins, 329 S.E.2d 839, 842 (W. Va. 1984). Courts in some jurisdictions have also been hesitant to allow multiple robbery charges due to a fear that a multiplicity of charges might lead to disproportionate sentences. See Facon, 796 A.2d at 122 (surveying the jurisdictional split on the issue and listing reasons why certain jurisdictions reject multiple robberies).

{27} Analyzing this issue in light of New Mexico’s legislative policy, we find the reasoning from the Maryland, California, and Virginia courts persuasive, that robbery is a crime designed to punish the use of violence. To the contrary, we are not persuaded by the arguments put forth by the Indiana and West Virginia courts, that robbery is a property crime and nothing more than aggravated larceny.

{28} Our Court of Appeals has previously noted that robbery is distinct from larceny because it requires, and is designed to punish, the element of force. Brown, 113 N.M. at 634, 830 P.2d at 186; see also UJI 14-1620 Committee commentary (“The gist of the offense of robbery is the use of force or intimidation.”); State v. Hernandez, 2003-NMCA-131, ¶ 9, 134 N.M. 510, 79 P.3d 1118 (“A robbery conviction requires that the force or threatened use of force must be the lever that serves to separate the property from the victim.”) (Internal quotation marks and citation omitted.). Since robbery generally carries a heavier punishment than larceny, the robbery statute clearly is designed to protect citizens from violence. Compare NMSA 1978, § 30-16-1 (2006) with § 30-16-2. Robbery is not merely a property crime, but a crime against a person. State v. Wingate, 87 N.M. 397, 398, 534 P.2d 776, 777 (Ct. App. 1975); cf. United States v. Lujan, 9 F.3d 890, 891-92 (10th Cir. 1993) (stating robbery under New Mexico law is a violent felony for purposes of federal career offender statute because it requires the use or threatened use of force). Like California, we have recognized that multiple victims can often give rise to multiple convictions with crimes of violence. See Dominguez, 2005-NMSC-001, ¶ 23. Since the robbery statute is designed to protect citizens from violence, we believe it logical that the legislature intended to allow for separate charges for each individual against whom violence or the threat of violence is separately used.

{29} To the extent that some jurisdictions limit the multiplicity of robbery charges due to fear of disproportionate sentences, we generally defer to the judgment of the legislature regarding the appropriate length of sentences. See State v. Archibeque, 95 N.M. 411, 412, 622 P.2d 1031, 1032 (1981). We see no reason, in this instance, to use the potential length of a sentence to guide us in determining the appropriate unit of prosecution for robbery.

{30} We note that in other contexts we have rejected arguments that a single intent with multiple acts can only constitute one crime. See, e.g., DeGraff, 2006-NMSC-011, ¶¶ 32, 37, 39 (holding three tampering with evidence convictions were permissible because of discrete acts, even though Defendant may have had a single intent). While a single intent weighs against distinctness, it is only one factor which can be overcome by other factors suggesting distinct conduct, most notably multiple victims. We also note that when we previously applied the single-larceny doctrine to the crime of embezzlement, the legislature responded promptly to our decision by allowing multiple embezzlement convictions for multiple instances of theft. See NMSA 1978, § 30-16-8(A) (1995); State v. Rowell, 121 N.M. 111, 118, 908 P.2d 1379, 1386 (1995) (discussing legislative aftermath following State v. Brooks, 117 N.M. 751, 877 P.2d 557 (1994)). We decline to extend the single-larceny doctrine to robbery or to establish a categorical rule limiting the unit of prosecution for robbery based upon a single intent.

{31} Accordingly, we reject Defendant’s analogy to the single-larceny doctrine and his reliance upon a continuous single intent. We hold that under these facts, where Defendant had the intent to steal only one victim’s property, but used separate and discrete acts of force and threats of force against two victims in an attempt to obtain that property, multiple attempted robbery charges do not violate double jeopardy. When a would-be robber uses force in a separate and distinct manner against multiple victims, multiple convictions for robbery (or attempted robbery) will not be prohibited solely because the robber intends to steal from one owner. Because there were two robbery attempts, and because the second robbery attempt was distinct from the first attempt which constituted the predicate felony for felony murder, we hold that no double jeopardy violation occurred when Defendant was convicted of and sentenced for both attempted armed robbery of Romero and felony murder of Giron.

Ineffective Assistance of Counsel

{32} For a successful ineffective assistance of counsel claim, a defendant must first demonstrate error on the part of counsel, and then show that the error resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 690, 692 (1984) (reaffirmed by Williams v. Taylor, 529 U.S. 362 (2000)). Trial counsel is generally presumed to have provided adequate assistance. Id. at 690. An error only occurs if “representation [fails] below an objective standard of reasonableness.” State v. Roybal, 2002-NMSC-027, ¶ 21, 132 N.M. 657, 54 P.3d 61 (quoting Lytle v. Jordan, 2001-NMSC-016, ¶ 26, 130 N.M. 198, 22 P.3d 666). If any claimed error can be justified as a trial tactic or strategy, then the error will not be unreasonable. Id. With regard to the prejudice prong, generalized prejudice is insufficient. Id. ¶ 25. Instead, a defendant must demonstrate that counsel’s errors were so serious, such a failure of the adversarial process, that such errors “undermine[] judicial confidence in the accuracy and reliability of the outcome.” Id. A defendant must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland,

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We express no opinion as to whether two attempted robberies could occur when the same act of force is used against two victims, e.g., pointing a gun at both at the same time when only one item of property is sought. That question is not before us because Defendant used separate acts of force, at separate times, against Giron and Romero. We reiterate that double jeopardy claims are analyzed on a case-by-case basis to determine if conduct is unitary.
466 U.S. at 694.

{33} Often times, the record on appeal does not provide enough information to adequately determine whether an action was error or caused prejudice. When such questions arise, further evidence is often required. Duncan v. Kerby, 115 N.M. 344, 346-47, 851 P.2d 466, 468-69 (1993). Rather than remand the case to the trial court for further hearings, this Court has a general preference that such claims be brought and resolved through habeas corpus proceedings. Id. at 346, 851 P.2d at 468; see Rule 5-802 NMRA. Therefore, on direct appeal, only when a defendant presents a prima-facie case of ineffective assistance of counsel will this Court remand to the trial court for evidentiary proceedings. Roybal, 2002-NMSC-027, ¶ 19 (citing State v. Swavola, 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct. App. 1992)).

{34} Defendant claims ineffective assistance on the following grounds: (1) trial counsel filed no substantive pre-trial motions, including no motion to dismiss charges on double jeopardy grounds; (2) trial counsel failed to object to hearsay statements during trial; (3) trial counsel stipulated to the admission of testimony from Defendant’s mother to the effect that two guns were stolen from her house the day before the burglary; (4) trial counsel failed to investigate, which led to ineffective cross-examination and opening statement; (5) trial counsel did not tender jury instructions; (6) trial counsel made an inadequate motion for directed verdict; (7) trial counsel failed to adequately confront witnesses on cross-examination; and (8) trial counsel failed to sever the felon in possession of a firearm charge.

{35} Initially, we note that the stipulation to the testimony of Defendant’s mother and the failure to sever the felon in possession of a firearm charge represent potentially serious failures on the part of trial counsel, which may demand a full-bodied inquiry at an evidentiary hearing on habeas corpus. These charges, like most of the rest of the claimed errors, may implicate tactical decisions made by counsel at or during trial, and are best evaluated during habeas corpus proceedings where trial counsel can provide testimony. Such evidence is also necessary in this case to demonstrate that any alleged errors caused prejudice.

{36} We conclude Defendant has not presented a prima-facie case of ineffective assistance of counsel on these grounds, and accordingly, we reject Defendant’s ineffective assistance of counsel claim. However, this decision does not preclude Defendant from pursuing habeas corpus proceedings on this issue should he be able to garner evidence to support his claims.

CONCLUSION

{37} Having concluded that Defendant’s convictions for attempted armed robbery and felony murder do not violate the double jeopardy prohibition against multiple punishments, and that Defendant has failed to present a prima-facie claim of ineffective assistance of counsel, we affirm his convictions.

{38} IT IS SO ORDERED.

RICHARD C. BOSSON, Chief Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
In this original proceeding in mandamus, Petitioners Barbara Johnson, Roger Gonzales, and the Republican Party of New Mexico, make three separate challenges to the upcoming 2006 general election ballot. While each Petitioner relies on different arguments, all three assert that the Secretary of State erred in including or excluding certain candidates from the 2006 general election ballot.

In reaching the merits of Petitioners’ claims, we must interpret certain sections of New Mexico’s Election Code. Petitioner Johnson’s and Petitioner Gonzales’s claims require us to interpret NMSA 1978, § 1-8-8 (1995) and NMSA 1978, § 1-8-26 (1997). The Republican Party’s claim requires us to review NMSA 1978, § 1-8-9 (1975). As explained in detail below, based on our examination of these sections of our Election Code, we find the arguments of all three Petitioners unpersuasive. Accordingly, we hold that the Secretary of State did not err in printing the 2006 general election ballot, and we deny the writ.

BACKGROUND

We address three different challenges to the 2006 general election ballot, involving a Second Judicial District Judge position, a House of Representatives District 68 opening, and the State Auditor position. The discussion and resolution of each issue is highly reliant on specific facts which we address below.

DISCUSSION

Second Judicial District Judgeship

Petitioner Johnson was nominated by the Republican Party of Bernalillo County (County Central Committee) to fill a district judge position that arose after the June primary with the retirement of District Judge James Blackmer, effective April 30, 2006. See State ex rel. Noble v. Fiorina, 67 N.M. 366, 369, 355 P.2d 497, 499 (1960) (when timing of resignation precludes a political party from choosing a candidate at the primary election, then the party may fill the vacancy after the primary by a central committee nomination). Pursuant to that nomination, the County Central Committee Chairman sent a nomination letter to the Bernalillo County Clerk on September 6, 2006. A courtesy copy of that letter was also sent to the Secretary of State. In its letterhead, title, text and signature, the letter referred to the County Central Committee as the nominating authority.

The Bernalillo County Clerk rejected
the filing and sent a letter to the County Central Committee explaining her reasons why the nomination letter was “improperly filed.” 1 (1) under Section 1-8-8(A)(1) district judge positions are to be nominated by the state central committee, not the county central committee, and (2) the nomination should have been filed with the Secretary of State, not the county clerk, as required by Section 1-8-25. The Secretary of State notified Johnson on September 20, 2006, that she would not appear on the ballot because she did not qualify as a candidate pursuant to Section 1-8-8(A)(1).

(6) Section 1-8-8, entitled “Vacancy on general election ballot; occurring after primary,” in pertinent part states:

A. If after a primary election a vacancy occurs, for any cause, in the list of nominees of a qualified political party for any public office to be filled in the general election, . . . the vacancy on the general election ballot may be filled by:

(1) the central committee of the state political party filing the name of its nominee for the office with the proper filing officer when such office is a federal, state, district or multi-county legislative district office; and

(2) the central committee of the county political party filing the name of its nominee for the office with the proper filing officer when such office is a magistrate, county or a legislative district office where the district is entirely within the boundaries of a single county.

C. Appointments to fill vacancies in the list of a party’s nominees shall be made and filed at least fifty-six days prior to the general election.

D. When the name of a nominee is filed as provided in this section, such name shall be placed on the general election ballot as the party’s candidate for that office. . . .

(Emphasis added.)

{7} Petitioner Johnson asserts that Section 1-8-8(A)(2) applies to her candidacy because the Second Judicial District Court position is located in a single county, Bernalillo County. She relies on two New Mexico Attorney General Opinions interpreting a predecessor version of Section 1-8-8, one of which concludes “[i]f the Judicial District is composed of a single county, as the Second Judicial District now is, there can be no question but that the nominee is to be selected by the County Central Committee.” N.M. Att’y Gen. Op. 72-49 (1972) (emphasis added); N.M. Att’y Gen. Op. 74-33 (1974) (concluding that a nominee for a legislative district located entirely within one county, as opposed to a multi-county legislative district, may be chosen by the county central committee). Petitioner therefore claims that it was proper for her to be nominated by the County Central Committee instead of the State Central Committee. She also argues that even if it was inappropriate to be nominated by the County Central Committee, her name should still be on the ballot because the Secretary of State did not notify her that she was off the ballot until well after the fifty-six day deadline for filling a vacancy set forth in Section 1-8-8(C).

{8} In examining the statute, we are impressed that the Legislature included a clear designation of when the County Central Committee or the State Central Committee fills a vacancy. The statute explicitly gives authority to the State Central Committee when the “office is a federal, state, district or multi-county legislative district office.” Section 1-8-8(A)(1) (emphasis added). It gives the County Central Committee nominating authority only when the “office is a magistrate, county or a legislative district office where the district is entirely within the boundaries of a single county.” Section 1-8-8(A)(2).

{9} The nomination in question here is for a “district” court judicial position, not a “magistrate, county or legislative district office where the district is entirely within the boundaries of a single county.” Thus, based on the character of the position, the statute designates it as one to be filled by the state central committee and not the county central committee. This legislative choice is consistent with other legislative indicators. A district judgeship is a state position, not a county position. See Perea v. Bd. of Torrance County Comm’rs, 77 N.M. 543, 546, 425 P.2d 308, 309-10 (1967) (noting that a district court judge is a “state officer” thus employees under the control of district court judges are not county employees); NMSA 1978, § 1-8-25 (1998) (stating that all judicial offices, other than magistrates, file their declarations of candidacy with the secretary of state along with all the other state positions while the county positions file their declarations with the county clerk).

{10} We also observe that the two Attorney General Opinions on which Petitioner relies involved an older statute, since replaced by the current form of Section 1-8-8. When the Legislature amended the statute in 1979, it included a clear designation of when the County Central Committee or the State Central Committee is to act in the nomination process. While prior to the statute’s amendment it arguably might have been proper for the County Central Committee to nominate Petitioner Johnson, the Legislature subsequently clarified the law, and the Secretary of State was obliged to follow it. Thus, we hold that a district court

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1 A courtesy copy of the letter had been sent to the Secretary of State, and based on that letter, the Secretary of State, while never notifying Johnson that the letter had been accepted, put Johnson’s name on the Secretary of State’s official website as the Republican candidate for District Judge in the Second Judicial District, Division 2. However, on September 20, 2006, Johnson was informed by the Secretary of State, both orally and in writing, that after further review by the legal department, she had been removed from the website and her name would not appear on the general election ballot.

2 In the alternative, Johnson argues that even if the nomination should have been submitted by the State Central Committee, she should still be allowed on the ballot because the Secretary of State did not inform her that she was not on the ballot in a timely fashion. She relies on Section 1-8-26, entitled “Primary Election Law; time of filing; documents necessary to qualify for ballot; challenge.” Section 1-8-26(D) states that a qualified candidate shall be mailed notice of placement on the ballot “no later than 5:00 p.m. on the Tuesday following the filing date.” Based on this language, Johnson argues that since the filing date was September 12, 2006, she should have been notified that she was taken off the ballot by September 19, 2006. She was not notified until September 20, 2006.

Johnson’s argument is flawed in that it seeks to apply to a general election, a statute intended to apply only to primary elections. As brought to our attention by Petitioner in oral argument, we recognize that there are no similar time limitations regarding candidate notification for general elections. Again, the Legislature only included such limitations in the Election Code for primary elections. This is a determination for the Legislature to make, and the Legislature chose not to extend its notification provisions to general elections. We are thus bound by the language of Section 1-8-26(D) to apply it only to primary elections.
judge position falls squarely under Section 1-8-8(A)(1), which means that a nomination to fill a vacancy for a district judge position must come from the state central committee of a political party.

District 68 of the New Mexico House of Representatives

{11} The conflict over the names on the ballot for State Representative for District 68 extends back to the primary election on June 6, 2006. In that election, Representative Hector Balderas won the Democratic primary for the district. Importantly, no Republican candidate ran in that primary election. Balderas subsequently withdrew from the race for District 68 to run for State Auditor. His withdrawal on September 5, 2006 was timely under New Mexico law. See § 1-8-9 (withdrawal must occur at least sixty-three days prior to the general election).

{12} Then, on September 9, 2006, the State Central Committee of the Republican Party sent the Secretary of State a letter nominating Roger Gonzales as the Republican candidate for the District 68 Representative seat. The Secretary of State rejected the nomination. Petitioner Gonzales argues that the rejection was in error because his nomination was in compliance with state law, and alternatively, that even if not in compliance, he should be included on the ballot because the Secretary of State did not inform him by mail that his name would not be included on the ballot. As we have already addressed the notice question above in regard to Petitioner Johnson, supra note 2, we will not belabor the point here and only address Petitioner Gonzales’s nomination question. See § 1-8-26 (discussing notice but only for primary elections).

{13} Because District 68 is a multi-county legislative district, Gonzales’s nomination is governed by Section 1-8-8(A)(1) of the Election Code, the same statute applicable to Petitioner Johnson. Unlike Johnson, however, Gonzales was properly nominated by the State Central Committee to represent a multi-county district, and the nomination letter was sent to the Secretary of State as required. Therefore, the only question regarding this particular nomination becomes whether, under the law, there was indeed a vacancy on the ballot that the State Central Committee could nominate someone to fill the vacancy caused by Balderas’s withdrawal, no similar vacancy existed for the Republican Party.

{15} Reviewing our precedent, we conclude there is ample support for the Secretary of State’s position. See Steen v. Hooper, 631 F.2d 707, 709, 711 (10th Cir. 1980) (relying on the federal district court’s decision that, under Section 1-8-8(A), a vacancy does not exist on the general election ballot unless the party ran a candidate in the primary election; also noting that a compelling state interest was served by ensuring “elections in New Mexico are conducted in a fair, honest and orderly fashion, unaccompanied by chaos, even when officials are confronted by a sudden change in events”); State ex rel. Van Schoyck v. Bd. of County Comm’rs, 46 N.M. 472, 475, 481-82, 131 P.2d 278, 280, 284 (1942) (holding, under previous version of Section 1-8-8, that unless a candidate is nominated in the primary election there is no vacancy for the central committee to fill); N.M. Att’y Gen. Op. 80-31 (1980) (stating that a party could not nominate a candidate to fill a vacancy if that party had “offered no candidate for that office in the primary election”); cf. Fiorina, 67 N.M. at 369, 355 P.2d at 499 (stating if the election is of a type where there was no opportunity for the political party to choose a nominee in the primary, such as a judiciary retirement occurring after a primary election, then there is a valid vacancy in the general election even if the party did not run a candidate in the primary election). While these precedents on the issue all address a previous version of Section 1-8-8, the changes made to the Election Code in 1979 did not alter the phrase, “If after a primary election a vacancy occurs . . . .” Accordingly, the Legislature has not sought to alter the outcome and the interpretation of “vacancy” offered in these cases. Thus, without a primary candidate there can be no vacancy, and without a vacancy, there can be no substitute candidate, not at least without some legislative amendment of Section 1-8-8. We affirm the Secretary of State’s decision to exclude Petitioner Gonzales from the general election ballot.

The State Auditor

{16} The Republican Party of New Mexico has petitioned this Court to remove Hector Balderas’s name from the general election ballot for the State Auditor position. Petitioner asserts that the previous Democratic candidate for State Auditor, Jeff Armijo, did not withdraw his name in time to create a statutory “vacancy” that the Democratic State Central Committee could fill. Petitioner also claims that even if there was a proper withdrawal, notice of the Hector Balderas nomination was not sent to the Secretary of State within the proper deadline.

{17} Armijo, the previous Democratic nominee for State Auditor, held a press conference on August 29, 2006, to announce that he was withdrawing from the race. That same day, the Democratic Party sent a copy of the Armijo press release to the Secretary of State. The deadline for withdrawing from the general election was September 5, 2006. See § 1-8-9 (withdrawal must be complete at least sixty-three days prior to the general election). The Secretary of State interpreted Armijo’s statements as a timely withdrawal, creating a vacancy.

{18} However, on September 5, 2006, Armijo held another press conference purporting to recant his previous withdrawal. In response to these actions, on September 8, 2006, the State Democratic Party filed a lawsuit against Armijo and the Secretary of State in the First Judicial District Court to restrain Armijo from being placed on the ballot. That same day Armijo filed a lawsuit against the Secretary of State in the Second Judicial District Court seeking to have his name placed on the ballot. Facing a September 12, 2006 deadline for naming a candidate for the State Auditor position, the Democratic Party State Central Committee nominated Hector Balderas as its candidate for State Auditor on September 9, 2006. In compliance with the Election Code the committee notified the Secretary of State of the nomination, which was received September 11, 2006, a day before the statutory deadline of September 12, 2006. A day later, on September 13, 2006, all the parties to the two pending lawsuits filed a Stipulation of Dismissal with Prejudice in both cases. Armijo has not chosen to challenge this legal outcome or otherwise contest his withdrawal in this Court.

{19} Petitioner’s main argument is that Armijo did not properly withdraw; therefore, Balderas could not be nominated and put on the ballot because there was no vacancy under Section 1-8-8(A). Petitioner, however, has not referred us to a statutory provision, and we have not been able to locate any, that specifies how a candidate withdraws from a general election. The only citation Petitioner gives us is to NMSA 1978, § 1-8-44 (1999), entitled “Primary election law; withdrawal of candidates,” which specifies how a candidate withdraws from a primary election.

{20} There are several problems with reliance on Section 1-8-44. First, as noted
in the title, Section 1-8-44 only applies to primary elections, and the ballot in question here is for a general election. As conceded by Petitioner in oral argument before this Court, there is no provision in the Election Code setting forth any requirements for withdrawal of a candidate from a general election, other than timeliness.

{21} Section 1-8-44 has other problems as well. Even if we were to attempt to apply Section 1-8-44 to general elections, the only requirement it lists is that the withdrawal be submitted “no later than the first Tuesday in April before that primary election.” There is no specific requirement that the withdrawal be submitted in writing to the Secretary of State as implied by Petitioner. The predecessor to Section 1-8-44 did include such a requirement. In 1955, the Legislature said that to withdraw the nominated person “shall notify the secretary of state or county clerk in writing by a sworn statement . . . .” NMSA 1953, § 3-11-66 (1955 Pocket Supp.). The requirement of a writing was repealed by 1963 N.M. Laws, ch. 317. The removal of the writing requirement from Section 1-8-44, and the failure to include any similar requirement in Section 1-8-9 pertaining to general elections, evinces a legislative intent that withdrawal does not require a formal written letter to the Secretary of State. Therefore, the Secretary of State was within her discretion to rely on Armijo’s August 29 press conference in which he withdrew from the State Auditor race.¹

{22} The absence of a formal withdrawal requirement in the Election Code also brings into question the propriety of mandamus in this case. Petitioner filed this action as an emergency writ of mandamus. “Mandamus lies only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law.” Brantley Farms v. Carlsbad Irrigation Dist., 1998-NMCA-023, ¶ 16, 124 N.M. 698, 954 P.2d 763 (citing El Dorado at Santa Fe, Inc. v. Bd. of County Comm’rs, 89 N.M. 313, 316, 551 P.2d 1360, 1363 (1976)). When the legal duty in question is based on a statute, mandamus is appropriate “only when that duty is clear and indisputable.” Id. (citing Witt v. Hartman, 82 N.M. 170, 172, 477 P.2d 608, 610 (1970)).

¹Petitioner argues that the withdrawal was not presented to the Secretary of State until after the September 5, 2006 deadline. As noted above, Armijo withdrew on August 29, 2006. A copy of that press conference release was given to the Secretary of State. As we have just held, no other formal requirements were necessary. Therefore, the withdrawal met the statutory deadline as found in Section 1-8-9.

{23} Petitioner claims the Secretary of State violated her clear legal duty by not requiring that Armijo’s withdrawal be in writing before allowing Balderas to be added to the ballot. Such a duty is not expressed in either Section 1-8-9 or Section 1-8-44. Hypothetically, even if applicable, neither statutory provision clearly and indisputably requires such a withdrawal to be in writing. Therefore, for this additional reason, mandamus is not appropriate, in any event, regarding the State Auditor’s position on the ballot presently held by Balderas.

CONCLUSION

{24} For these reasons we deny the writ of mandamus and hold that the Secretary of State did not err in printing the 2006 general election ballot.

{25} IT IS SO ORDERED.

RICHARD C. BOSSON,  
Chief Justice

WE CONCUR:
PAMELA B. MINZNER, Justice  
PATRICIO M. SERNA, Justice  
PETRA JIMENEZ MAES, Justice  
EDWARD L. CHÁVEZ, Justice
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-129

BANKERS TRUST CO.,
Plaintiff,
v
MORRIS WOODALL a.k.a. MITCH WOODALL, ROBBIN WOODALL, and WELLS FARGO BANK NEW MEXICO, N.A.,
Defendants,
TIERRA CASA INVESTMENTS, L.L.C.,
Defendant-Appellant,
v
GRETCHEN and STEVEN WELCH,
Defendants-Appellees.

No. 25,930 (filed: August 23, 2006)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
THERESA BACA, District Judge

JOHN E. FARROW
FAIRFIELD, FARROW
& STROTZ, P.C.
Albuquerque, New Mexico
for Appellant

SYLVAIN SEGAL
LAW OFFICES OF SEGAL
& WHITTAKEI, L.L.P.
Albuquerque, New Mexico
for Appellees

OPINION

RODERICK T. KENNEDY, Judge

1. Mitchell and Robbin Woodall, following their divorce and the subsequent foreclosure and sale of the real property they had purchased during their marriage, each assigned their respective right of redemption to a different assignee. The first assignee to file a petition to redeem the property, Tierra Casa Investments, L.L.C. (Tierra Casa), appeals from the district court’s order allowing the other assignee to redeem the property equally with Tierra Casa as tenants in common. Tierra Casa argues that the first in time rule for redemption applies because: (1) the cotenancy that existed between the Woodalls ended with the foreclosure sale, or (2) the cotenancy that existed between the Woodalls ended with their individual assignments to others of their rights of redemption. As a result, Tierra Casa maintains that, as the first to redeem, it should be allowed to redeem to the exclusion of Gretchen and Steven Welch (the Welches). In other words, it argues that with the cotenancy extinguished, its redemption of the property is not subject to the Welches’ right to contribution as cotenants.

2. We affirm and hold that the Woodalls’ cotenancy was not terminated either by the foreclosure sale or their assignments of their rights of redemption to two different parties; the first in time rule therefore does not apply to this case, and Tierra Casa’s right of redemption is subject to the Welches’ right of contribution. We hold that parties to whom tenants in common assign their rights to redeem property following foreclosure take their assignments subject to the rights and obligations of their assignors.

FACTS AND BACKGROUND

3. The Woodalls were married when they bought the property at issue in this case. Following their divorce, the mortgage on the property was foreclosed and on January 5, 2005, a special master sold the property to Tierra Casa. On January 6, Mitchell Woodall assigned his right of redemption in the property to Tierra Casa, and Robbin Woodall assigned her right of redemption to the Welches. On January 27, the foreclosure sale was confirmed by the district court. That same day, Tierra Casa filed its petition to redeem the property. The next day, the Welches filed their petition to redeem.

4. The Welches and Tierra Casa both asserted a superior right to redeem the property. The Welches also proposed that they and Tierra Casa be allowed to contribute half of the redemption price as cotenants. The district court agreed to this proposal. Subsequently, this Court decided HSBC Bank USA v. Fenton, 2005-NMCA-138, 138 N.M. 665, 125 P.3d 644, which held that, generally, the first to file a petition to redeem property following a foreclosure sale has priority with respect to redemption. Id. ¶¶ 1, 10. Tierra Casa asked the district court to reconsider its decision in light of that opinion. On June 14, the district court reaffirmed its decision that Tierra Casa and the Welches were to be allowed to equally redeem the property. Tierra Casa appeals.

DISCUSSION

Mortgage Foreclosure Sales Do Not Terminate Cotenancies Until After the Period of Redemption Has Passed

5. The issues in this case are legal issues and our review is therefore de novo. See Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582.

6. Tierra Casa initially argued on appeal that the foreclosure sale terminated the cotenancy because the sale destroyed the unity of possession. See 86 C.J.S. Tenancy in Common § 11 (1997) (stating that destruction of the unity of possession defeats the cotenancy). Tierra Casa conceded during oral arguments that this argument is incorrect. We agree.

7. “A ‘cotenancy’ is a tenancy under more than one distinct title, but with unity of possession.” 20 Am. Jur. 2d Cotenancy & Joint Ownership § 1 (2005). The unity of possession does not require actual physical possession, but merely the right to possession. Id. § 33. Unity of possession is merely each cotenant’s right to possess the whole. Id. §§ 32-33. “[U]nity of possession . . . is, of course, simply another way of saying that the tenancy in common is a form of concurrent ownership.” 4 David A. Thomas, Thompson on Real Property § 32.06(a), at 87 (David A. Thomas ed., 2d ed. 2004).

8. Some authorities assert the blanket proposition that a foreclosure sale terminates the cotenancy. See 86 C.J.S. Tenancy in Common §§ 11; Sigman v. Rubeling, 271 S.W.2d 252, 255 (Mo. Ct. App. 1954). However, in New Mexico, a foreclosure sale is always subject to the owner’s right of redemption. NMSA 1978, § 39-5-18(A) (1987). The statutory right of redemption is a right to regain actual physical possession of the property, conditioned upon certain acts. See id. We view the ‘right to
possess” as a right that is not destroyed by a foreclosure sale until the time for redemption passes, because a cotenant still has the right to possess the whole until then. See Bradley v. Bradley, 554 N.W.2d 761, 764 (Minn. Ct. App. 1996) (“Upon expiration of the right of redemption, a redeeming cotenant’s title becomes paramount to that of a nonredeeming co-tenant.”).

A party may redeem its interest in property lost through foreclosure sale by reimbursing all of the repurchaser’s acquisition costs, or if another co-tenant has already redeemed the property, by paying that co-tenant the portion of the redemption money attributable to the later-redeeming co-tenant’s interest in the property. A co-tenant who repurchases property lost through foreclosure takes subject to his co-tenant’s right of redemption.

Id. (citation omitted). Redemption acts to restore the title of property to its status before the sale. See Velasquez v. Mascareñas, 71 N.M. 133, 139-40, 376 P.2d 311, 315 (1962) (characterizing the purchase of real property at a tax sale as obtaining an “inchoate title” (internal quotation marks and citation omitted)).

(9) At the time of the foreclosure sale, the Woodalls were cotenants. The Woodalls did not assign any of their rights in the property until after the foreclosure sale. Since the foreclosure sale did not terminate the Woodalls’ cotenancy, under the doctrine of inurement, a redemption by one cotenant would inure to the benefit of the other cotenant, triggering the latter’s right of contribution. In New Mexico, “a cotenant who redeems from a tax sale does so for the benefit of all the cotenants.” Id. at 138, 376 P.2d at 314; Chavez v. Chavez, 56 N.M. 393, 396, 444 P.2d 781, 782 (1962). We hold that this rule applies with equal force to redemption from a mortgage foreclosure sale. See 86 C.J.S. Tenancy in Common § 63 (“Generally, a redemption from a judicial or foreclosure sale of the common property by one tenant in common inures to the benefit of all the cotenants.”). We therefore hold that a foreclosure sale does not extinguish a cotenancy until the time for redemption has passed, and that one cotenant’s redemption inures to the benefit of the other cotenants. See Laura v. Christian, 88 N.M. 127, 129, 537 P.2d 1389, 1391 (1975) (“[T]he redemption or prevention from loss by one cotenant of common property by payment of an obligation or the purchase of an outstanding interest, which should be discharged or purchased proportionately by cotenants, inures to the benefit of the cotenants at their option, subject to the right of contribution.”). Torrez v. Brady, 37 N.M. 105, 111, 19 P.2d 183, 187 (1932) (“[W]hen a cotenant purchases an outstanding title or claim to the common property, such purchase inures to the benefit of the common estate, subject only to the right of the purchasing cotenant to require a proportionate contribution from the other cotenants.”).

Dual Assignments of Redemption Rights Do Not Terminate Cotenancies

{10} Tierra Casa next argues that the Woodalls’ assignments of their respective rights of redemption to different parties terminated the cotenancy because there was no longer a confidential relationship between the parties. Tierra Casa relies on Smith v. Borradaile, 30 N.M. 62, 227 P. 602 (1922), which noted a number of exceptions to the general rule of inurement between cotenants. Id. at 81, 227 P. at 607. These exceptions include: (1) situations where title is perfected in a third party before the cotenant seeks to purchase the property, (2) situations of adverse possession between cotenants, (3) situations where the cotenants are taxed separately so that the other cotenant does not have a general duty to protect the other cotenant’s interest, and (4) situations “where the titles derived by cotenants came from different sources, where it is said that the condition establishing a confidential relation between them with reference to the title, that is to say, a fiduciary or trust relationship, does not exist.” Id. It is this fourth exception which concerns us here. Tierra Casa maintains that because each assignee in this case derived its right of redemption from a different source, and the parties are “strangers,” the cotenancy was destroyed for lack of a confidential relationship. We disagree with this conclusion.

{11} We begin by noting that Tierra Casa agreed during oral arguments that if there was only one assignment in this case, that single assignment would be insufficient to terminate the cotenancy. The general rule is that while “[a] tenant in common who conveys his or her interest to a third person ceases to be a cotenant . . . the purchaser of the undivided share of a tenant in common becomes a cotenant with the remaining owners.” See 20 Am. Jur. 2d Cotenancy & Joint Ownership § 40 (footnotes omitted). Furthermore, the cotenant’s conveyance only “operates to transfer the identical interest of the grantor in the common property.” 86 C.J.S. Tenancy in Common §§ 140(b); see also 6 Am. Jur. 2d Assignments § 144 (1999) (“As a general rule, an assignee takes the subject of the assignment with all the rights and remedies possessed by or available to the assignor . . . [and] is subject to any defense that would have been good against the assignee; the assignee cannot recover more than the assignor could recover, and the assignee never stands in a better position than the assignor.” (footnotes omitted)). Rather, Tierra Casa asserts that it was the double assignment in this case that effectively ended the cotenancy. We see no reason to carve out an exception where all the cotenants’ interests are assigned, as opposed to situations where only one assignment is made.

{12} Tierra Casa implies that it would be unfair to force strangers into an unwanted business relationship, but we are not persuaded. Cotenancy interests are freely alienable. “Generally, a tenant in common may convey his or her own interest in the common estate to a stranger without the knowledge or approval of other cotenants.” Landskroner v. McClure, 107 N.M. 773, 775, 765 P.2d 189, 191 (1988); see also 7 Richard R. Powell, Powell on Real Property § 50.06[4], at 50-35 (Michael Allan Wolf ed., 2005) (“Without consent of cotenants, each tenant in common may sell or encumber his or her property interest, and thus inject a stranger into the cotenancy.”). Had Robbin Woodall not assigned her interest and instead sought to redeem, there would be no more or less of a cotenancy. Also, by purchasing a right of redemption from a divorced cotenant, the purchaser/assignee is charged with constructive knowledge of the existence of the other cotenant’s rights. See, e.g., Fed. Nat’l Mortgage Ass’n v. Elliott, 566 P.2d 21, 26 (Kan. Ct. App. 1977). Since cotenants may freely inject strangers into the cotenancy, and strangers may freely choose to enter the cotenancy, we find no basis in this argument to support termination of the cotenancy. Here, Tierra Casa had actual knowledge of the cotenancy.

{13} The principle that strangers may freely enter a cotenancy also defeats Tierra Casa’s argument that the lack of confidential relationship between itself and the Welchels defeats the cotenancy. As explained in Smith,

Many cases have considered the duty or obligation as to the common estate existing between tenants in common from the standpoint of a sort of confidential
relation said to arise by reason of their common ownership, and have denied that such confidential relation exists where the several cotenants derive their title from different sources. But as this confidential relation arises by operation of law upon the arising of the unity of possession, these cases would appear to confuse effect for cause and to deny the distinguishing feature of tenancies of this character as defined by the books.

30 N.M. at 84, 227 P. at 608. Smith thus elucidates that the confidential relationship does not create the cotenancy, but that the cotenancy creates the confidential relationship. The fact that Tierra Casa and the Welches are accidental cotenants is of no consequence; a confidential relationship was created when the cotenancy arose, continuing through the foreclosure sale until the period of redemption expires, and Tierra Casa’s redemption inures to the benefit of the Welches. See Laura, 88 N.M. at 129, 537 P.2d at 1391 (describing the doctrine of inurement).

{14} We recognize that some authorities hold that “if tenants’ interests accrue at different times and under different instruments,” the doctrine of inurement does not apply. See 20 Am. Jur. 2d Cotenancy & Joint Ownership § 76. However, the better rule says otherwise. Tenants in common hold distinct titles. See id. § 1; see also 86 C.J.S. Tenancy in Common § 3. The only requirement of a tenancy in common is unity of possession; tenants in common “are united only by their right to possession of the property.” 86 C.J.S. Tenancy in Common § 3.

In other words, no privity of estate exists between [the cotenants], but as between themselves their rights and interests are several; there is no unity of title between them, each owner being considered solely and severally seized of a share. In fact, there may be an entire disunion of time, interest, or title, the cotenants may claim their several interests from entirely different sources, the qualities of their estates may be different, the shares may be unequal, and the modes of acquisition of title may be unlike, and they may hold by different tenures.

Id. (footnotes omitted). Because the only unity that a tenancy in common requires is unity of possession, and the cotenants separate title is freely alienable to strangers, we see no reason why the doctrine of inurement should not apply where the cotenants took title under separate instruments or in different modes. We also note that cotenancies between remote assignees may exist in many other situations. See, e.g., Olson v. H & B Props., Inc., 118 N.M. 495, 497, 882 P.2d 536, 538 (1994) (describing the 1934 creation of a cotenancy in the usage of a ditch, where the two current cotenants in the ditch usage were successors in interest to five original cotenants); Earp v. Mid-Continent Petroleum Corp., 27 P.2d 855, 862 (Okla. 1933) (holding that different lessees under separate leases from several cotenants were tenants in common). To proceed as Tierra Casa urges would require this Court to develop at least three rules: a rule for when some, but not all, of the cotenants assign their rights of redemption; a rule for situations where all of the cotenants assign their rights of redemption; and a rule for when no cotenants assign their rights of redemption. We hold that the Woodalls’ separate assignments to two different parties in this case was insufficient to terminate their cotenancy. Tierra Casa and the Welches took as tenants in common, and therefore, Tierra Casa’s redemption of the foreclosed property inured to the benefit of its cotenants, the Welches, who retained a cotenant’s right of contribution, as properly held by the district court.

The First in Time Rule

{15} Tierra Casa argues that since it was the first to file a petition for redemption, it should be entitled to redeem to the exclusion of the Welches. In HSBC Bank USA, we held that due to the absence of a statutory order of priority, the first to file a petition for redemption was entitled to redeem. 2005-NMCA-138, ¶ 10. However, HSBC Bank USA involved a race to redeem between the assignee of a lien creditor and the assignee of the owner. Id. ¶¶ 1-3. While HSBC Bank USA affirms that there is no priority between redemptioners, neither party in that case took their assignments subject to the right of contribution from a cotenant. See id. ¶¶ 2-3, 10.

{16} In this case, unlike HSBC Bank USA, there is only one redemption—Tierra Casa’s. As explained above, Tierra Casa’s redemption inured to the benefit of the other cotenants, namely the Welches. Tierra Casa essentially redeemed the property for the benefit of other cotenants as well, and no additional redemption is necessary. The Welches do not redeem the foreclosed property as additional redemptioners, but must instead, as cotenants, give contribution to Tierra Casa to rehabilitate their interest in the property. There having been but one redemption in this case, the rule in HSBC Bank USA does not apply.

CONCLUSION

{17} We affirm.

{18} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

MICHAEL E. VIGIL, Judge
The facts in connection with Defendant. The vehicle was then searched and methamphetamine and drug paraphernalia were found.

3) The district court concluded that one police officer may act upon information about a possible violation of the law communicated to him by another officer and denied the motion to suppress. Defendant entered a conditional plea of guilty to possession of methamphetamine and possession of drug paraphernalia, reserving the right to appeal the denial of his motion to suppress.

DISCUSSION

4) The Fourth Amendment to the United States Constitution protects the people of the United States against unreasonable searches and seizures by the government, and the New Mexico constitution protects the people against unreasonable searches and seizures. U.S. Const. amend. IV; N.M. Const. art. II, § 10. In Whren v. United States, 517 U.S. 806 (1996) the United States Supreme Court held that as long as a police officer could have stopped a vehicle for a suspected traffic offense, his true motive for making the stop is constitutionally irrelevant under the Fourth Amendment. Id. at 809, 811-12. The parties present us with the question of whether the New Mexico Constitution affords greater protection than the federal constitution. See State v. Gomez, 1997-NMSC-006, ¶ 22-23, 122 N.M. 777, 932 P.2d 1 (describing how to present and preserve for appellate review an argument that the state constitution affords greater protection than the federal constitution). In Whren, the police officers who stopped the vehicle actually observed traffic violations being committed. 517 U.S. at 808. In this case, Officer Martinez did not personally observe any traffic violation. Our first task, therefore, is to determine whether Officer Martinez could have stopped Defendant.

5) The critical inquiry under the Fourth Amendment is whether police conduct is reasonable. The traffic stop of a vehicle by police results in the temporary detention of its occupant, even if only for a brief period and for a limited purpose. Such a stop therefore constitutes a “seizure” of a “person” under the Fourth Amendment and it must be reasonable. State v. Duran, 2005-NMSC-034, ¶ 22, 138 N.M. 414, 120 P.3d 836. “Whether a traffic stop is conducted in a reasonable manner is determined by balancing the public interest in the enforcement of traffic laws against an individual’s right to liberty, privacy, and freedom from arbitrary police interference.” Id. In balancing these interests to determine whether the stop of Defendant’s vehicle was “reasonable,” our review is de novo. See State v. Ryon, 2005-NMSC-005, ¶ 11, 137 N.M. 174, 108 P.3d 1032 (stating that the determination of Fourth Amendment “reasonableness” is reviewed on appeal de novo).

6) A police officer’s traffic stop must be “justified at its inception.” Duran, 2005-NMSC-034, ¶ 23 (internal quotation marks and citation omitted) (emphasis added); State v. Morales, 2005-NMCA-027, ¶ 14, 137 N.M. 73, 107 P.3d 513. To be justified, the traffic stop must be based on a reasonable suspicion that a traffic law has been or is being violated. See State v. Prince,
2004-NMCA-127, ¶ 9, 136 N.M. 521, 101 P.3d 332 (“In the context of a Fourth Amendment analysis, an officer may stop a vehicle when he or she has reasonable suspicion that a traffic law has been violated.”). In order for his suspicion to be reasonable, the police officer must be aware of specific articulable facts that, judged objectively, lead a reasonable person to believe a traffic offense has been committed. State v. Urioste, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964. Whether a police officer has a constitutionally adequate reasonable suspicion to stop a vehicle is, like reasonableness, a question subject to our de novo review. Prince, 2004-NMCA-127, ¶ 8 (“Legal issues such as whether there was reasonable suspicion to support an investigatory detention are reviewed de novo.”); Urioste, 2002-NMSC-023, ¶ 6 (“Determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.”).

We begin our analysis by examining the nature of a seatbelt violation. New Mexico law requires (with limited exceptions not applicable here) each occupant of a motor vehicle to have a seatbelt properly fastened about his body “at all times when the vehicle is in motion on any street or highway.” NMSA 1978, § 66-7-372(A) (2001). A violation is a “penalty assessment misdemeanor” punishable by a $25 fine. NMSA 1978, § 66-8-116(A) (2006) (internal quotation marks omitted). This means that whenever a police officer charges a driver with such a violation, he must issue a uniform traffic citation to the driver, who has the option of agreeing to pay the assessment or to appear in court on the date specified in the citation. Upon signing the citation to do either, the driver is entitled to be released. NMSA 1978, § 66-8-123 (1989); see also NMSA 1978, § 66-8-117(A) (1990) (directing that for a penalty assessment misdemeanor, the alleged violator shall be offered the option of accepting a penalty assessment).

Since a seatbelt violation is a misdemeanor, our misdemeanor arrest rule requires that the offense be committed in the officer’s presence to justify a warrantless arrest for its violation. Cave v. Cooley, 48 N.M. 478, 152 P.2d 886 (1944). The court explained:

A crime is committed in the presence of an officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be consid-

ered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that such is the case.

Id. at 482, 152 P.2d at 888 (quoting State ex rel. Verdis v. Fid. & Cas. Co. of N.Y., 199 S.E. 884, 887 (1938). In City of Roswell v. Mayer, 78 N.M. 533, 534, 433 P.2d 757, 758 (1967), our Supreme Court reiterated that this is the correct lens under which to determine whether a misdemeanor is committed “in the presence” of the officer. The rule was applied in State v. Luna, 93 N.M. 773, 776, 606 P.2d 183, 186 (1980), where a police officer saw the defendant pull away from an intersection at a high rate of acceleration, causing his tires to spin. Id. The officer stopped the defendant and cited him for the misdemeanor of exhibition driving. Id. While talking to the defendant, the officer noticed that the defendant’s breath smelled of alcohol. Since the defendant was a minor, the officer then arrested him for violating an ordinance prohibiting a minor from allowing himself to be served alcohol outside the presence of his parents or guardian, another misdemeanor offense. Id. The court concluded that the offense of exhibition driving was committed in the officer’s presence, but the liquor offense was not. Id. at 777, 606 P.2d at 187. “There is no testimony that the officer ever saw the defendant drinking or being served before the arrest. We therefore agree that the officer had no reasonable grounds to believe that the specific misdemeanor of allowing oneself to be served had been committed in his presence.” Id. (Emphasis added.)

The legislature has made specific exceptions to our misdemeanor rule. For example, NMSA 1978, Section 66-8-125(B) (1978) provides in part that a police officer may arrest without a warrant, any person present at the scene of a motor vehicle accident if he has reasonable grounds, based on personal investigation, “which may include information from eyewitnesses,” to believe the person arrested has committed a crime. Id.; see also NMSA 1978, § 31-1-7(A) (1979) (“Notwithstanding the provisions of any other law to the contrary, a peace officer may arrest a person and take that person into custody without a warrant when the officer is at the scene of a domestic disturbance and has probable cause to believe that the person has committed an assault or a battery upon a household member.”). However, there is no such exception for a seatbelt violation.

Since Officer Martinez did not observe Defendant commit a seatbelt viola-

tion, we must determine whether other authority exists which allowed him to stop Defendant at the inception of this alleged violation. The district court concluded that Officer Martinez was allowed to act upon the information provided to him by Agent Edmison. This requires us to determine if the “police-team” concept as developed in New Mexico permitted Officer Martinez to stop Defendant’s vehicle.

We first recognized the “police-team” qualification to the “in the presence of” requirement for misdemeanor arrests in State v. Lyon, 103 N.M. 305, 308, 706 P.2d 516, 519 (Ct. App. 1985), and State v. Marquez, 103 N.M. 265, 267, 705 P.2d 170, 172 (Ct. App. 1985), which were decided the same day. In Lyon, two officers were working as a team in arresting the defendant for DWI. The defendant was stopped and cited for an open container violation by a police officer who saw defendant driving with a beer bottle between his legs. Id. at 307, 706 P.2d at 518. The officer radioed for assistance because he was in a canine police unit and could not expose the defendant to danger from the dog, and because he needed to remain free to service the canine unit. Id. A second officer who was in the DWI unit responded and administered field sobriety tests to the defendant in the presence of the first officer. Id. When the defendant failed the field sobriety tests, the second officer arrested the defendant, again in the presence of the first officer. Id. While the second police officer never actually observed the defendant driving, we upheld the arrest under the “police-team” qualification to the “in presence” requirement. Id. at 308, 706 P.2d at 519. “Under this qualification, a member of the police-team may arrest for a misdemeanor committed in the presence of another member of the police-team when their collective perceptions are combined to satisfy the presence requirement.” Id.

Similarly, in Marquez, three police officers were acting as a team to arrest a fleeing defendant. A police officer was driving a marked police unit and observed a crowd watching two women fighting. 103 N.M. at 265-66, 705 P.2d at 170-71. He stopped his unit, approached the crowd, announced he was a police officer (he was dressed in jeans), and was attempting to stop the fight, when pushing between the defendant and the officer took place. Id. The police officer identified himself as a police officer to the defendant and turned his attention back to the women. Id. The officer then told the defendant he was going to jail, and the
defendant left the area to avoid arrest. *Id.* at 266, 705 P.2d at 171. He slipped into the crowd, walking away, trying to be inconspicuous, and after reaching the rear of an adjacent service station, started to run away. *Id.* A second officer arrived, and the first officer pointed to the defendant, instructing him to arrest the defendant. *Id.* The second officer radioed a third officer to arrest the defendant, and the arrest was made. *Id.* We held that the three police officers were acting as a “police-team” as described in *Lyon* to arrest the fleeing defendant.

[W]hen a misdemeanor is committed in the presence of a police officer [leaving the scene to avoid arrest] and information of such is promptly placed on the police radio or otherwise communicated and a description of the misdemeanor given, the arrest of the misdemeanor by another police officer within a reasonable time of receipt of the information is valid. *Marquez*, 103 N.M. at 267, 705 P.2d at 172 (quoting *Lyon*, 103 N.M. at 309, 706 P.2d at 520).

{13} In *State v. Warren*, 103 N.M. 472, 709 P.2d 194 (Ct. App. 1985), we adopted guidelines establishing when the “police-team qualification” applies. *Id.* at 477, 709 P.2d at 199 (internal quotation marks omitted). The first category of cases in which the exception is applicable are “situations in which the police officer must call in assistance for such reasons as inherent danger or criminal flight.” *Id.* Marquez was cited as a specific example of this exception. *Id.* The second category of cases “involve situations where police officers are working collectively,” and usually involve traffic surveillance. *Id.* “The link connecting these cases is that, in each of these cases, two or more officers are combining efforts in one investigation.” *Id.* Since the police officers in *Warren* were not in the process of arresting a defendant who was in flight and they were not participating in a cooperative investigation when one of the officers allegedly saw the defendant commit a misdemeanor offense (drinking a beer in a public park), we held that the “police-team” qualification to the in presence requirement for a misdemeanor arrest was not applicable. *Id.* at 477-78, 709 P.2d at 199-200. We concluded: “In the absence of some exigency or cooperative police effort, the police-team exception probably should not be invoked. To randomly apply the exception would effectively emasculate the felony-misdemeanor distinction.” *Id.* at 478, 709 P.2d at 200.

{14} Tested by the foregoing standards, Officer Martinez’s stop of Defendant’s vehicle when he never saw a seatbelt violation was not reasonable. Defendant was not fleeing from arrest, Agent Edmison and Officer Martinez were not jointly participating in enforcing the seatbelt statute when Agent Edmison saw Defendant driving without a seatbelt fastened, and there were no public safety considerations or exigencies requiring the vehicle to be stopped. In this case, the public right to liberty, privacy, and freedom from arbitrary police interference outweighs the public interest in the enforcement of the seatbelt statute. See *Durán*, 2005-NMSC-034, ¶ 22. *Compare State ex rel. Taxation & Revenue Dep’t Motor Vehicle Div. v. Van Ruiten*, 107 N.M. 536, 538-39, 760 P.2d 1302, 1304-05 (Ct. App. 1988) (concluding that a stop was justified by reasonable suspicion when a police dispatcher told the police officer that a person called the dispatcher and reported he observed a very intoxicated person leave a store in a described vehicle traveling in a certain direction and fifteen minutes later the police officer saw the described vehicle traveling in the reported direction); *People v. Wells*, 45 Cal. Rptr. 3d. 8 (2006) (upholding the validity of a traffic stop based solely on an uncorroborated phoned-in tip that accurately described the vehicle and its location and related that a possibly intoxicated person was behind the wheel and “weaving all over the roadway” because (1) the circumstances were sufficiently exigent to pose a threat to public safety, and (2) the tip was reasonably considered reliable because of its contemporaneity and specificity). We therefore hold that the stop of Defendant’s vehicle by Officer Martinez was not constitutionally reasonable.

{15} A necessary element of the *Whren* analysis is a finding that the officer making the stop could have stopped the vehicle for a traffic violation. We hold that Officer Martinez could not have stopped Defendant’s car. Therefore, we do not decide whether our citizens receive greater protection against unreasonable searches under N.M. Const. art. II, § 10, than what *Whren* provides.

CONCLUSION

{16} The order of the district court denying Defendant’s motion to suppress is reversed.

{17} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Chief Judge

IRA ROBINSON, Judge
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Eric Sedillo Jeffries
Attorney at Law
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8:30 a.m. Introduction: The Characteristics Of A Limited Liability Company (LLC)

9:00 a.m. An Examination Of The New Mexico LLC statute's Contents

10:00 a.m. Break

10:15 a.m. An Overview Of The Common Law Legal Treatment Of LLCs

11:15 a.m. A Written Operating Agreement: An Essential Document For Any LLC Formed Under New Mexico Law

12:15 p.m. Lunch

1:15 p.m. The Impact On Commercial And Transactions Attorneys Of The Interplay Of The New Mexico Code Of Legal Ethics, The Internal Revenue Service's Circular 230 Rules (1.0 Ethics)

2:15 p.m. What Every Commercial And Business Lawyer Should Know About The Tax Treatment Of LLCs

2:45 p.m. LLC Income As “Active Trade Or Business Income” vs. “Passive Income?” The Tax Advantages Of LLCs

3:30 p.m. Comparison Of The Cost Of Employment And Health Insurance Tax Paid By Members Of An LLC, With The Tax Liability Of Partners In A Partnership And Owners Of A Corporation

3:45 p.m. Adjourn

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